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

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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INDEX OF APPENDICES

APPENDIX A

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 97-CF-013379**

v.

RAY JOHNSTON, **DIVISION: J**
Defendant.
_____/

FINAL ORDER DENYING DEFENDANT'S FIRST SUCCESSIVE MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS MATTER is before the Court on Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentence," filed, through counsel, on January 5, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. On January 25, 2017, the State filed an "Unopposed Motion for Extension of Time." On January 30, 2017, the Court granted the State's motion for forty-five days. On March 16, 2017, the State filed the "State's Response to Successive Rule 3.851 Motion for Post-Conviction Relief." Defendant filed his "Notice of Supplemental Authority" on April 12, 2017, and his "Witness/Exhibit List" on April 13, 2017.

On April 13, 2017, the Court held a case management conference. On April 14, 2017, the State filed its "State's Motion to Strike Defendant's Witness/Exhibit List and Attachments." Defendant filed his "Response to the State's Motion to Strike" on May 3, 2017. Another case management conference was held on May 4, 2017. Defendant filed additional "Notice[s] of Supplemental Authority" on May 10, 2017, and May 16, 2017.

On May 18, 2017, the Court held a hearing on the "State's Motion to Strike Defendant's Witness/Exhibit List and Attachments." On June 8, 2017, the Court granted the State's motion and struck the previously scheduled evidentiary hearing after determining that Defendant's claims were purely legal and did not require an evidentiary hearing. Defendant filed his "Motion for

Rehearing on the Striking of Dr. Moore" on June 19, 2017, which was denied by the Court on June 29, 2017. Defendant then filed his "Supplement to Motion for Rehearing on the Striking of Dr. Moore" on June 30, 2017, which the Court dismissed on July 20, 2017.

After considering Defendant's motion, the State's response, the court file and record, as well as the arguments of counsel presented during the April 13, 2017, and May 4, 2017, case management conferences, the Court finds as follows:

On June 11, 1999, a jury found Defendant guilty of first-degree murder (count one), kidnapping (count two), robbery (count three), sexual battery (great force/deadly weapon) (count four), and burglary of a conveyance with an assault or battery (count five). The jury recommended a sentence of death by a vote of twelve-to-zero on June 17, 1999. The Court sentenced Defendant to death on count one, to life in prison on counts two, four, and five, and to fifteen years' prison on count three on March 13, 2001. The Florida Supreme Court affirmed Defendant's convictions and sentences. *See Johnston v. State*, 841 So. 2d 349 (Fla. 2002). The mandate issued on March 13, 2003. Defendant did not seek certiorari review in the United States Supreme Court. On June 11, 2003, ninety days after the mandate issued, Defendant's convictions and sentences became final.

Defendant subsequently filed a motion for postconviction relief. The postconviction court denied the motion for postconviction relief. The Florida Supreme Court affirmed the denial. *See Johnston v. State*, 63 So. 3d 730 (Fla. 2011).

In his "First Successive Motion to Vacate Judgment of Conviction and Sentence," Defendant asserts various claims in light of the United States Supreme Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Defendant requests that the Court vacate his death sentence.

Claim One

In claim one, Defendant asserts his death sentence is unconstitutional based on *Hurst v. Florida*, prior precedent, and subsequent developments, because he was denied his right to a jury trial on the facts that led to his death sentence. Defendant argues that his death sentence was obtained under the exact death penalty scheme found unconstitutional in *Hurst* and as such, it violates the Sixth Amendment under *Ring* and *Hurst*. Defendant asserts that regardless of any issues of retroactivity or application of harmless error, he was denied his right to a jury trial on the essential elements that led to his death sentence in violation of the United States Constitution and the corresponding provisions of the Florida Constitution. As such, Defendant argues that his death sentence should be vacated.

In its response, the State, relying on *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), asserts the Florida Supreme Court held that *Hurst v. Florida* could be applied retroactively to cases that were not final when the *Ring* opinion issued in 2002. The State asserts Defendant's death sentences became final after *Ring* was decided and therefore, *Hurst* could be retroactively applied to Defendant's case. However, the State asserts that the fact that Defendant's sentencing jury unanimously agreed, by a vote of twelve-to-zero, that he should be sentenced to death renders him ineligible for relief under *Hurst*.

The State argues that in this case, the jury was not required to recommend death if the aggravators outweighed the mitigators, and it was never instructed that its recommendation must be unanimous or that it must unanimously find sufficient aggravating circumstances outweighed the mitigating circumstances, but the jury, nevertheless, unanimously recommended death.

The State contends that in Defendant's case, any *Hurst* error should be considered harmless. The State, relying on *Miller v. State*, 42 So. 3d 204, 218-19 (Fla. 2010), asserts *Ring* was

satisfied in cases, like this one, where aggravating factors were established by prior violent felonies and contemporaneous felonies. The State asserts because *Hurst* is an application of *Ring* to Florida, and the Florida Supreme Court has previously found that prior and contemporaneous convictions remove a case from the scope of *Ring*, it should also follow that Defendant's contemporaneous murder conviction removes his case from the scope of *Hurst*. However, the State, relying on *Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016), and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016), acknowledges that following the *Hurst* remand, the Florida Supreme Court has rejected the State's argument that a prior or contemporaneous felony conviction insulates a defendant from *Ring* and *Hurst*.

Regardless, the State contends that it can still be established that a rational jury would have unanimously found the aggravating factors and recommended death in this case. The State argues that the trial court found four aggravators: 1) multiple prior violent felony convictions, 2) that Defendant was engaged in the commission of sexual battery and kidnapping at the time of the murder, 3) pecuniary gain, and 4) that the murder was especially heinous, atrocious, and cruel. The State contends that there is no doubt that the prior violent felony aggravator, along with the additional offenses of sexual battery and kidnapping, were established by a unanimous jury verdict. The State contends that the remaining aggravators were uncontestable on the weight of the evidence; Defendant admitted to taking money from the victim, thus establishing that the offense was committed for pecuniary gain, and any rational juror would have found that the murder was heinous, atrocious, and cruel, given the facts of the case.

The State also acknowledges that the Florida Supreme Court has only found harmless error in cases involving *Hurst* violations where the jury recommendation was unanimous. However, the State asserts that under these specific facts, a rational jury would have unanimously found the

aggravating factors if it had been instructed to, and it would have unanimously found that the aggravating factors outweighed the mitigation. The State asserts that given the strong aggravation and the extremely weak mitigation evidence presented, there is no reason to believe that a rational juror, properly instructed, would have made the assessment differently. As such, the State argues that the error was harmless in this case.

After reviewing the allegations, the State's response, and all relevant case law, the Court initially finds that Defendant is entitled to the retroactive application of *Hurst* because his judgment and sentence became final after the issuance of *Ring v. Arizona*, 536 U.S. 583 (2002). *See Mosely*, 209 So. 2d at 1283. As such, Defendant qualifies for resentencing relief unless the *Hurst* error was harmless beyond a reasonable doubt. *See Hurst*, 202 So.3d at 67 (recognizing that a *Hurst* error is capable of harmless error review); and *Hurst v. Florida*, 136 S. Ct. at 624 (remanding to the state court to determine whether the error was harmless). However, the Court may conduct a harmless error review of the record without the need for an evidentiary hearing. The Florida Supreme Court has explained the appropriate standard for a harmless error review as follows:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, in the context of a *Hurst* error, the burden is on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate: "The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court

> to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact". *DiGuilio*, 491 So.2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

Mosley, 209 So. 3d at 1283-87 (citing *Hurst*, 202 So. 3d at 68) (alteration in original).

The following is a summary of the facts relevant to the imposition of the Defendant's death sentence:

> The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.
>
> Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.
>
> Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.
>
> Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be

performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain, making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he

> was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the perfect husband-he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard, Johnston's younger sister, stated that Johnston never acted normal-he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.
>
> Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.

Johnson, 841 So. 2d at 352.

On this record, the Court finds beyond a reasonable doubt that any *Hurst* error was harmless. The Court finds that this was a highly aggravated case where the aggravators

significantly outweighed the mitigators, that the jury was instructed the aggravators must be established beyond a reasonable doubt, that the jury was not required to recommend death if the aggravators outweighed the mitigators, and that the jury recommendation was unanimous. Further, the Court finds that the evidence supporting the previous violent felonies both due to the contemporaneous felonies of sexual assault, kidnapping, and burglary of a conveyance with an assault or battery, and due to Defendant's prior violent felony convictions for brutal acts of violence against women, which involved the same modus operandi as was present in the instant case, outweigh both the statutory and non-statutory mitigation that was presented on Defendant's behalf. *See Davis v. State*, 207 So. 3d 142, 173-175 (Fla. 2016). Additionally, the Court finds that the evidence presented proving that the murders were especially heinous, atrocious, or cruel showed that the murder was clearly committed in a way unnecessarily tortuous to the victim, thereby further outweighing any mitigation presented on Defendant's behalf. *Id.* Finally, the Court finds that to date, the Florida Supreme Court has not found *Hurst* error harmful in any unanimous jury cases. Consequently, the Court concludes that there is no reasonable possibility that *Hurst* error affected the sentence in this case. **As such, no relief is warranted upon claim one.**

Claim Two

In claim two, Defendant argues that the Court should vacate his death sentence because, in light of *Hurst* and subsequent cases, his death sentence violates the Eighth and Fourteenth Amendments because it was contrary to evolving standards of decency and is arbitrary and capricious. Defendant contends that he had no jury to determine his death sentence in the guided manner necessary to avoid his being condemned to death in an arbitrary and capricious manner.

Defendant argues that his advisory panel was instructed that, although the court was required to give great weight to its recommendation, the recommendation was only advisory.

Defendant also argues that had this been an actual jury trial, it would have been contrary to *Caldwell v. Mississippi* as an advisory panel accurately instructed on its role in an unconstitutional death penalty scheme does not meet the Eighth Amendment requirements of *Caldwell.* Defendant contends that any reliance or argument based on the advisory recommendation in his case is misplaced and fails to rise to the level of constitutional equivalence based on *Caldwell.*

Defendant argues that he was sentenced to death in violation of the Eight Amendment and that his sentence is arbitrary and capricious because he was sentenced without a jury to ensure the reliability of his sentence. Defendant argues that to subject him to the death penalty based on Florida's previous unconstitutional system when a jury advisory recommendation would today violate the United States and/or the Florida Constitution is the very definition of arbitrary and capricious.

In its response, the State argues that the Defendant's argument that *Caldwell* mandates relief in this case is patently without merit as any complaint about jury instructions at this point is untimely and procedurally barred from consideration in this successive post-conviction motion. The State contends that the jury was properly instructed on its role based upon the law existing at the time of Defendant's trial.

After reviewing the allegations, the State's response, and all relevant case law, the Court finds *Hurst v. Florida* did not address the Eighth Amendment. The Court finds there is no Florida State Supreme Court or United States Supreme Court precedent this Court must follow asserting that the Eighth Amendment does or does not require unanimity in jury capital sentencing recommendations. **As such, no relief is warranted upon claim two.**

Claim Three

In claim three, Defendant argues the Court should vacate his death sentence because the fact-finding that subjected him to death was not proven beyond a reasonable doubt. Defendant argues that *Hurst* mandates that the State prove each element beyond a reasonable doubt and that he was denied a jury trial on the elements that subjected him to the death penalty. Defendant contends that it necessarily follows that he was denied his right to proof beyond a reasonable doubt, and as such, this Court should vacate his death sentence.

In its response, the State argues that these claims should have been raised on direct appeal rather than in a post-conviction motion, and therefore, are procedurally barred. The State contends that in addition to being procedurally barred and untimely, this claim is without merit as the jury in Defendant's case was instructed that the aggravating circumstances they may consider must be proven beyond a reasonable doubt. Because the jury was unequivocally instructed as to Defendant's right to proof beyond a reasonable doubt on the aggravation that subjected him to the death penalty, the State argues this claim should be denied.

After reviewing the allegations, the State's response, and all relevant case law, the Court agrees with the State's assertion that there is no legal authority that would permit or require this Court to reevaluate whether the fact-finding in Defendant's case was proven beyond a reasonable doubt. As stated in claim one, Defendant's death sentence was imposed unanimously after the jury was instructed that the it should only consider aggravating circumstances that were proven beyond a reasonable doubt. **As such, no relief is warranted upon claim three.**

Claim Four

In claim four, Defendant argues that in light of *Hurst*, his death sentence should be vacated because it was obtained in violation of the Florida Constitution. Specifically, Defendant argues

that the increase in penalty imposed on him was without any jury at all. Defendant also argues that because the State proceeded against him under an unconstitutional system, it never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict him. Defendant argues he was never formally informed of the full nature and cause of the accusation because the aggravating factors were not found by the Grand Jury and contained in the indictment. Defendant contends that this Court should vacate his death sentence because it was obtained in violation of the Florida Constitution.

In its response, the State argues that this claim is procedurally barred and untimely. The State argues that even on the merits, Defendant is not entitled to relief as the Florida Supreme Court has long rejected the argument that aggravating circumstances must be alleged in the indictment. The State also notes that since the issuance of *Hurst v. State*, the Florida Supreme Court has not vacated any death sentence based on the absence of aggravating factors being listed in the indictment. The State contends that even if an allegedly incomplete indictment could somehow be attributed to a *Hurst* error, Defendant has failed to show why an error in the indictment would warrant resentencing in this case.

After reviewing the allegations, the State's response, and all relevant case law, the Court agrees with the State's assertion that there is no legal authority that would permit or require this Court to find that the Florida Constitution requires the aggravating factors of a capital case to be charged in the indictment in light of either *Hurst* decision. **As such, no relief is warranted upon claim four.**

Claim Five

In claim five, Defendant argues that his previous postconviction claims must be reheard and determined under a constitutional framework. Defendant states that in light of *Hurst*,

Defendant incorporates his previously filed claims under Florida Rule of Criminal Procedure 3.851 and requests that to the extent it is possible, the Court should rehear his previously denied claims and vacate his death sentence.

After reviewing the allegations and all relevant case law, the Court finds that there is no legal authority that would permit or require this Court to reevaluate or reconsider Defendant's previously presented postconviction claims in light of either *Hurst* decision. **As such, no relief is warranted upon claim five.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's "First Successive Motion to Vacate Judgment of Conviction and Sentence" is hereby **DENIED**.

Defendant has thirty (30) days from the date of this final order within which to appeal. However, a timely-filed motion for rehearing shall toll the finality of this order.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of July, 2017.

ORIGINAL SIGNED

JUL 21 2017

MICHELLE SISCO, Circuit Judge

MICHELLE SISCO
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire, and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 21st day of July, 2017.

DEPUTY CLERK

APPENDIX B

2018 WL 1633043
Only the Westlaw citation is currently available.

Supreme Court of Florida.

Ray Lamar JOHNSTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1678
|
April 5, 2018

An Appeal from the Circuit Court in and for Hillsborough County, Michelle Sisco, Judge—Case No. 291997CF013379000AHC

Attorneys and Law Firms

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Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

*1 Ray Lamar Johnston appeals an order summarily denying his first successive postconviction motion filed under Florida Rule of Criminal Procedure 3.851.[1]

1 We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

The underlying facts of this case were described in this Court's opinion on direct appeal. *Johnston v. State*, 841 So.2d 349, 351–55 (Fla. 2002). Johnston was convicted of the first-degree murder of Leanne Coryell, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. *Id.* at 351. Following a unanimous jury recommendation for death, the trial court sentenced Johnston to death. *Id.* at 355.

In this successive postconviction motion, we affirm the denial of Johnston's claim that he is entitled to relief pursuant to *Hurst v. Florida*, ——U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). 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*[2] claim. *See Reynolds v. State*, No. SC17-793, —— So.3d ——, ——– ——, slip op. at 26-36, 2018 WL 1633075, at *10–12 (Fla. Apr. 5, 2018).

2 *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

Accordingly, we affirm the denial of postconviction relief.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, and LAWSON, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

QUINCE, J., dissents with an opinion.

QUINCE, J., dissenting.

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*, —— U.S. ——, 136 S.Ct. 616, 619, 193 L.Ed.2d 504 (2016)); *see also Truehill v. State*, 211 So.3d 930, 961 (Fla.) (Quince, J., concurring in part and dissenting in part), *cert. denied*, —— U.S. ——, 138 S.Ct. 3, 199 L.Ed.2d 272 (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.

All Citations

--- So.3d ----, 2018 WL 1633043 (Mem), 43 Fla. L. Weekly S162

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APPENDIX C

Supreme Court of Florida

TUESDAY, JULY 3, 2018

CASE NO.: SC17-1678
Lower Tribunal No(s).:
291997CF013379000AHC

RAY LAMAR JOHNSTON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and PARIENTE, LEWIS, POLSTON, LABARGA, and LAWSON, JJ., concur.
QUINCE, J., dissents.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

tw
Served:

TIMOTHY ARTHUR FREELAND
GREGORY W. BROWN
JAMES L. DRISCOLL JR.
DAVID DIXON HENDRY
HON. MICHELLE SISCO
JAY PRUNER
HON. PAT FRANK, CLERK

APPENDIX D

Filing # 71020968 E-Filed 04/20/2018 01:29:05 PM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1678

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

MOTION FOR REHEARING

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COMES NOW, Defendant, Ray Lamar Johnston, by and through the undersigned counsel, pursuant to Fla. R. Crim. Proc. 3.851(f)(7), and moves for rehearing of his successive motion to vacate death sentence which was denied by written order April 5, 2018, and offers the following in support:

The Court failed to substantively address the Appellant's two claims in his Initial Brief. Specifically:

This Court failed to address or mention Dr. Harvey Moore's report in support of harmful error, and failed to address or mention the lower court's refusal to consider Dr. Moore's report. In simply citing to "a unanimous jury recommendation of death" to find "the *Hurst* error in this case is harmless beyond a reasonable doubt," this Court resorted to a mere counting of advisory recommendations to determine a life or death issue. This Court

failed to consider and analyze the 65 specific *Caldwell* violations that occurred at Mr. Johnston's trial. This Court failed to consider the diminishing effect that these 65 *Caldwell* violations had on this particular advisory panel.

At page 2 of 2 of the majority opinion, by simply citing to this Court's analysis of the *Caldwell* claims raised in "*Reynolds v. State*, No. SC17-793," this Court failed to make an independent and individual assessment of ***this*** particular death sentence. This Court has now detracted from individualized and particularized appellate review in a case involving the ultimate penalty of death. This Court has overlooked the fact that Death is Different, and that Mr. Johnston's case is certainly different from Mr. Reynold's case, and his unique appellate issues are quite different from the other death-sentenced defendants who are suffering the misfortune of having had an unanimous advisory panel at trial.

This Court failed to analyze whether the relevant sociological and scientific evidence proffered in the lower court in support of harmful error was improperly *Frye*-barred. This Court also failed to consider that *Caldwell* already held 33 years ago that this type of error is presumptively harmful, not harmless. *Caldwell* held that this type of error involving diminishing a jury's role at trial ***can never be deemed harmless error beyond a reasonable doubt.*** The United States Supreme Court stated the following in *Caldwell*:

> 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.**

Caldwell at 341 (emphasis added).

This Court failed to consider the claim that the advisory panel who recommended a unanimous sentence did so without hearing available mitigating evidence from witness Diane Busch. Ms. Busch was available to testify, and she would have informed the advisory panel that she credited Mr. Johnston with saving her life. Had just one advisory panel member heard this evidence, they likely would have recommended life over death. The Court also failed to consider the claim that the advisory panel was not informed that mercy was always an option even if the aggravating evidence far outweighed the mitigating evidence.

This Court should rehear the case and reverse the lower court's order refusing to consider Dr. Moore's report, denying an evidentiary hearing, and refusing to vacate this unconstitutional sentence of death.

CERTIFICATE OF SERVICE

We certify that a copy hereof will be furnished to opposing counsel by filing with the e-portal which will serve a copy on Timothy Freeland, Assistant Attorney General on April 20, 2018.

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APPENDIX E

841 So.2d 349
Supreme Court of Florida.

Ray Lamar JOHNSTON, Appellant,
v.
STATE of Florida, Appellee.

No. SC00-979.
|
Dec. 5, 2002.
|
Rehearing Denied March 13, 2003.

Synopsis
Defendant was convicted following jury trial in the Circuit Court, Hillsborough County, Diana M. Allen, J., of first-degree murder and other offenses and was sentenced to death. Defendant appealed. The Supreme Court held that: (1) juror was not under prosecution for a crime at time of jury selection so as to be disqualified from service; (2) arrest of same juror for possession of marijuana and crack cocaine following first day of penalty phase did not entitle defendant to an interview of that juror to determine whether she had abused drugs during guilt phase; (3) trial court's failure to independently voir dire eight prospective jurors to determine extent of their exposure to pretrial publicity was not abuse of discretion; (4) evidence did not support statutory mitigating factor of extreme mental or emotional disturbance; and (5) death sentence was proportionate.

Affirmed.

Pariente, J., filed an opinion concurring in part and dissenting in part.

Anstead, C.J., concurred in result only.

Attorneys and Law Firms

*351 James Marion Moorman, Public Defender, and Steven L. Bolotin, Assistant Public Defender, Tenth Judicial Circuit, Bartow, FL, for Appellant.

Richard E. Doran, Attorney General, and Kimberly Nolen Hopkins, Assistant Attorney General, Tampa, FL, for Appellee.

Opinion

PER CURIAM.

Ray Lamar Johnston appeals his convictions of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault or battery, and his respective sentences, including the sentence of death which was imposed for the crime of murder. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the following reasons, we affirm his convictions and sentences.

FACTS

Leanne Coryell, a clinical orthodontic assistant for Dr. Gregory Dyer, went to work at 1 p.m. on August 19, 1997. At approximately 8:15 p.m., Dr. Dyer went home, leaving Melissa Hill and Coryell to close the office. Coryell clocked out at 8:38 and, after some difficulty setting the office's alarm, left within the next ten minutes. Coryell picked up groceries at Publix Super Market where the store's surveillance cameras documented her checking out at 9:23. She was not seen alive again.

Ray Johnston, Gary Senchak, and Margaret Vasquez shared a three-bedroom apartment at the Landings Apartment Complex-the same apartment complex in which Coryell lived. On the evening that Coryell was murdered, Johnston argued with his roommates over the utility bills and left the apartment between 8:30 and 9:30 p.m. Vasquez noted that around 9:45, Johnston's car[1] was still in the parking lot although Johnston had not returned. Sometime after 10:00, Johnston came back to the apartment and threw $60 at Senchak, telling him, "That's all you're getting from me, you son-of-a-bitch."

[1] Johnston drove a Buick Skyhawk that had recently been in a collision, causing one of his headlights to be out of adjustment. One of the taillights was also out.

Coryell's body was discovered around 10:30 p.m. on the evening of August 19 by John Debnar, who was playing catch with his dogs in a field close to St. Timothy's Church. While there, he noticed that a car with an out-of-place headlight entered St. Timothy's property and stopped briefly beside an empty black car. When Debnar walked his dogs home, one of his dogs stopped at a pond on the church's property, causing Debnar to notice the body of a woman floating in the water.

*352 Hillsborough County sheriff's officers arrived at St. Timothy's Church shortly before 11:30 p.m. and found Coryell's body lying face down in the pond, completely nude. Her clothes were found on a nearby embankment. Dental stone impressions were taken of some shoe prints that were in the general area where the clothing was found. Coryell's empty black Infiniti was in the church's parking lot with the keys in the ignition and the engine still warm. Some, but not all, of her groceries were sitting in the back seat. Although the police were unable to lift any prints from the interior of the car, they did lift a fingerprint matching Johnston's from the exterior.

Dr. Russell Vega performed the autopsy and opined that the victim died sometime after 9 p.m. Based on the extensive bruising of the external and internal neck tissues, Dr. Vega concluded that the victim died from manual strangulation, as opposed to the use of a ligature. Dr. Vega also observed a laceration on the left side of the victim's lower lip and a laceration on her chin, both of which were caused by blunt impact. There were vertical scrapes on the victim's back which suggested that she was dragged to the pond. There were two unusually shaped bruises on Coryell's buttocks which were similar to the metal appliques on her belt, causing Dr. Vega to believe that she was hit with her own belt while still alive. Finally, the victim suffered both internal and external injuries to her vaginal area, injuries which were consistent with vaginal penetration. Her hand still clutched strands of grass.

In the late evening hours of August 19 and again early the next morning, the victim's ATM card was used to withdraw the $500 daily limit. The police used the ATM surveillance videos to capture pictures of the person who was using the victim's card, and these photographs were provided to the news media, which aired them. Juanita Walker, a friend of Johnston, saw the televised pictures and called the authorities, identifying Johnston as the person in the photos. She also told police that she and Christine Cisilski saw Johnston a little before 10 p.m. on the night of the crime, driving a black, mid-size car out of the Landings Apartment Complex.

Based on telephone calls identifying Johnston as the person in the photos, the police obtained a warrant to search his apartment and found a pair of wet tennis shoes and shorts. The imprints from the tennis shoes matched three partial impressions that were found at the scene of the crime. However, the shoes did not have any individual characteristics which would enable an expert to conclude that Johnston's shoes were the exact shoes which made the impressions.

Johnston saw his picture on television and volunteered to give a statement in which he initially told police that he was a friend of Coryell and that they had gone out to dinner a few times. He told Detective Walters that on the evening of the 19th, he had met Coryell at Malio's for drinks at 6:15 p.m. The pair then went to Carrabba's and left around 8:30 or 9:00.

According to Johnston, the victim indicated that she needed to stop at a grocery store before she went home, but before they parted, the victim gave Johnston her ATM card and PIN so that he could withdraw $1200 in repayment of a loan she had obtained from him. When he arrived home, he changed, went jogging, and then withdrew $500 from her account. He withdrew another $500 the following day.

Johnston was placed under arrest for grand theft, was read his rights under *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and agreed to continue the interview. The detective confronted Johnston with the fact that Coryell ***353** did not leave work until 8:38. Johnston's response was that other employees must have covered for her because he was with her at that time, but he was unable to provide the names of anybody who could corroborate this explanation. The detective then told Johnston that they had found his jogging shoes, which were completely wet. Johnston justified the wet shoes by claiming that he jumped into the hot tub, shoes and all, to wash off after his run. The detective asked several times whether Johnston was involved with Coryell's death and Johnston responded by saying that they would not find any DNA evidence, hair, or saliva which would link him to the victim.

In response to Johnston's contention that he loaned Coryell money, the State introduced several witnesses who testified that Johnston near the time of the murder did not have the financial ability to make a $1200 loan. The State also called Laurie Pickelsimer, the defendant's pen pal in prison, who testified that Johnston asked her to provide a false alibi for him. Johnston suggested that she tell his attorneys that on the night of the murder, she and Johnston were working out in the gym at the apartment complex from 9:00 until about 10:30, except for a short time when he walked back to his apartment to get them a drink for the hot tub. The jury found Johnston guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault.

The penalty phase of the trial began on June 16, 1999. The State introduced testimony from three victims of prior violent felonies that Johnston had committed against total strangers. Susan Reeder was the first witness to testify and recalled how Johnston grabbed her when she was stepping out of her car, put a hunting knife to her throat, drove her to an isolated area, and then beat her with his belt and raped her. Julia Maynard recounted how Johnston broke into her home, and when she arrived, grabbed her, held a knife to her neck, and took her to her bedroom so he could take pictures of her in various states of dress and undress and touch her sexually. Carolyn Peak testified that in June 1988, while she was getting out of her car, Johnston put a knife to her throat, forced her back into the car, and tied her hands with an Ace Bandage. She escaped when a police officer pulled the car over because a head light was out.

Dr. Vega, the medical examiner who performed the autopsy on Coryell, opined that Coryell was conscious at the time she was beaten and received her vaginal injuries. He believed the last injury to the victim was manual strangulation and that she was likely conscious for up to two minutes while being strangled. Finally, the State introduced three witnesses to provide victim impact evidence: the victim's father, Thomas Morris; her employer, Dr. Dyer; and her pastor, Matthew Hartsfield.

Defense counsel introduced four experts to testify that Johnston had frontal lobe brain damage and mental health problems. Dr. Diana Pollack, a neurologist, treated Johnston a few months before the murder because Johnston suffered from blackouts, headaches, a tingling sensation down one side of his body, and spells of confusion. She administered various neurological tests, including an MRI and an EEG, but was unable to find any structural deficiencies in his brain.

Dr. Harry Krop, a clinical psychologist, testified that he performed a neuropsychological evaluation on Johnston. When Johnston performed poorly, Dr. Krop recommended that a PET scan be performed. Based on Johnston's documented history and further testing, he concluded that Johnston suffered from a frontal lobe impairment ***354** and that this problem has three main manifestations: (1) difficulty starting an action; (2) difficulty stopping an existing action; and (3) being too impulsive or acting without thinking.

Dr. Frank Wood, a neuropsychologist, examined Johnston and reviewed the results of his PET scan. He concluded that Johnston's frontal lobe area had substantially less activity than was normal (below the first percentile) and that this deficiency correlates with poor judgment, impulsivity, and "disinhibited" behavior. Based on Johnston's medical and behavioral record, Dr. Wood concluded that this was a chronic condition.

Dr. Michael Maher, a physician and psychiatrist, evaluated Johnston and reviewed his history and medical records. Dr. Maher agreed that it was evident from the PET scan that Johnston suffered from impairments of the frontal lobe of his brain,

making it extremely hard for him to resist any strong urges. He also believed that Johnston suffered from seizures that were related to his brain abnormality and had dissociative disorder (a psychiatric disorder in which some aspect of a person's total personality or awareness is unavailable at certain times).

Several character witnesses testified in Johnston's behalf. According to Gloria Myer, a placement specialist for a correctional institution, Johnston was dedicated to his job, very organized, and followed Myer's instructions. She also recalled a time when she thought he was having a stroke because "his whole side of his face had fallen, had drooped." John Walkup, Johnston's probation officer, recommended Johnston for early termination because he had a stable family life, worked at a steady job, reported regularly, paid his fees, and was doing fine. William Jordon, a case manager for the Department of Corrections, knew Johnston while he was in prison and asserted that he got along well with other inmates and was not a disciplinary problem. John Field, a chaplain with the Department of Corrections, knew Johnston when he was incarcerated in the early 1990s and declared that Johnston was one of the chapel's best clerks. Bruce Drennen, the president of the Brandon Chamber of Commerce, testified that Johnston was a designated representative of a company that was a member of the chamber.

Johnston's family provided mitigation. His mother, Sara James, testified that at the age of three or four, Johnston had fallen out of a car and hit his head on the curb, resulting in an injury which required stitches. Johnston did not perform well in school, and by the time he was in the seventh grade, he became disruptive in class and was sometimes sent home. Problems became more serious the older he grew, and eventually he was sent to the Hillcrest Institution for treatment. Normally, Johnston had a sweet disposition, but he could get explosive at times. Susan Bailey, Johnston's ex-wife, testified that while she was married to him, Johnston was the perfect husband-he cooked, cleaned, and helped raise her two daughters. She described him as very tenderhearted, remembering how it would upset him if she had to paddle her girls for misbehaving. She also stated that even though he would occasionally snap over minor issues, he would not vent his anger towards his family. Rebecca Vineyard, Johnston's younger sister, stated that Johnston never acted normal-he would try too hard to make people love him and would go overboard trying to get positive responses. However, his personality could quickly change, and he did not like being rejected or humiliated.

Finally, Ray Johnston took the stand and admitted that he killed the victim. According to Johnston, he saw Coryell ***355** drive in after he had just gotten out of the hot tub. He asked her if he could help carry her groceries to her apartment, but she ignored his request. Johnston stated that he just wanted her attention and meant to reach for her shoulders but grabbed her neck instead. He thought he held her for just a few seconds, but then her legs gave out. She hit her lip on the edge of the door, and her chin hit the ground, causing two lacerations on her face. When he rolled her over, he saw her eyes and mouth were open. He tried reviving her by giving CPR, but it had no effect. Thinking that he had broken her neck, Johnston put her in the back seat of her car and drove her to the church. To make it look like she had been assaulted, Johnston took off her clothes and scattered them out, kicked her in the crotch, beat her with her belt, and dragged her to the pond. A car drove into the parking lot, prompting Johnston to run home. After he took a shower, Johnston drove back to the church to see if anybody had discovered the body. While there, he found the victim's ATM card and its PIN, which was written on the cover of her address book. He took her ATM card and drove to Barnett Bank to withdraw some money. The next day, after Johnston learned his picture was being broadcast on the news, he turned himself in and made up the story that Coryell had given him the ATM card.

The jury unanimously recommended the death penalty. After holding a *Spencer* hearing,[2] the trial court found four aggravating factors,[3] one statutory mitigator,[4] and numerous nonstatutory mitigators, and followed the jury recommendation. Johnston raises four claims on appeal.

2 *See Spencer v. State*, 615 So.2d 688 (Fla.1993).

3 The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel.

[4] The court found defense counsel proved that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired and gave it moderate weight.

ANALYSIS

In his first claim, Johnston asserts that he is entitled to a new trial because juror Tracy Robinson (1) was under prosecution at the time of the trial; (2) withheld a material fact during voir dire; and (3) was abusing drugs during the trial. The record reveals that approximately ten months before Johnston's trial, Robinson pled nolo contendere to charges of obstructing a police officer without violence. The judge withheld adjudication and required her to pay court costs in the amount of $121. Robinson was notified in writing at the time of sentencing that if she could not pay the fine, she was required to appear in court on September 25, 1998, and was further informed that the failure to pay the fine or to go to court would result in her arrest. Robinson failed to timely pay the court fine and failed to appear in court as ordered, and on January 13, 1999, after several notices went unheeded, a capias was issued.

On June 7, 1999, Robinson appeared in court for jury selection in the instant case. On the juror questionnaire, Robinson indicated that either she or somebody close to her was previously accused of a crime. During voir dire, the prosecutor requested that she elaborate on her answer:

> Mr. Pruner: These jury forms ask very broad questions and, of course, this is where we're getting into that area ***356** where I'm not trying to embarrass anyone or intimidate anyone, but it asks, have you or any member of your family or any close friends ever been accused of a crime. That's what I want to go into now.
>
> I want to ask who was the person, what relationship was it to you; if it wasn't you, whether you felt that that person, whether it was you or someone else, was treated fairly in the process, and whether you think that incident or experience would prevent you from being a fair and impartial juror.
>
> Before I move on, did I miss anybody else about prior jury service, though?
>
> [Prospective jurors indicating negatively.]
>
> ....
>
> Mr. Pruner: Ms. Robinson, who was that person?
>
> Ms. Robinson: My son's father.
>
> Mr. Pruner: Okay. Did you follow along with that person's involvement in the criminal justice system, keep up with his case?
>
> Ms. Robinson: Oh, yeah.
>
> Mr. Pruner: Was this in Hillsborough?
>
> Ms. Robinson: Uh-huh.
>
> Mr. Pruner: Did you have an opinion whether that person was treated fairly or unfairly?
>
> Ms. Robinson: It was fair.
>
> Mr. Pruner: Is there anything about your knowledge of his experience that would prevent you from being a fair and

impartial juror?

Ms. Robinson: No.

Mr. Pruner: Thank you.

Defense counsel did not question Robinson any further as to her response to this line of questioning, telling the potential jurors, "Since [the prosecutor has] already asked you many of [the] things I might have asked, I won't ask you to repeat yourself." Robinson never amended her answer and never mentioned that she pled nolo contendere in a criminal proceeding less than a year before signing the questionnaire form. She was selected as one of the jurors and became the forewoman of the jury that convicted Johnston of first-degree murder.

The penalty phase began on June 16, 1999, and after the first four witnesses testified, the jurors were sent home. Later that night, police arrested juror Robinson for possession of marijuana, crack cocaine, and a loaded firearm. The trial judge replaced juror Robinson with the remaining alternate juror,[5] and the jury subsequently recommended that Johnston be sentenced to death. Immediately after the jury recommended the death penalty, defense counsel filed a timely motion for new trial, which included the allegation that the trial judge erroneously replaced juror Robinson with an objectionable alternate juror. After defense counsel conducted an investigation of Robinson and discovered her prior criminal history, they amended the motion for new trial and raised two additional grounds: (1) that Robinson was under prosecution during the time she served as a juror; and (2) that Robinson could have been abusing drugs during the guilt phase proceedings. The trial court subsequently denied the motion.

5 Defense counsel objected to seating the alternate juror, asserting that this juror had shaken hands with the victim's family and had given them his condolences.

[1] [2] Johnston asserts that he is entitled to a new trial because juror Robinson was under prosecution by the same office which was prosecuting Johnston. We disagree. Generally, a person is statutorily ***357** disqualified from serving on the jury if he or she is under prosecution for a *crime.* § 40.013(1), Fla. Stat. (1999) ("No person who is under prosecution *for any crime* ... shall be qualified to serve as a juror."). In this case, however, Robinson's criminal charges were resolved prior to jury selection and the only outstanding item was payment of the fine. Although she was threatened with arrest for the failure to pay the fine, it is undisputed that this involved *civil* contempt charges,[6] as opposed to *criminal* charges. Robinson did not commit a criminal offense when she failed to pay her fine[7] and, accordingly, was not statutorily disqualified from serving on the jury.

6 Pursuant to section 938.30(9), the failure to pay court costs results in simply *civil* contempt. *See* § 938.30(9), Fla. Stat. (1999) ("Any person failing to appear or willfully failing to comply with an order under this section, including an order to comply with a payment schedule, may be held in civil contempt.").

7 As this Court has recognized, "civil contempt is neither a felony nor a misdemeanor but a power of the courts." *Ducksworth v. Boyer.* 125 So.2d 844, 845 (Fla.1960).

[3] [4] Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year. Appellate counsel concedes that defense counsel failed to specifically raise this claim with the trial court. As this specific ground for a new trial was not raised with the lower court, it will not be considered on appeal.[8] To the extent that Johnston is claiming his counsel was ineffective, we find that this issue should be addressed in a rule 3.850 motion-not on direct appeal.[9]

8 *See Steinhorst v. State.* 412 So.2d 332, 338 (Fla.1982) ("[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below.").

9 *See Bruno v. State,* 807 So.2d 55, 63 (Fla.2001) ("Whereas the main question on direct appeal is whether the trial court erred, the main question in a *Strickland* claim is whether trial counsel was ineffective. Both claims may arise from the same underlying facts, but the claims themselves are distinct and-of necessity-have different remedies: A claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal.") (footnotes omitted).

[5] Finally, the defendant asserts that he is entitled to a new trial, or at a minimum, a juror interview, to determine whether juror Robinson abused drugs during the guilt phase of the trial. Specifically, he contends that based on the addictive nature of crack cocaine and the timing of Robinson's arrest for drug possession, she *may* have been under the influence of illegal substances during the guilt phase. In order to be entitled to juror interviews, a party must present "sworn allegations that, if true, would require the court to order a new trial because the alleged error was so fundamental and prejudicial as to vitiate the entire proceedings." *Johnson v. State,* 804 So.2d 1218, 1225 (Fla.2001). In this case, Johnston is not entitled to relief because his request for an interview was based on mere speculation.[10] Johnston never alleged that any juror, party, or witness observed Robinson appearing to be intoxicated during the course of the trial, nor did anybody see Robinson abusing ***358** drugs. Accordingly, the trial court did not err in its decision to deny the motion to interview Robinson.

10 *See Hackman v. City of St. Petersburg,* 632 So.2d 84, 85 (Fla. 2d DCA 1993) ("The motion to interview and supporting affidavits are speculative at best. As such, they fail to establish a legally sufficient reason to interview the jurors."); *Walgreens, Inc. v. Newcomb,* 603 So.2d 5, 6 (Fla. 4th DCA 1992) ("A request to interview a juror requires something more than conjecture and speculation by movant's counsel.").

Johnston's second claim raises the issue of whether he is entitled to a new trial based on the failure of the trial court and counsel to ascertain the extent of the exposure of eight prospective jurors (including two who served on the jury) to the inflammatory pretrial publicity which focused almost entirely on inadmissible material. The record reveals that both the television media and the newspapers closely followed the progress of the murder investigation and the criminal proceedings in the case. Media reports included numerous inadmissible details of Johnston's criminal history and early releases, his purported proclivities for violence against women, and statements from some of Johnston's own family that they believed Johnston was guilty and was "a ticking time bomb." Prior to the trial, the trial judge granted defense counsel's request to individually question prospective jurors at the bench relative to the jurors' prior knowledge about the case. Despite this ruling, however, defense counsel never asked to individually question the several jurors who indicated that they recalled hearing something about the case.

[6] Johnston recognizes that defense counsel "dropped the ball" by not requesting individual voir dire for these jurors, but asserts that he is entitled to a new trial because the trial judge also had an independent obligation to address this issue, especially in light of the fact that defense counsel had initially alerted the court to the potential problem. This Court has never created an *independent* obligation on the part of the trial judge to question prospective jurors *sua sponte,* in the absence of a request by counsel. In fact, the Court has recognized that the trial court is not required to grant individual voir dire, even with a request by counsel. Specifically, this Court described the legal standard as follows:

> [A] trial court has broad discretion in deciding whether prospective jurors must be questioned individually about publicity the case has received. Individual voir dire to determine juror impartiality in the face of pretrial publicity is constitutionally compelled only if the trial court's failure to ask these questions renders the trial fundamentally unfair. The mere existence of extensive pretrial publicity is not enough to raise a presumption of unfairness of constitutional magnitude. A prospective juror is presumed impartial if he or she can set aside a preformed opinion or impression and return a verdict based on evidence presented in court.

Bolin v. State, 736 So.2d 1160, 1164 (Fla.1999) (citations omitted). We find that the trial court did not abuse its discretion by refusing to independently voir dire the jury and hence this claim is denied.

[7] Alternatively, Johnston asserts he is entitled to a new trial because his trial counsel was ineffective for failing to

individually question those jurors who had exposure to pretrial publicity. We deny this claim without prejudice because it should be raised in a postconviction motion, as opposed to direct appeal. *See Teffeteller v. Dugger,* 734 So.2d 1009, 1020 (Fla.1999) (addressing this type of postconviction motion); *Loren v. State,* 601 So.2d 271, 272 (Fla. 1st DCA 1992) ("[C]laims of ineffective assistance of counsel are generally not reviewable on direct appeal, but are properly raised in a motion for postconviction relief.").

[8] In his third claim of error, Johnston contends that the trial court committed reversible error by failing to instruct the penalty phase jury on the mitigating factor of "extreme mental or emotional ***359** disturbance at the time of the offense." The record reveals that during the penalty phase jury charge conference, defense counsel abandoned this mitigator:

> The Court: What are you going to ask for?
>
> Mr. Registrato: Mental health mitigators.
>
> The Court: The statutory mental health mitigators?
>
> Mr. Registrato: Yes, ma'am.
>
> The Court: Who are you planning to call to establish them?
>
> Mr. Registrato: Well, I-I mean, they may not have said the word, but I believe they've already been established.
>
> The Court: Which they?
>
> Mr. Registrato: Dr. Maher and Dr. Krop.
>
> The Court: No, no, which statutory mitigators do you believe have been established?
>
> Mr. Registrato: I would ask for the mitigator 7(b), the capital felony was committed while the defendant was under the influence of extreme or mental emotional disturbance, as well as 7(g), the defendant could not have reasonably foreseen his conduct in the course of the commission of the offense would cause-wait a minute. That's not it, Judge. 7(e) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired.
>
> The Court: Well, as to (b), the only evidence in this case that the crime was committed while the defendant was under the influence of mental or emotional disturbance is the testimony of Dr. Maher who said that at the time of the crime, he was in a mild dissociative-having a mild dissociative episode triggered by the initial approach and rejection by the victim. I don't know how you can get extreme mental or emotional disturbance out of that testimony. You can certainly argue the nonstatutory mental mitigator.
>
> Mr. Registrato: Yes, ma'am.
>
> The Court: But that's-unless you can point to some other testimony, that's the only testimony that I heard on that mitigator.
>
> Mr. Registrato: All right, Judge. I would ask for 7(e) as well.
>
> The Court: Well, I think it's (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his or her conduct to the requirements of the law was substantially impaired.
>
> Mr. Registrato: Yes, ma'am.

Defense counsel never presented further arguments relative to what testimony supported the extreme mental disturbance mitigator but instead acquiesced in the trial court's decision that the evidence did not support this mitigator. The trial judge eventually gave the jury instructions which addressed nonstatutory mitigation and the statutory mitigator that "the defendant may have had impaired capacity to conform his conduct to the requirements of the law," but did not address the extreme mental or emotional disturbance mitigator. Accordingly, we deny this claim.

[9] [10] In his final ground, Johnston asserts that the trial court erred when it did not address in its sentencing order the "extreme mental or emotional disturbance" statutory mitigator. We disagree. Defense counsel never requested the trial court to find the statutory mitigator that the homicide was committed while Johnston was under the influence of extreme mental or emotional disturbance, and hence this ground is not preserved for appellate purposes. Additionally, this mitigator was not established by the evidence, ***360** but was in fact contradicted by Johnston's own version of what occurred during the murder. According to his story, he meant to grab Coryell's shoulder because he wanted her attention, but grabbed her neck instead and held it only for a brief period. He asserted that he was aware the whole time about what he was doing and never mentioned that he was angry or had an extreme emotional problem at the time.

[11] [12] Finally, although Johnston does not challenge the proportionality of his death sentence, this Court must still ensure that the sentence is proportional. *Rimmer v. State,* 825 So.2d 304, 331 (Fla.2002) ("Although appellant does not argue the proportionality of the death sentence in this case, this Court must nevertheless conduct a proportionality review."), *cert. denied,* 537 U.S. 1034, 123 S.Ct. 567, 154 L.Ed.2d 453 (2002). This review "is not a comparison between the number of aggravating and mitigating circumstances; rather, it is a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases." *Beasley v. State,* 774 So.2d 649, 673 (Fla.2000) (internal quotation marks omitted).

In this case, despite Johnston's allegation that the victim was killed in the parking lot and that he staged her death to look like a sexual assault, the grass which was clutched in the victim's hand tells another tale-one where she was still struggling for life at the edge of the pond after being sexually assaulted. The jury recommended the death penalty by a vote of twelve to zero. The trial court found such a punishment was appropriate after considering all the evidence and properly weighing the aggravators against the mitigators. Specifically, the court found four aggravating factors,[11] one statutory mitigator,[12] and numerous nonstatutory mitigators.[13]

11 The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies; (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; (3) it was committed for pecuniary gain; and (4) it was especially heinous, atrocious, or cruel (HAC).

12 The court found defense counsel had proven that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and gave it moderate weight.

13 The trial court found the following nonstatutory mitigation: (1) the time passing between the decision to cause the victim's death and the time of the killing itself was insufficient under the circumstances to allow cool and thoughtful consideration of his conduct (no weight); (2) the defendant will not be a danger to others while serving a sentence of life in prison (no weight); (3) the defendant has shown remorse (slight weight); (4) the defendant did not plan to commit the offense in advance (no weight); (5) the defendant has a long history of mental illness (slight weight); (6) the defendant suffers from a dissociative disorder (no weight); (7) the defendant suffers from a seizure disorder and blackouts, but there is no evidence that any such disorder contributed to this crime (no weight); (8) the murder was the result of impulsivity and irritability (no weight); (9) the defendant is capable of strong, loving relationships (slight weight); (10) the defendant is a man who excels in a prison environment (slight weight); (11) the defendant could work and contribute while in prison (slight weight); (12) the defendant has "extraordinary musical skills and is a gifted musician" (no weight); (13) the defendant has obtained additional education from the University of Florida (no weight); (14) the defendant served in the U.S. Air Force (slight weight); (15) the defendant refused worker's compensation despite constant headaches and seizures (no weight); (16) during the time the defendant was on parole, he excelled and was recommended for early termination (slight weight); (17) the defendant was a productive member of society after his release from prison (slight weight); (18) when notified that the police were looking for him, he did not flee but turned himself in (slight weight); (19) the defendant demonstrated appropriate courtroom behavior during trial (slight weight); (20) the defendant tried to conform his behavior to normal, but has been thwarted by his mental illness and brain dysfunction (slight weight); (21) the defendant has a special bond with children (no weight); (22) the defendant has the support of his mother and sister (slight weight); (23) since the defendant can be sentenced to multiple consecutive life sentences based on the other crimes, he will die in prison and the death penalty is not necessary to protect society (no weight); (24) the totality of circumstances do not set this murder apart from the norm of other murders (no weight); (25) the defendant might be subject to Jimmy Ryce Act involuntary commitment (no weight); and (26) the defendant offered to be a kidney donor for his ex-wife (slight weight).

*361 [13] Upon review, we find that the circumstances of this case are similar to other cases in which we have upheld the death penalty. *See Orme v. State,* 677 So.2d 258, 263 (Fla.1996) (holding the death sentence proportional for the sexual battery, beating, and strangulation of victim where there were three statutory aggravators-HAC, pecuniary gain, and sexual battery-and both statutory mental mitigators); *Schwab v. State,* 636 So.2d 3, 7 (Fla.1994) (holding the death sentence proportional for kidnapping, murder, and sexual battery of a boy, where prior conviction of violent felony, murder in the course of a felony, and HAC were proven). Comparing these circumstances with those of the foregoing and other capital cases, we conclude that death is proportionate.

CONCLUSION

We affirm Johnston's first-degree murder conviction and death sentence. We also affirm his convictions and sentences for kidnapping, robbery, sexual battery, and burglary of a conveyance with assault.

It is so ordered.

SHAW, WELLS, LEWIS, and QUINCE, JJ., and HARDING, Senior Justice, concur.

PARIENTE, J., concurs in part and dissents in part with an opinion.

ANSTEAD, C.J., concurs in result only.

PARIENTE, J., concurring in part and dissenting in part.

Although I concur in the majority's disposition of the other juror-related matters, I would not affirm the conviction at this time. I would instead remand this case for the trial court to conduct a juror interview to determine whether juror Robinson was abusing drugs during the guilt-phase portion of the trial. Juror Robinson was the *forewoman of the jury.* Robinson was arrested for possession of crack cocaine, marijuana and a loaded firearm on the evening of the first day of the penalty phase. This occurred only *five* days after the jury's guilt-phase decision. In fact, jury selection commenced on June 7 and the juror's arrest occurred only nine days later on June 16. Although juror Robinson was replaced during the penalty phase as a result of this arrest, the proximity in time and nature of the arrest in relation to the guilt phase amount to more than mere speculation or conjecture as to whether Robinson abused drugs during trial.

I recognize that there must be some evidence of misconduct in order to require a jury interview. Further inquiry of jurors is permissible only if the moving party has made sworn factual allegations that, if true, would require the trial court to order a new trial. *See Baptist Hospital of Miami v. Maler,* 579 So.2d 97, 100 (Fla.1991). However, use of crack cocaine by a juror during trial would be an overt act subject to judicial inquiry and, if true, would require a new trial. The allegations *362 in this case are a far cry from the cases cited by the majority. *See* majority op. at 357, note 10. In *Hackman v. City of St. Petersburg,* 632 So.2d 84, 85 (Fla. 2nd DCA 1993), the allegation was that the "jury may have overheard statements made by the judge from the bench while the jury was seated in the jury room and also when seated in the jury box." Clearly that allegation, without more, amounts to an insufficient basis for a jury interview. The case of *Walgreens, Inc. v. Newcomb,* 603 So.2d 5, 6 (Fla. 4th DCA 1992), involved a situation where the trial court denied a request for juror interviews after counsel violated the rules prohibiting contact with jurors in gathering facts to support an allegation of misconduct. There is no indication of improper contact by counsel with jurors in this case.

Although the defense in this case did not present evidence of any apparent outward manifestation of intoxication, the use of crack cocaine may not be readily apparent. Additionally, crack cocaine is highly addictive. It is troubling that we are affirming this death case without obtaining an answer to the question of whether the forewoman of the jury used crack

cocaine during the trial and in deliberations.[14] Certainly, the use of crack cocaine by a juror in a capital case, if true, would require a new trial. *Cf. Gamble v. State,* 44 Fla. 429, 33 So. 471, 473 (1902) (holding that if intoxicants have been used by a juror, a "presumption arises in favor of the convicted defendant that it resulted injuriously to him"). Thus, given the seriousness of this allegation, I would remand for a jury interview to allow inquiry into whether the juror was using drugs during the trial. In my view, the circumstances of this case demand this action at a minimum.

14 The potential problems with this juror, who was the foreperson, are even more troubling to me given that this is the same juror who failed to disclose in voir dire that she faced criminal charges the previous year, and who was facing arrest and a civil contempt sanction for failure to pay the fine in her criminal case when she served on the jury in Johnston's guilt-phase trial. *See* majority op. at 355-56.

All Citations

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APPENDIX F

63 So.3d 730
Supreme Court of Florida.

Ray Lamar JOHNSTON, Appellant,
v.
STATE of Florida, Appellee.
Ray Lamar Johnston, Appellant,
v.
Edwin G. Buss, etc., Appellee.

Nos. SC09–780, SC10–75.
|
March 24, 2011.
|
Rehearing Denied June 3, 2011.

Synopsis
Background: Following appellate affirmance of first-degree murder conviction and death sentence, 841 So.2d 349, defendant filed motion for postconviction relief. The Circuit Court, Hillsborough County, Rex Martin Barbas, J., denied motion. Defendant appealed and filed petition for habeas corpus.

Holdings: The Supreme Court held that:

[1] defendant failed to establish claim for relief arising out of juror's failure to disclose a prior misdemeanor and an active capias on civil contempt charge;

[2] counsel was not ineffective for failure to file motion to suppress;

[3] counsel's failure to call defendant's friend to testify was reasonable trial strategy;

[4] counsel was not ineffective for failing to inform jury that defendant was taking prescribed psychotropic medications;

[5] counsel was not ineffective in the presentation of mitigating evidence; and

[6] defendant was not entitled to habeas relief.

Affirmed; habeas petition denied.

Attorneys and Law Firms

*734 Bill Jennings, Capital Collateral Regional Counsel, David D. Henry, Assistant CC Regional Counsel, Middle Region, Tampa, FL, for Appellant/Petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, FL, and Katherine V. Blanco, Assistant Attorney General, Tampa, FL, for Appellee/Respondent.

Opinion

PER CURIAM.

Ray Lamar Johnston appeals an order of the trial court denying his motion to vacate his conviction for first-degree murder and sentence of death filed under Florida Rule of Criminal Procedure 3.851. He also petitions this Court for a writ of habeas corpus.[1] For the reasons that follow, we affirm the trial court's order denying postconviction relief. We also deny the habeas petition.

1 We have jurisdiction. *See* art. V, § 3(b)(1), (9), Fla. Const.

I. FACTS AND PROCEDURAL HISTORY

Johnston was charged with the 1997 murder, kidnapping, robbery, and sexual battery of Leanne Coryell and with burglary of a conveyance with assault or battery. ***735** *Johnston v. State,* 841 So.2d 349, 351 (Fla.2002). The jury found Johnston guilty on all charges and unanimously recommended the death penalty. The trial court followed the jury's recommendation and sentenced Johnston to death. *Id.* at 355.

The evidence presented at Johnston's trial demonstrated that Johnston had beaten, raped, and manually strangled Coryell, then dragged her to a pond and left her nude, floating face down. *Id.* at 352. When law enforcement arrived at the scene, Coryell's car was in a nearby parking lot with the keys in the ignition and the engine still warm. *Id.* Later that night and early the next morning, ATM surveillance videos captured Johnston using Coryell's ATM card to withdraw $1000 from her account. *Id.* Police obtained a warrant to search Johnston's apartment, where they found a pair of wet tennis shoes matching three partial impressions found at the scene. *Id.*

After Johnston saw his picture on television, he voluntarily told police he was friends with Coryell and had gone out for dinner and drinks on the night of the murder. *Id.* At that time, he explained that he had loaned money to Coryell and that she had provided the ATM card so that Johnston could withdraw money from her account as repayment. *Id.* After making this initial statement, Johnston was arrested for grand theft. *Id.* He received *Miranda*[2] warnings and agreed to continue the interview. *Id.* Thereafter, the detectives pointed out factual discrepancies in Johnston's initial statement and confronted Johnston with the information that they had discovered his wet tennis shoes. *Id.* at 352–53. Johnston continued to deny his guilt and responded that law enforcement would not find any DNA evidence, hair, or saliva that would link him to the victim. *Id.* at 353.

2 *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At trial, the prosecution presented evidence that Coryell had clocked out of work over two hours after Johnston had purported to meet her for drinks. *Id.* at 351–52. His roommate testified that they lived in the same apartment complex as Coryell, that Johnston left the apartment that night without taking his car, and that Johnston returned later that night with money to repay a loan. *Id.* at 351. Johnston's fingerprint was found on the outside of Coryell's car. *Id.* at 352.

In imposing the death sentence, the trial court found four aggravators,[3] one statutory mitigator,[4] and numerous nonstatutory mitigators.[5]

3 The trial court found the following aggravators: (1) the defendant was previously convicted of violent felonies (great weight); (2) the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping (great weight); (3) it was committed for pecuniary gain (great weight); and (4) it was especially heinous, atrocious, or cruel (great weight). *Id.* at 355 n.

3.

4 The trial court found that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired and gave it moderate weight. *Id.* at 355 n. 4.

5 The trial court gave weight to the following nonstatutory mitigation: (1) the defendant has shown remorse (slight weight); (2) the defendant has a long history of mental illness (slight weight); (3) the defendant is capable of strong, loving relationships (slight weight); (4) the defendant excels in a prison environment (slight weight); (5) the defendant could contribute while in prison (slight weight); (6) the defendant served in the U.S. Air Force (slight weight); (7) during the time the defendant was on parole, he excelled (slight weight); (8) the defendant was a productive member of society after his release from prison (slight weight); (9) when notified that the police were looking for him, he turned himself in (slight weight); (10) the defendant demonstrated appropriate courtroom behavior during trial (slight weight); (11) "the defendant has tried to conform his behavior to normal time after time, but has been thwarted by his mental illness and brain dysfunction" (slight weight); (12) the defendant has the support of his mother and sister (slight weight); and (13) the defendant offered to be a kidney donor for his ex-wife (slight weight). *Id.* at 360 n. 13.

*736 This Court affirmed Johnston's conviction and sentence on direct appeal. *Id.* at 361. Johnston subsequently filed a motion for postconviction relief. The trial court denied Johnston's postconviction motion after holding an evidentiary hearing on some of his claims. Johnston now appeals the denial of postconviction relief and has filed a habeas petition in this Court.

II. JOHNSTON'S POSTCONVICTION CLAIMS

On appeal from the denial of postconviction relief, Johnston raises ten issues: (A) counsel was ineffective for failing to adequately question juror Tracy Robinson concerning her prior misdemeanor and active capias; (B) counsel was ineffective for failing to include juror Robinson's resulting nondisclosure in a motion for new trial; (C) the postconviction court erred in denying Johnston's motion to interview juror Robinson; (D) counsel was ineffective for failing to file a motion to suppress Johnston's statements to law enforcement; (E) counsel was ineffective for failing to call Diane Busch as a witness; (F) counsel was ineffective for failing to inform the trial court or jury that Johnston was using prescribed psychotropic medication at the time of trial; (G) counsel was ineffective for offering ill-considered and improper advice concerning Johnston's need to testify; (H) counsel was ineffective for failing to present potential mitigators; (I) counsel was ineffective for failing to adequately challenge fingerprint evidence; (J) counsel was ineffective for failing to adequately challenge shoe tread evidence; (K) counsel was ineffective for failing to further question members of the venire concerning their exposure to pretrial publicity; (L) counsel was ineffective for failing to file a legally sufficient motion to disqualify the trial judge; and (M) cumulative error warrants relief.[6] As explained below, we affirm the trial court's denial of relief.

6 Because Johnston has failed to provide this Court with any basis for relief in any of his postconviction claims, Johnston is not entitled to relief based on cumulative error. *See Bradley v. State*, 33 So.3d 664, 684 (Fla.2010).

A. Failure to sufficiently question juror Robinson at voir dire

Johnston first claims that counsel was ineffective for failing to sufficiently question juror Tracy Robinson at voir dire, suggesting that a targeted "follow-up" question would have brought out additional facts not disclosed by Robinson. He also asserts that such information would have caused defense counsel to move to strike Robinson for cause or to peremptorily

exclude Robinson. We disagree.

Juror Robinson, who served as the jury foreperson, was arrested for a drug-related offense during the penalty phase. *Johnston,* 841 So.2d at 355.[7] Her arrest revealed that she pled nolo contendere approximately ten months before Johnston's trial to misdemeanor charges of obstructing a police officer without violence. *Id.* During voir dire, juror Robinson did not reveal her prior plea and charges. *Id.* Robinson also failed to pay her court costs in that obstruction case; therefore, at the time of Johnston's trial she was the subject of an active capias for civil contempt charges. *Id.* at 357. On direct appeal, *737 Johnston argued that he was entitled to a new trial because of Robinson's nondisclosure and active capias. *Id.* at 355–57. This Court rejected Johnston's argument, holding that the capias did not statutorily disqualify Robinson and that Johnston had failed to raise the issue of Robinson's nondisclosure with the trial court. *Id.* at 357–58.

7 This Court's opinion on direct appeal fully set out the facts regarding juror Robinson. *See id.* at 355–56.

[1] Following the United State Supreme Court's decision in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), this Court has held that for ineffective assistance of counsel claims to be successful, the defendant must demonstrate both deficiency and prejudice:

> First, the claimant must identify particular acts or omissions of the lawyer that are shown to be outside the broad range of reasonably competent performance under prevailing professional standards. Second, the clear, substantial deficiency shown must further be demonstrated to have so affected the fairness and reliability of the proceeding that confidence in the outcome is undermined.

Bolin v. State, 41 So.3d 151, 155 (Fla.2010) (quoting *Maxwell v. Wainwright,* 490 So.2d 927, 932 (Fla.1986)).

[2] [3] [4] [5] [6] [7] There is a strong presumption that trial counsel's performance was not deficient. *See Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689, 104 S.Ct. 2052. The defendant carries the burden to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* "[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Occhicone v. State,* 768 So.2d 1037, 1048 (Fla.2000). Furthermore, where this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument. *Melendez v. State,* 612 So.2d 1366, 1369 (Fla.1992).

[8] In demonstrating prejudice, the defendant must show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

[9] Because both prongs of the *Strickland* test present mixed questions of law and fact, this Court employs a mixed standard of review, deferring to the circuit court's factual findings that are supported by competent, substantial evidence, but reviewing the circuit court's legal conclusions de novo. *See Sochor v. State,* 883 So.2d 766, 771–72 (Fla.2004).

[10] First, in this case, counsel was not ineffective for failing to sufficiently question juror Robinson regarding the capias. *See Ferrell v. State,* 29 So.3d 959, 976 (Fla.2010) ("Trial counsel cannot be deemed ineffective for failing to raise a meritless argument."). As this Court held on direct appeal, Robinson's civil contempt charge did not disqualify her from service under section 40.013(1), Florida Statutes (1999). *Johnston,* 841 So.2d at 356–57. Therefore, even if Robinson was aware of the capias and disclosed it upon questioning, such disclosure would not have provided *738 a reason for Robinson to be removed for cause.

[11] Second, counsel was not deficient because in keeping juror Robinson, defense counsel was following its strategy of seeking a young and minority jury. After conducting a mock trial and soliciting pretrial advice from a professional jury

consultant, defense counsel decided to pursue a strategy of seating jurors matching the profile shared by juror Robinson. Defense counsel testified at the evidentiary hearing that Robinson's prior misdemeanor and active capias would not have made her any less desirable to the defense. Counsel was not ineffective for pursuing this reasonable strategy. *See Dillbeck v. State,* 964 So.2d 95, 103 (Fla.2007) ("Dillbeck's trial counsel adopted a reasonable trial strategy of avoiding a death sentence by attempting to seat jurors likely to recommend a life sentence.").

[12] Additionally, Johnston has failed to establish prejudice; given that defense counsel would not have moved to strike juror Robinson even if counsel had further questioned Robinson and she had disclosed her criminal history, our confidence in the outcome is not undermined. In fact, after learning of juror Robinson's arrest, the defense verbally objected to her removal, expressing a preference for juror Robinson over the alternate juror.

Accordingly, because Johnston cannot demonstrate deficiency and prejudice, this ineffectiveness claim is without merit.

B. Failure to cite juror Robinson's misconduct in motion for new trial

[13] Johnston next claims that defense counsel was ineffective for failing to include in the motion for new trial a claim of juror misconduct based on juror Robinson's nondisclosure. Because Johnston cannot demonstrate prejudice, we disagree.

This Court has explained that

> [i]n determining whether a juror's nondisclosure of information during voir dire warrants a new trial, courts have generally utilized a three-part test. First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa v. Zequeira, 659 So.2d 239, 241 (Fla.1995) (citations omitted); *see also Lugo v. State,* 2 So.3d 1, 13 (2008).

[14] Under the first prong of *De La Rosa,* Johnston must establish that the nondisclosed information is relevant and material to jury service in this case. *De La Rosa,* 659 So.2d at 241; *see also Murray v. State,* 3 So.3d 1108, 1121–22 (Fla.2009). "There is no per se rule that involvement in any particular prior legal matter is or is not material." *Roberts v. Tejada,* 814 So.2d 334, 345 (Fla.2002); *see also State Farm Fire & Cas. Co. v. Levine,* 837 So.2d 363, 366 n. 2 (Fla.2002). Factors that may be considered in evaluating materiality include the remoteness in time of a juror's prior exposure, the character and extensiveness of the experience, and the juror's posture in the litigation. *Roberts,* 814 So.2d at 342.

[15] [16] But "materiality is only shown 'where the omission of the information prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge.' " *Levine,* 837 So.2d at 365 (internal quotation marks omitted) (quoting *Roberts,* 814 So.2d at 340). In other words, "[a] juror's nondisclosure ... is considered material if *739 it is so substantial that, if the facts were known, the defense likely would peremptorily exclude the juror from the jury." *Murray,* 3 So.3d at 1121–22 (quoting *McCauslin v. O'Conner,* 985 So.2d 558, 561 (Fla. 5th DCA 2008)).

In *Lugo,* we held that a juror's nondisclosure was not sufficiently material where the juror, sitting on a death penalty case, had been a victim of theft. *Lugo,* 2 So.3d at 14. In evaluating materiality, this Court observed that the juror's "one-time isolated incident" did not resemble the murder victim's "extended torture and captivity." *Id.* Thus, we concluded that the sheer disparity between the experiences made the juror's experience insufficiently material or relevant to service on that jury. *Id.*

Similarly, here, Johnston has failed to satisfy materiality under *De La Rosa's* first prong. We find nothing about the character and extensiveness of Robinson's own experience—she committed a nonviolent offense and then pled nolo contendere—that suggests she would be biased against a defendant pleading not guilty in a death penalty case or against legal proceedings in general. *See Lugo,* 2 So.3d at 14; *cf. De La Rosa,* 659 So.2d at 241. The capias, furthermore, was not issued for a criminal offense. *Johnston,* 841 So.2d at 357. In fact, juror Robinson's positioning as a prior *defendant* makes bias against Johnston

especially unlikely. *See Garnett v. McClellan,* 767 So.2d 1229, 1231 (Fla. 5th DCA 2000) (finding that prior litigation experience was immaterial, in part, because the juror had been similarly situated to and was therefore more likely to be sympathetic to the complaining party).

[17] Neither was there any evidence to suggest that here, "if the facts were known, the defense likely would [have] peremptorily exclude[d] the juror from the jury." *Murray,* 3 So.3d at 1121–22 (quoting *McCauslin,* 985 So.2d at 561). In fact, as explained above, Robinson matched the profile of the optimal juror sought by the defense. Defense counsel also testified at the evidentiary hearing that in his experience, the substance of Robinson's nondisclosure would have caused the prosecution—not the defense—to exclude or strike a juror.

Accordingly, because Johnston could not have demonstrated materiality, any motion for new trial based on Robinson's disclosure would not have been successful. And because the claim lacked merit, counsel cannot be deemed ineffective for failing to raise it. Therefore, denial of this ineffectiveness claim is affirmed.

C. The postconviction court's denial of motion for juror interview

Johnston claims that the postconviction trial court should have permitted him to conduct an interview of juror Robinson under Florida Rule of Criminal Procedure 3.575. Johnston told the postconviction court that he sought to question juror Robinson on her motives or intent during voir dire.[8] We affirm the trial court's denial.

8 To the extent that Johnston alleges entitlement to a juror interview on the same grounds advanced on direct appeal—the issue of Robinson's active capias—the trial court correctly denied an interview because the subject claim was procedurally barred. *See, e.g., Green v. State,* 975 So.2d 1090, 1106 (Fla.2008) ("Because the ... issue was raised on direct appeal, Green is not permitted to relitigate it on postconviction appeal.").

[18] [19] "A trial court's decision on a motion to interview jurors is reviewed pursuant to an abuse of discretion standard." *Anderson v. State,* 18 So.3d 501, 519 (Fla.2009). The trial court does not abuse its discretion in denying motions to interview *740 jurors based on juror bias or misconduct where there is no indication of bias or misconduct in the record. *See id.*

Here, the trial court did not abuse its discretion in denying Johnston's rule 3.575 motion because a juror interview was unnecessary given that the substance of Robinson's nondisclosure was already known.

D. Johnston's statement to law enforcement

[20] Johnston argues that trial counsel was ineffective under *Strickland* for failing to move to suppress his statement made to law enforcement prior to issuance of a *Miranda* warning. Johnston also asserts that counsel should have moved to suppress the statement made after Johnston received a *Miranda* warning because the warning came in the middle of continual interrogation. We affirm denial of both arguments.

Upon seeing his picture on television, Johnston phoned police, drove himself to the police station, and made a statement to detectives he knew to be assigned to the case. He believed his statements would account for his whereabouts on the night of the murder and his use of the victim's ATM card. At the postconviction evidentiary hearing, defense counsel explained that he *wanted* the jury to hear Johnston's statements because they provided the only lawful explanation as to why Johnston possessed the victim's ATM card.

Defense counsel's explanation demonstrates that his decision not to move to suppress Johnston's statements was a reasonable, strategic choice. *See Occhicone,* 768 So.2d at 1048; *Lawrence v. State,* 969 So.2d 294, 309 (Fla.2007). Short of calling Johnston to testify, there was no available evidence aside from the statement that could explain Johnston's use of the

ATM card.

[21] Additionally, counsel cannot be deemed ineffective because any motion to suppress would have been meritless. *See Kormondy v. State,* 983 So.2d 418, 430 (Fla.2007); *Fitzpatrick v. State,* 900 So.2d 495, 511 (Fla.2005). Evidence presented at the postconviction evidentiary hearing demonstrated that Johnston's initial statement was voluntary. Therefore, no *Miranda* warnings were required until Johnston was formally arrested. *See Traylor v. State,* 596 So.2d 957, 965–66 (Fla.1992). And, since Johnston was not in custody when he gave his initial statement, it follows that Johnston's post-*Miranda* statement was obtained following a valid waiver. *See Ault v. State,* 866 So.2d 674, 682 (Fla.2003) ("[I]t is custodial interrogation that triggers the *Miranda* prophylactic."). Therefore, a motion to suppress either statement would have been denied.

Because defense counsel made a reasonable strategic choice and because a motion to suppress would have lacked merit, Johnston cannot demonstrate the deficiency prong of *Strickland.* Therefore, we affirm the trial court's denial of this ineffectiveness claim.

E. Failure to call Diane Busch as a witness

[22] Johnston claims that counsel was ineffective for failing to investigate and call Diane Busch as a witness. We disagree.

Johnston proffered the testimony of his friend, Diane Busch, at the postconviction evidentiary hearing. She testified that in the months prior to the murder, Johnston paid for several social outings and did not appear to be in need of money. She also testified that when she was hospitalized for an illness, Johnston saved her life by being concerned for her and listening to her. However, Busch also testified that while she was still in recovery at the hospital, she saw something on television indicating ***741** law enforcement was looking for Johnston and reported him to the police. At the postconviction evidentiary hearing, her statement to the police was introduced to show that she found Johnston to be "possessive and obsessed" and verbally abusive to her family and hospital staff during her hospital stay. She told police that once she realized how Johnston was acting, she requested that he be kept from visiting her.

[23] [24] This Court has "consistently held that a trial counsel's decision to not call certain witnesses to testify at trial can be reasonable trial strategy." *Everett v. State,* 54 So.3d 464, 474 (Fla.2010); *see also Hertz v. State,* 941 So.2d 1031, 1039 (Fla.2006) (holding counsel not ineffective for failing to call a witness at the penalty phase when counsel decided that he "was not a good witness and not that helpful" during the guilt phase). "[I]t is reasonable for trial counsel to forego evidence that, if presented in mitigation, could damage a defendant's chances with the jury." *Nelson v. State,* 43 So.3d 20, 32 (Fla.2010); *see also Reed v. State,* 875 So.2d 415, 437 (Fla.2004) ("An ineffective assistance claim does not arise from the failure to present mitigation evidence where that evidence presents a double-edged sword.").

The decision to not use Johnston's friend as a witness at trial was clearly within "the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052. Given the slight value of her proffered testimony and the likelihood that it would have opened the door to the prosecution's highly damaging cross-examination and impeachment evidence also presented to the postconviction court, trial counsel's decision was reasonable. *See Gaskin v. State,* 822 So.2d 1243, 1248 (Fla.2002) ("Trial counsel will not be held to be deficient when she makes a reasonable strategic decision to not present mental mitigation testimony during the penalty phase because it could open the door to other damaging testimony.").

Accordingly, we affirm denial of this claim.

F. Johnston's use of prescribed psychotropic medication at trial

[25] Johnston claims that counsel was ineffective because counsel failed to inform the jury that Johnston was taking prescribed psychotropic medications at the time of trial. Johnston alleges that the medications rendered him incompetent and that when he testified at the penalty phase, the medications made him appear cold and callous. However, this ineffectiveness claim is

without merit because Johnston has failed to demonstrate prejudice.

[26] "In order to demonstrate prejudice from counsel's failure to investigate his competency, a petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial.' " *Futch v. Dugger,* 874 F.2d 1483, 1487 (11th Cir.1989) (quoting *Alexander v. Dugger,* 841 F.2d 371, 375 (11th Cir.1988)), *quoted in, Nelson v. State,* 43 So.3d 20, 29 (Fla.2010).

A defense expert evaluated Johnston's general competency several times throughout the trial and testified at the postconviction evidentiary hearing that he never saw any reason to question Johnston's competence. Johnston's defense counsel also testified that Johnston never appeared blunted or confused at any stage of the proceedings. With respect to Johnston's testimony at the penalty phase, both the expert and defense counsel testified that Johnston appeared emotional and not cold or callous at the time he delivered his testimony.

*742 Johnston has failed to demonstrate prejudice because there was no reasonable probability that an evaluation would have produced a finding of incompetence. In fact, the postconviction court determined that Johnston was *not* incompetent, confused, or blunted. This finding was supported by competent, substantial evidence in the form of testimony from an evaluating defense expert and from counsel. *See Reed,* 875 So.2d at 421–22; *Zakrzewski v. State,* 866 So.2d 688, 696 (Fla.2003) (where defendant's and counsel's testimony conflicted, upholding the trial court finding that counsel was credible).

Regarding the failure to request an instruction prior to Johnston's penalty-phase testimony, because Johnston was not incompetent and did not appear cold or callous, the lack of instruction in this case does not undermine our confidence in the outcome. Thus, Johnston cannot demonstrate prejudice.

Accordingly, we affirm denial of this claim.

G. Johnston's decision to testify at the penalty phase

We also affirm the denial of Johnston's claims that defense counsel provided him with ill-considered and improper advice about the need to testify at the penalty phase. The trial court found after an evidentiary hearing that defense counsel in fact *discouraged* Johnston from testifying. The trial court's finding was based on the competent substantial evidence provided by defense counsel's evidentiary hearing testimony. *See Roberts v. State,* 840 So.2d 962, 973 (Fla.2002) ("Findings on the credibility of evidence by a lower court are not overturned if supported by competent, substantial evidence."). The voluntariness of Johnston's decision is underscored by the penalty-phase colloquy in which Johnston represented that he understood it was his decision whether to testify and that he wanted to testify. *See Gonzalez v. State,* 990 So.2d 1017, 1031–32 (Fla.2008). Accordingly, this claim does not warrant relief.

H. Potential mitigators

[27] Next, Johnston claims that his trial counsel should have presented additional evidence of psychological issues that could have served as nonstatutory mitigation. Johnston also claims that trial counsel's general theory of mitigation was incoherent. Because Johnston has failed to show a constitutional deficiency of counsel, we affirm the trial court's denial of this claim.

Johnston's expert, who testified during the postconviction evidentiary hearing, suggested that there should have been additional evidence of neurological and brain functioning impairment, the nexus between the impairment and Johnston's criminal conduct, aggressive reactivity, reactive impulsivity and poor judgment, affective and anxiety disorders, familial dysfunctional factors, and attention deficit hyperactivity disorder (ADHD). However, other testimony from the postconviction evidentiary hearing revealed that prior to trial, defense counsel enlisted a mitigation specialist and reviewed Johnston's medical, criminal, hospital, education, and employment records. The mitigation specialist contacted and

interviewed Johnston and his family members, consulted with medical experts who eventually testified on behalf of Johnston, scheduled a PET scan, and communicated all information, including PET scan results, to defense counsel and an evaluating psychologist. Defense counsel secured a mental health evaluation, consulted with the evaluator and other medical experts, and at the penalty phase, elicited from four medical experts testimony that Johnston had frontal lobe brain damage ***743** and mental health problems. *Johnston,* 841 So.2d at 354–55.

[28] [29] [30] As this Court explained in *Pagan v. State,* 29 So.3d 938 (Fla.2009),

> "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." Rather, in deciding whether trial counsel exercised reasonable professional judgment with regard to the investigation and presentation of mitigation evidence, a reviewing court must focus on whether the investigation resulting in counsel's decision not to introduce certain mitigation evidence was itself reasonable. When making this assessment, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."

Id. at 949 (citations omitted) (quoting *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Here, the evidence presented to the postconviction court demonstrated that defense counsel did not fail to reasonably investigate mitigation. *See Stewart v. State,* 37 So.3d 243, 258 (Fla.2010) (holding that the defendant did not show deficiency or prejudice where "the mental health experts and lay witnesses who testified during the penalty phase conveyed the substance, though perhaps not all of the details, of the proposed mitigating circumstances to the penalty phase jury"). Substantial evidence of Johnston's mental health was considered and presented by counsel at the penalty phase. In fact, the substance of almost all the information now presented by Johnston was presented to the jury. Therefore, counsel was not deficient in failing to present additional mitigation evidence. *See Pagan,* 29 So.3d at 950; *Darling v. State,* 966 So.2d 366, 378 (Fla.2007) (holding that trial counsel was not ineffective for failing to present cumulative and redundant psychiatric mitigation). And, to the extent that Johnston disagrees with the defense's mental health expert and his decision not to diagnose Johnston with ADHD or any other condition, counsel was not deficient for relying on the prior psychiatric evaluation. *See Darling,* 966 So.2d at 377 ("[D]efense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire.").

Accordingly, this claim does not warrant relief.

I. Fingerprint evidence

[31] Johnston claims that counsel was ineffective for failing to consult and present an expert who could testify as to the lack of reliability regarding latent fingerprint analysis. However, the expert presented by Johnston had no formal training in latent fingerprint analysis and did not examine the latent fingerprints in this case. Therefore, it is highly unlikely that this testimony would have been admissible.

Regardless of the admissibility of such testimony, defense counsel's failure to present it does not undermine confidence in the outcome. Because the expert was neither qualified nor prepared to offer testimony on whether the latent fingerprint found on the victim's car indeed matched Johnston's fingerprint, the expert could not have called into question the State's positive identification of Johnston. *See Morris v. State,* 931 So.2d 821, 830 (Fla.2006) ("[T]he failure to call witnesses can constitute ineffective assistance of counsel ***744** if the witnesses may have been able to cast doubt on the defendant's guilt...." (quoting *Ford v. State,* 825 So.2d 358, 360–61 (Fla.2002))).

Accordingly, this ineffectiveness of counsel claim does not warrant relief.

J. Shoe tread evidence

[32] Johnston claims that defense counsel was ineffective for failing to secure the most defense-friendly statistic on the number of shoes that could have matched the impressions found at the crime scene. However, counsel cannot be deemed deficient for failing to present evidence that does not exist. *See, e.g., Clark v. State,* 35 So.3d 880, 888 (Fla.2010) ("At the evidentiary hearing, Clark presented no evidence to support this claim. Trial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial."). Johnston himself failed to obtain any evidence from the shoe manufacturer or from any other source to establish that the number of matching shoes was "millions," as he claims, or that the affidavit presented at trial was otherwise incorrect. Therefore, we affirm denial of this claim.

K. Pretrial publicity

[33] Johnston claims that trial counsel was ineffective for failing to sufficiently question members of the venire regarding their exposure to pretrial publicity. Because Johnston has not shown that the jurors were actually biased, our confidence in the outcome is not undermined. *See Carratelli v. State,* 961 So.2d 312, 324 (Fla.2007).

During voir dire, two eventual jurors indicated that they had heard about the case on the news. Trial counsel asked one of those jurors directly whether, given exposure to media reports, he could be fair and impartial. That juror responded that he could. While counsel did not directly question the other juror, the second juror gave no indication as to what he had heard on the news or whether he was at all influenced by the news report, even after defense counsel invited jurors to respond to his repeated explanation of the requirement that jurors must be fair and impartial.

[34] In *Carratelli,* we explained:

> [W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.
>
> A juror is competent if he or she "can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court." Therefore, actual bias means bias-in-fact that would prevent service as an impartial juror. Under the actual bias standard, the defendant must demonstrate that the juror in question was not impartial—i.e., that the juror was biased against the defendant, and *the evidence of bias must be plain on the face of the record.*

961 So.2d at 324 (citations omitted) (emphasis supplied) (quoting *Lusk v. State,* 446 So.2d 1038, 1041 (Fla.1984)). To be entitled to relief, the defendant must show that the juror "was actually biased, not merely that there was doubt about her impartiality." *Owen v. State,* 986 So.2d 534, 550 (Fla.2008).

In *Carratelli,* we held that the defendant failed to demonstrate actual bias where the challenged juror represented during voir dire that he could be fair, listen to the evidence, and follow the law. *See* 961 So.2d at 327. And in *Lugo,* we found that the defendant could not demonstrate actual bias where, after the trial court's specific discussion on improper bias, the juror simply did not indicate that his ability to ***745** be impartial was affected by a prior experience. 2 So.3d at 16.

Johnston has failed to demonstrate actual bias. *See id.; Owen,* 986 So.2d at 550; *Carratelli,* 961 So.2d at 324. One juror, like the juror in *Carratelli,* indicated that he retained the ability to be impartial. The other juror, like the one in *Lugo,* simply declined to respond to specific discussion on bias during voir dire. There is no evidence that either juror was biased.

Because Johnston must show more than mere doubt about the juror's impartiality and because there is no evidence of actual bias, we affirm denial of this claim. *See Owen,* 986 So.2d at 549–50.

L. Motion to disqualify

[35] Johnston claims that counsel was ineffective for failing to file a legally sufficient motion to disqualify the trial judge. The record indicates that a motion to disqualify was filed and that the trial judge denied the motion. Nevertheless, Johnston asserts—without argument—that the postconviction trial court erred in summarily denying this claim because the claim required an evidentiary determination. However, Johnston waived this argument because he does not identify the alleged error, describe the factual determination he believes was necessary, or even set out the facts he believes are pertinent to the claim. *See Cooper v. State,* 856 So.2d 969, 977 n. 7 (Fla.2003) ("Cooper ... contend[s], without specific reference or supportive argument, that the 'lower court erred in its summary denial of these claims.' We find speculative, unsupported argument of this type to be improper, and deny relief based thereon."); *Duest v. Dugger,* 555 So.2d 849, 852 (Fla.1990) ("The purpose of an appellate brief is to present arguments in support of the points on appeal. Merely making reference to arguments below without further elucidation does not suffice to preserve issues.").

III. PETITION FOR WRIT OF HABEAS CORPUS

Johnston raises three claims in his petition for writ of habeas corpus: (A) the sentence constitutes cruel and unusual punishment; (B) appellate counsel was ineffective for failing to claim fundamental error on the issue of juror Robinson's nondisclosure; and (C) admission of Johnston's statements to law enforcement violated his right against self-incrimination.

A. Cruel and unusual punishment

[36] Johnston argues that his execution would violate the Eighth and Fourteenth Amendments as interpreted by the United States Supreme Court in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (holding the death penalty unconstitutional for mentally retarded defendants), and *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding the death penalty unconstitutional for defendants under age eighteen at the time of the crime). Johnston claims that he is a "profoundly mentally ill individual" and that evolving standards of decency prohibit his execution. He makes no claim of mental retardation.

However, this Court has consistently rejected similar claims. *See Nixon v. State,* 2 So.3d 137, 146 (Fla.2009) (declining to extend *Atkins* to mentally ill). Accordingly, relief is denied as to this claim.

B. Juror Tracy Robinson

Next, Johnston claims that his appellate counsel was ineffective for failing to frame the issue of juror Tracy Robinson's nondisclosure as one involving fundamental error. We disagree.

*746 [37] Consistent with the *Strickland* standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine

> first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So.2d 798, 800 (Fla.1986); *see also Freeman v. State,* 761 So.2d 1055, 1069 (Fla.2000); *Thompson*

v. State, 759 So.2d 650, 660 (Fla.2000).

[38] [39] [40] In raising such a claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman,* 761 So.2d at 1069 (citing *Knight v. State,* 394 So.2d 997, 1001 (Fla.1981)). Claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion. *See Rutherford v. Moore,* 774 So.2d 637, 643 (Fla.2000). "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective." *Id.* (quoting *Williamson v. Dugger,* 651 So.2d 84, 86 (Fla.1994)).

[41] We deny relief for two reasons. First, Johnston's claim is procedurally barred. Johnston's argument that he is entitled to a new trial based on juror Robinson's alleged misconduct was raised in direct appeal to this Court, *Johnston,* 841 So.2d at 357, and as the first issue in his rule 3.851 motion. Johnston is not permitted to camouflage the underlying argument as an ineffective assistance of appellate counsel claim. *See Schoenwetter v. State,* 46 So.3d 535, 562 (Fla.2010) ("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright,* 507 So.2d 1377, 1384 (Fla.1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

Second, even if the claim were not procedurally barred, it is meritless. Contrary to Johnston's assertion, appellate counsel *did* raise on direct appeal the unpreserved issue of entitlement to a new trial based on juror misconduct. *See Johnston,* 841 So.2d at 357 ("Johnston next asserts that he is entitled to a new trial because juror Robinson deliberately failed to disclose that she pled nolo contendere to a misdemeanor charge within the past year."). Inherent in this Court's treatment of the claim on direct appeal was the determination that Johnston's claim was *not* fundamental error. *See Carratelli,* 961 So.2d at 325 ("If an appellate court refuses to consider unpreserved error, then by definition the error could not have been fundamental.").

Accordingly, we deny relief.

C. Right against self-incrimination

[42] Finally, Johnston claims that his statements to law enforcement were admitted at trial in violation of *Miranda.*[9] ***747** He also asserts, without argument, that appellate counsel was ineffective for failing to raise the issue on direct appeal.

9 To the extent that Johnston claims *State v. Powell,* 998 So.2d 531 (Fla.2008), *reversed,* —— U.S. ——, 130 S.Ct. 1195, 175 L.Ed.2d 1009 (2010), dictates another result, his claim is meritless. As Johnston concedes, he was clearly advised of his *Miranda* rights.

Johnston's claim is procedurally barred because each argument could have been, or was raised in Johnston's postconviction motion. *See Teffeteller v. Dugger,* 734 So.2d 1009, 1025 (Fla.1999). In fact, Johnston's argument that his statement was obtained in violation of his *Miranda* rights in his postconviction motion has been addressed above. *See Hildwin v. Dugger,* 654 So.2d 107, 111 (Fla.1995) ("Habeas corpus is not to be used for additional appeals of issues that could have been, should have been, or were raised in a [postconviction] motion.") (emphasis omitted).

Accordingly, we reject this claim.

IV. CONCLUSION

Based on the foregoing, we affirm the trial court's order denying Johnston's rule 3.851 motion, and we deny his habeas petition.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

All Citations

63 So.3d 730, 36 Fla. L. Weekly S122

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APPENDIX G

TRIAL PRACTICES INC.

April 11, 2017

Via Electronic and U.S. Mail

Subject: Content Analysis of *Johnston v. State*

David D. Hendry, Esquire
Capital Collateral Regional Counsel-Middle
12973 N. Telecom Parkway
Temple Terrace, FL 33637

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.*[1] 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."[2]
>
> "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."[3]

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.[4] 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

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[1] *Caldwell v. Mississippi 472 U.S. 320 (1985).*
[2] *Caldwell v. Mississippi, 472 U.S. at 328 (1985).*
[3] *Caldwell v. Mississippi, 472 U.S. at 330 (1985).*
[4] White, M., & Marsh, E. (2006), Content Analysis: A Flexible Methodology, *Library Trends, 55*(1 Summer); or, Babbie, E. R. (2007), *The Basics of Social Research* (4th ed., p.416), Belmont: Wadsworth Publications.

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."[5]

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.[6] 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 the 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

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[5] Drisko, J. W., & Maschi, T. (2015). *Content analysis*. New York: Oxford University Press, 2015.

[6] Implicit comments were those which included restatement of the question, in whole or in part, by one party to another before the larger audience as within the case when the prosecution partially repeats a question or response made by a juror in an attempt to ensure common understanding.

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.[7] 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.[8] 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

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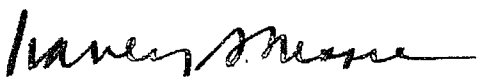
[7]See, for example, see the discussion in Jensen, E. (2005), *Teach with the Brain in Mind,* Alexandria, Virginia: The Association for Supervision and Curriculum Development, which references the importance of repetition as part of seven factors critical for learning due to the nature of neural networking and the strengthening of conditioned responses through repetition leading to increased recall and application; see also Cacioppo, J., & Petty, R. (1989), Effects of Message Repetition on Argument Processing, Recall, and Persuasion, *Basic and Applied Social Psychology, 10*(1), 3-12; or, Melton, A. (1970), The Situation with Respect to the Spacing of Repetitions and Memory, *Journal of Verbal Learning and Verbal Behavior, 9*(5), 596-606; or, Wogan, M., & Water, R. H. (1959), The Role of Repetition in Learning, *The American Journal of Psychology, 72*, 612-613; or, Rock, I. (1957), The Role of Repetition in Associative Learning, *The American Journal of Psychology, 70*(2), 186-193; or, Repovs, G., & Baddely, A. (2006), The Multi-Component Model of Working Memory: Explorations in Experimental Cognitive Psychology, *Neuroscience, 139*(1), 5-21.

[8] Murdock, B. B. (1962), The Serial Position Effect of Free Recall. *Journal of Experimental Psychology, 64*(5), 482-488; or, Troyer, A. (2011), Serial Position Effect, *Encyclopedia of Clinical Neuropsychology*, 2263-2264; or, Lind, E., Kray, L., & Thompson, L. (2001), Primacy Effects in Justice Judgments: Testing Predictions from Fairness Heuristic Theory, *Organizational Behavior and Human Decision Processes, 85*(2).

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.[9] 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.

[9] See Krauss, Daniel A.; Sales, Bruce D. "The effects of clinical and scientific expert testimony on juror decision making in capital sentencing." *Psychology, Public Policy, and Law*, Vol 7(2), Jun 2001, 301; or, Pennington, N., & Reid, H. (1993), *Inside the Juror.* Cambridge: The Press Syndicate of the University of Cambridge; see also, Bennett, W., Feldman, M. (1984), *Reconstructing reality in the courtroom,* Rutgers: New Jersey.

Tab A

Table I
Content Coding for Johnston Analysis

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
24	1	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.	1	1	1	1
24	21	Such a second phase of trial would be for the purpose of having the jury recommend to the court which of the two possible penalties should be imposed upon the defendant.	1	1	1	1
25	1	At such a second phase, both parties may present additional evidence relative to the issue of what penalty should be recommended.	1	1	1	1
25	4	The jury would hear the attorneys' positions and the court would give instructions on legal standards to be considered in considering and recommending a penalty.	1	1	1	1
25	7	The court must place great weight on the jury's recommendation when deciding the penalty to impose upon the defendant.	1	1	1	1
135	18	We are going to be talking about your opinions and beliefs and whether under certain circumstances, you could vote to recommend the imposition of the death penalty.	1	1	1	1
150	20	It is incumbent upon you as a juror to weigh the aggravating circumstances and the mitigating circumstances, that evidence in favor of the death penalty and that evidence that weighs in favor of the death penalty and that evidence that weighs in favor of a life recommendation.	1	1	0	1
151	1	Before you vote recommending the imposition of the death penalty or vote to recommend life in prison, do you believe there are cases that you can vote for the imposition of the death penalty, or is your view such that you can never, under any circumstance, vote for the imposition of the death penalty.	1	1	0	1
152	23	Do you believe you would be able, as a juror, to weigh the aggravating circumstances, that evidence in support of the death penalty, and weigh that against the mitigating circumstances, evidence in favor of life under appropriate case, recommend the imposition of the death penalty.	1	1	1	1
154	1	Do you feel such, ma'am, under no circumstances could you vote to recommend the death penalty?	1	1	1	1
155	2	Is there anyone here in this panel that has any concern that if the trial was all said and done and that you had voted to recommend the imposition of the death penalty, that you would be subject to criticism, either family or home, or at work, or at church?	1	1	1	1
155	9	Does everyone here believe you can vote your individual conscience on the recommendation of the proper penalty after weighing the aggravating circumstances with the mitigating circumstances.	1	0	1	1
155	17	Is there anyone on this side who believes that if you, after the trial is said and done and that you have voted, if you have voted to recommend the imposition of the death penalty, is there anyone here who believes that you may be subject to criticism at home, at work, in church, at the golf course, anything like that?	1	1	1	1
155	24	And it's-you would think I would have your names down by now, wouldn't you?	1	0	1	0
156	3	And, Ms. Fuchs?	1	0	1	0
156	5	You have concerns you would be subject to criticism?	0	0	1	0

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
157	7	If you're selected to serve and go in that jury room and determine whether to vote for or against the imposition of the death penalty and if assuming for this question, you believe the aggravating circumstances do outweigh the mitigating circumstances and that the death penalty is called for by law in this case, and according to your view of the evidence, if you assume all of that, your view of the evidence and the law supports the death penalty in the weighing progress, could you vote for the recommendation of the imposition of the death penalty?	1	1	1	1
158	10	Could you vote under the appropriate circumstances to recommend the imposition of the death penalty?	0	1	1	1
222	3	Is there possibility of re-trial where he can come back and get a lesser sentence?	0	0	1	0
222	9	Even though this court here finds him guilty, isn't there another court he can go to and say, I want to go to a higher court and overrule what this judge says here, lessen the sentence to twenty-five of life and provide for parole and I can get out of here earlier.	0	0	1	0
225	24	Do you understand the law does not require a death recommendation in any case?	1	1	1	1
226	1	You understand that?	1	1	0	0
226	3	That in the first part of the trial, Her Honor is going to tell you that if you have no reasonable doubt, okay, that you should find him guilty, but she's not going to tell you, I don't believe, that there are any circumstances in which you should recommend the death penalty?	1	1	0	1
226	17	There is no case in which you're told you should recommend the death penalty; understand that?	1	1	1	1
226	21	Everybody understand that?	1	0	0	1
1406	6	It is the judge's job to determine a proper sentence if the defendant is guilty.	1	0	1	0
1468	18	The final decision as to what punishment shall be imposed rests solely with the judge of this court.	1	1	1	1
1468	20	However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.	1	1	1	1
1468	23	You advisory sentence must be given great weight by the Court in determining what sentence to impose upon the defendant, and it is only under rare circumstances that the Court could impose a different sentence.	1	1	1	1
1469	21	After the instructions are given, you will then retire to consider your advisory sentence.	1	1	1	1
1474	9	At the close of all evidence, both counsel and I will have an opportunity to suggest to you why the evidence presented on each party's behalf either merits a vote to recommend the imposition of the death penalty or to recommend a life sentence.	1	1	0	1
1806	7	Member of the jury, it is now your duty to advise the court as to what punishment should be imposed upon the defendant for his crime of Murder in the First Degree.	1	1	1	1
1806	11	As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge,	1	1	1	1

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
1806	13	However, it is your duty to follow the law that will now be given you by the court and render to the court an advisory sentence based upon your determination 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.	1	1	1	1
1806	23	Your advisory sentence is entitled by law and will be given great weight by this court in determining the sentence to impose in this case.	1	1	1	1
1807	1	It is only under rare circumstances that this court could impose a sentence other than what you recommend.	1	1	1	1
1807	4	Your advisory sentence should be based upon the evidence that you have heard while trying the guilt or innocence of the defendant and evidence that has been presented to you in these proceedings.	1	1	1	1
1809	5	If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without the possibility of parole.	1	1	1	1
1811	17	The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law	1	1	1	1
1811	19	You should weigh the aggravating circumstances against the mitigating circumstances and your advisory sentence must be based on these considerations.	1	1	0	1
1811	23	The fact that your recommendation is advisory does not relieve you or your solemn responsibility for the court is required to and will give great weight and serious consideration to your recommendation in imposing sentence.	1	1	1	1
1812	3	In these proceedings, it is not necessary that the advisory sentence of the jury be unanimous.	1	1	1	1
1812	14	Your recommendation to the court must be based only on the aggravating circumstances and the mitigating circumstances about which I have instructed you.	1	1	1	1
1812	17	The fact that that determination of whether you recommend a sentence of death or sentence to life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.	1	1	1	1
1812	23	Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence.	1	1	1	1
1813	3	If the majority of the jury determine that Ray Lamar Johnston should be sentenced to death, your advisory sentence will be a majority of the jury by a vote of blank to blank advise and recommend to the court that it impose the death penalty upon Ray Lamar Johnston.	1	1	1	1
1813	9	On the other hand, if by six or more votes the jury determines that Ray Lamar Johnston should not be sentenced to death, your advisory sentence will be the jury advises and recommends to the court that it impose a sentence of life imprisonment upon Ray Lamar Johnston without the possibility of parole.	1	1	1	1
1813	16	You will now retire to consider your recommendation.	1	1	1	1

Table I
Content Coding for Johnston Analysis cont.

Transcript			Coders			
Page	Line	Sentence	Moore	Deery	Brennan	Ali
1813	17	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.	1	1	1	1
1813	23	And you will have two advisory sentence forms, one of each as I have read to you.	1	1	1	1
1816	22	Has the jury reached an advisory sentence?	1	0	1	0
1817	3	The clerk will publish the advisory sentence.	1	1	0	0
1817	11	Advisory Sentence	1	1	1	1
1817	12	A majority of the jury by a vote of 12 to 0 advise and recommend to the Court that it impose the death penalty upon Ray Lamar Johnston.	1	1	1	1
1817	20	Members of the jury, we are going to ask each of you individually concerning the advisory sentence.	1	1	1	1
1817	22	It is not necessary that you state how you personally voted or how any other person voted, but only if the advisory sentence as read was correctly stated.	0	0	0	1
1818	1	Do you, Mr. Alicea, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	6	Do you, Mr. Jeffreys, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	11	Do you, Ms. Divincenzo, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	16	Do you, Mr. Macallister, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1818	21	Do you, Ms. Maciel, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	1	Do you, Mr. Ursetti, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	6	Do you, Mr. James, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	11	Do you, Ms. Puet, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	16	Do you, Mr. Terrero, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1819	21	Do you, Ms. Lewis, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1820	1	Do you, Mr. Rutherford, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
1820	6	Do you, Mr. Pateracki, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?	1	1	1	1
		Total	68	68	68	68
		Observed	63	58	59	59
		Miscodes	1	1	2	0
		Mistakes	4	9	7	9
		Implicit	4	4	4	4
		Direct	61	61	61	61

Tab B

RESUME

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Education: Ph.D., Case Western Reserve University, 1972.

M.S., Illinois State University, 1969.

B.A., Knox College, 1968.

EMPLOYMENT:

1988 - President, Trial Practices, Inc., a litigation consulting firm.

1974-1993 University of South Florida (USF), Department of Sociology, 4202 E. Fowler Avenue, Tampa, Florida 33620. Taught Sociology of Law, Deviant Behavior, Social Problems, Community Analysis, Criminology, Juvenile Delinquency. Tenured.

1984-1989 Director, MacDonald Center Project. University of South Florida/MacDonald Center for Developmental Disabilities.

1984-1986 Deputy Director for Research, Florida Mental Health Institute.

1982-1984 Publisher, Tampa Bay Monthly Magazine, Tampa, FL (G. Steinbrenner, owner)

1982-1985 Assistant to the President, USF.

1979-1983 Director, Human Resources Institute, College of Social and Behavioral Sciences, USF. Developed Institute consisting of five multi-disciplinary research centers which paralleled the structure of the College: Community Analysis and Development, Applied Anthropology, Community Psychology, Applied Gerontology, and the Center for Evaluation Research.

1971-1974 U.S. Army. Final assignment: HQ, Continental Army Command, Special Programs Division (DCSPER), Fort Monroe, Virginia. Responsible for system management of continental U.S. drug and alcohol rehabilitation/treatment programs; Organizational Development Pilot Test Program, and the Personnel Control Facilities for problems of indiscipline.

1969-1972 Research Associate and Project Director, Case Western Reserve University, Institute on the Family and the Bureaucratic Society; also taught courses on social problems, race relations, and social satisfaction.

1968-1969 Psychiatric Social Worker, Galesburg State Research Hospital, Galesburg, Illinois.

Honors: Outstanding Professor, University of South Florida Senior Class, 1990; NDEA Fellow, 1970-1971; Alpha Kappa Delta; Order of Omega; Student Government Professor of the Year, 1983.

Robert L. Hindman Award for Public Service, Pinellas County Criminal Defense Lawyer's Association, 1999

Florida Public Defenders Association, Inc. "Award for Public Service," 2001

U.S. Attorneys Office Recognition in Prosecution of U.S. v. Ahmed Mohamed and U.S. v. Yousseff Megahed. 2009

Dissertation: *Client Interests and Organizational Goals.* Case Western Reserve University, Normal, Illinois, 1972.

Thesis: *The Significant Others of a College Population.* Illinois State University, Normal, Illinois, 1969.

Books, Monographs and Reports: *Television Advertising by Attorneys: An Evaluation of Its Impact on the Public,* Tallahassee: The Florida Bar, September 12, 1989.

Treatment Programs for Sex Offenders: Report of the Governor's Task Force on Mentally Disordered Sex Offenders and their Victims, (with J. Zusman). Tampa, April, 1984.

Employment Training Needs in Pinellas County, (with D. Stenmark, A. Wolf, T. Northcutt, R. Wheeler). Private Industry Council, Clearwater, Florida, 1981.

CETA and the Private Sector: On-the-Job Training in Manatee County, (with A. Wolf, R. Hansen, T. Northcutt). Private Industry Council, Bradenton, Florida, 1981.

The Chiropractic Component in Health Planning: A Twelve State Survey of Practice Characteristics and Utilization Patterns. Congress of Chiropractic State Associations, Sarasota, Florida 1981 (with R. Francis and M. Kleiman).

Landsat and Crop/Labor Demand Estimation: A Preliminary Study, (with E. Nesman and T. Northcutt). Florida Department of Labor and Employment Security, Tallahassee, Florida, 1981.

Drug Use and Emergent Organizational Responses. Gainesville: The University of Florida Press, 1977. Reviewed in *Social Work*, January 1979, and Contemporary Sociology, Vol. 5, No. 2, March 1979.

Organizing State and Local Health Services: A Comparative Study, (with T. Northcutt, L. Bowman and V. Getting). Department of Health and Rehabilitative Services, Tallahassee, Florida, 1978.

Community Approaches to Drug Abuse (with Marie Haug). Administration of Justice Committee, Greater Cleveland, Ohio, 1972.

Selected References: Studies on Drug Abuse. Administration of Justice Committee, Cleveland, Ohio, 1972.

Papers and Articles:

"Developing Effective Graphic Communications", presented at the Defense Research Institute Seminar on Products Liability, San Diego, California, January 22-24, 1997.

"The Trial is 30 Days Away: Surrogate Jurors and Witness Preparation", presented at the American Bar Association 1997 Annual Meeting, Section of Litigation, Washington, DC, April 17, 1997.

"Qualitative Research, Thematic Development & Jury Selection in Mass Tort Litigation," presented at the Defense Research Institute Seminar, Tampa, Florida, April 1996.

"Multidisciplinary Development of Trial Strategy in Complex White Collar Criminal Defense: A Review and Case Study," *in White Collar Crime 1995.* American Bar Association: Chicago, 1995. Pp. G12 to G22 (with Bennie Lazzara, Jr., Esquire).

"Courtroom Observation and Applied Litigation Research: A Case History of Jury Decision Making," *The Clinical Sociology Review* (with J. Friedman), pp. 123-141, September, 1993.
"Television Advertising by Attorneys: An Evaluation of Its Impact on the Public." Paper presented at the American Board of Trial Advocates, November 5, 1992, Mauna Kea, Hawaii.

"Applied Sociology and Corporate Legal Practice," *The Florida Bar Journal*, Volume LXIII, No. 6, pp. 81-83, June, 1989.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," *Youth in the Contemporary World*, edited by Yedla Simhadri, Delhi: Mittal Publications, pp. 35-55, 1989.

Harvey A. Moore and Jennifer Friedman. "Applied Sociology and Courtroom Intervention: Participant Observation and Jury Decision-Making." Presented at the National Social Science Association Meeting, New Orleans, LA November 2, 1989.

D. Paul Johnson and Harvey A. Moore. "Focus Groups, Mock Trials and Jury Technique. Presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

I. Jeff Litvak, Erik Skramsted and Harvey A. Moore. "Computing and Communicating Economic Damages," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

Roy Hansen and Harvey A. Moore. "Survey Research and Litigation Consulting," presented at the National Social Science Association Meetings, New Orleans, LA, November 2, 1989.

"Social Science Consultation in the Courtroom" and "Tactical Use of Parallel Juries" presented at the Florida/Georgia Academy of Trial Lawyers Annual Meeting, Snowmass, Colorado, December 10, 1988.

"The Concept of Youth and Applied Sociology," Special Inaugural Address, International Seminar on Youth (UNESCO), February 17, 1986, Visakhapatnam, Andhra Pradesh, India.

"Youth and Deviance: Punishment, Treatment and the Sexual Offender," paper presented at the International Seminar on Youth (UNESCO), February 21, 1986, Visakhapatnam, Andhra Pradesh, India.

"Private Sector Mass Transit Option For Hillsborough County: A Concept Paper," presented to the Florida High Speed Rail Commission and the Hillsborough County High Speed Rail Task Force, Tampa, Florida, 1986.

"Noninstitutional Treatment for Sex Offenders in Florida, *American Journal of Psychiatry,* 142: 964-970 1985. (with J. Zusman).

"Athletes and Academics: The Integration of Leisure and Occupation," presented at the Annual Conference of Transitions to Leisure, St. Petersburg, Florida, February 1985.

"The Decision to Treat Sex Offenders: Policy Implications for Florida." Presented at the Annual Conference of the Florida Council for Community Mental Health, 1983.

"Nobody's Clients: Females, Alcohol, and Skid Row," (with B. Yegidis). *Journal of Drug Issues,* 12:2 (Spring, 1982).

"Chiropractic Utilization in the United States" (with R. G. Francis and M. Kleiman). *The New Zealand Medical Journal,* Vol. 93, Winter, 1981, pp. 43-46.

"Rehabilitation and Protection: The Goals of Probation and Parole Workers" (with M. Donnelan). *Journal of Offender Rehabilitation,* Vol. 3, No. 3, Spring 1979, pp. 207-218.

"Reference Others and Family Influence: A Re-Examination," *Sociological Symposium,* No. 20, Fall 1979, pp. 45-60, (with R. Schmitt and S. Grupp).

"Youth, Leisure and Post-Industrial Society: Implications for the Family," *The Family Coordinator,* (with B. G. Gunter), 24 (2) April 1975, pp. 199-207. Reprinted in D. Rogers (ed.), *Issues in Adolescent Psychology,* Englewood Cliffs, NJ: Prentice-Hall Inc., 1977.

"Examining the Flat Ego: The Problem of Self Concept, Race and Social Myth," paper presented at a conference entitled *Demythologizing the Inner-City Child,* sponsored by the Urban Life Foundation and Georgia State University, Atlanta, Georgia, March 26, 1976. Reprinted in Granger and Young (eds.) Demythologizing the Inner-City Child. Washington, D.C.: National Association for Education of Young Children, 1976.

"Observations on the Role-Specific and Orientational Others" (with R. Schmitt and S. Grupp). *Pacific Sociological Review,* Vol. 16 (3) October, 1973, pp. 509-517.

"Grappling with Deviance: Informal Treatment Modalities for Drug Abuse" (with M. Haug), paper presented at the annual meeting, Midwest Sociological Society, Chicago, Illinois, April 11, 1975.

"Reference Relationships and the Family," (with R. Schmitt and S. Grupp), paper presented at the annual meeting, Southern Sociological Society, Washington, D.C., April 9-12, 1975.

"Developing Professional Roles in Drug Abuse," presented at the Second Army Conference on Alcoholism and Drug Abuse Treatment and Rehabilitation, Atlanta, Georgia, June 1973.

"Doctor, Lawyer, and Indian Chief: The Public and the Professions" (with G. Kitson). Presented at the annual meeting, OVSS, Cleveland, Ohio, April 1971.

"Role Specific and Orientational Others," presented at the annual meeting, Ohio Valley Sociological (OVSS), Akron, Ohio, April 1970.

Research and Training: Grants/Contracts:

Co-Principal Investigator and Project Director, Swine Influenza Immunization Program Evaluation, (with T. J. Northcutt) Center for Disease Control, DHEW, Atlanta, Georgia, $54,157 (1978).

Co-Principal Investigator and Project Director, "Comparative Analysis of Public Health Organization and Structure," (with T. J. Northcutt, Jr. and R.L. Bowman), Florida Department of Rehabilitation Services, $67,500 (1977).

Co-Principal Investigator (with Marie Haug), "Drug Treatment Evaluation Program,: The Associated Cleveland Foundations, $63,400 (1972).

Principal Investigator, Staff Development and Technical Assistance Project, Big Brothers of Tampa, Inc., $7,500 (1975).

Principal Investigator, Evaluation Training Program, Tampa Area Mental Health Board, $15,400 (1974)

Co-Principal Investigator and Project Director, (with T. J. Northcutt), Florida Public Health Immunization Project, State of Florida, Department of Health and Rehabilitative Services, $24,900 (1976).

Co-Principal Investigator (with D. Stenmark), City of Tampa, CETA Training Project, $5,307 (1979).

Co-Principal Investigator (with R. Francis and M. Kleiman), National Survey of Chiropractors, Congress of Chiropractic State Associations, $14,797 (1979).

Principal Investigator, "A Planning and Program Base for Employment Generating Services in Manatee County," U.S. Department of Labor, $33,420 (1980).

Principal Investigator, "Private Industry Council Labor Market Analysis: Pinellas County, "U.S. Department of Labor, $52,320 (1980).

Co-Principal Investigator (with E. Nesman and T. Northcutt) "Periodic Estimates of Florida's Seasonal Migrant Farm Workers," Florida Department of Labor and Employment Security, $40,440 (1980).

Principal Investigator, "In Service Training Audio-Visual Slide/Tape Instructional program Development, Florida Department of Health and Rehabilitative Services, $140,318 (1980).

Principal Investigator, "Management of Hostility and Violence," Florida Department of Health and Rehabilitative Services (District IX, West Palm Beach), $9,680 (1980).

Principal Investigator, "Training Project for Children and Youth Workers," Florida Department of Health and Rehabilitative Services (District XIII, Fort Myers) $22,094 (1981).

Principal Investigator, "Individual and Group Counseling Training Project," Florida Department of Health and Rehabilitative Services (District III, Gainesville) $8,900 (1981).

Principal Investigator, "Medicaid Program Pre-Service Training Module Development," Florida Department of Health and Rehabilitative Services, $85,210 (1981).

Co-Principal Investigator (with J. P. Doyle), "Training Primary Care Health Providers," National Institute of Mental Health, $10,000 (1982).

Project Director, "The Retired Retarded: Evaluating Day Care for the Elderly Developmentally Disabled." Hillsborough County Government funded at J. Clifford MacDonald Center, Tampa, FL $10,000 (1987).

Project Director/ Principal Investigator, Supported Employment Conversion Project. Florida Department of Health and Rehabilitative Services, funded at the J. Clifford MacDonald Center, Tampa, FL $51,200 (1988).

Project Director/Principal Investigator: Retired Retarded: Evaluating Adult Day Care. Hillsborough County, $42,499 (1988-89), funded at JCMC.

Recent Seminars and Presentations:

"Once Upon a Time: The Development of Successful Trial Stories," The Southern Trial Lawyers Association Conference, (New Orleans) 2005

"Use of Experts and The Development of Successful Trial Stories," The Academy of Florida Trial Lawyers Workhorse Seminar, (Orlando, FL) 2005

"Tassel Top Loafer Lawyers and the Damages Crisis," American Association for Justice, (Columbus, OH) 2006

"The Business Model of Voir Dire and Trial," Indiana Trial Lawyers Association Seminar, (Indianapolis, IN) 2006

"Using the Social Sciences to Prepare Killer Questioning," PESI Seminars, Depositions Fantasy Camp, (Taos, NM) 2007

"Managing The Art of Video Depositions and Audience Responses," The Academy of Florida Trial Lawyers (Orlando, FL) 2007

"Multi-Camera Video Depositions," The Ohio Academy of Trial Lawyers (Columbus, OH) 2007

"Understanding the Psychology and Sociology of Persuasion in Jury Trials: What All Jurors Need to Hear in the Courtroom," The Absolute Litigators Conference (Las Vegas, NV) 2007

"Focus Groups and Other Preliminary Work to Get Ready for the Deposition," PESI Deposition Fantasy Camp (Taos, NM) 2007

"Modulating Persuasion in Jury Trials: Communicating with Conservative Jurors," International Society of Primerus Law Firms (Charleston, SC) 2007

"Understanding the Psychology and Sociology of Conservative Jurors," Idaho Trial Lawyers Association (Sun Valley, ID) 2007

"Accelerating Risk: Developing and Telling the Trial Story," The Florida Bar CLE Special Topics and Eminent Domain Seminar, (Tampa, FL) 2007

"Voir Dire: Using a Jury Consultant in the Cyber-Age," National Association of Criminal Defense Lawyers, (Key West, FL) 2007

St. Petersburg Bar Association Seminar on Jury Selection, (Clearwater, FL) 2008

"Jury Psychology: Developing and Telling the Defense Story Before Trial Instructor," Current Topics in Liability and Insurance Defense, (Orlando, FL) 2009

"Tassel Top Loafer Lawyers and the Real Problem with Juries Today," National CLE Conference – Litigation, (Vail, CO) 2009

"Jury Consultant Negotiation," Negotiation & Settlement Planning Seminar, Champions Gate, FL (2009)

"The Focus Group Speaks," 360 Seminar, Teton Village, WY (2011)

"Voir Dire, Vorpal Swords and the Cheap Whore: Pre-trial Research and the Trucking Voir Dire," Association of Plaintiff Interstate Trucking Lawyers of America, (St. Louis, MO) 2011

"There is No Such Thing as a Bad Jury: The 5 Must Do's to Effectively Communicate with Conservative Jurors," Trial Lawyers Summit, (South Beach, FL) 2012

"How to Theme Your Case, Then Use the Theming to Develop Damages," Attorneys Information Exchange Group, (Charleston, S.C.) 2012

"Effectively Communicating with Conservative Jurors - Lessons in Psychology and Sociology," Nevada Justice Association, (Las Vegas, NV) 2012

"Jury Selection: Overview," University of Miami Criminal Law Symposium, (Miami, FL) 2012

Private Brain Injury Seminar, (Melbourne, FL) 2013

"Witness Preparation," American Inns of Court, (Tampa, FL) 2013

"Jury Appeal: How to Obtain a Not Guilty Verdict During Voir Dire," Trial Lawyers Association, (Miami, FL) 2014

"Gravitational Pull in Advocacy, What to Do, What to Say, and How to Say It from the Start," Connectionology Seminars, Columbus, OH 2014

"How to Make a Jury Listen: Pearls of Wisdom on use of Focus Groups, Visual Aids, and Technology in Malpractice Cases," Florida Justice Association Medical Malpractice Seminar, Orlando, FL 2014

"Essential Components of Jury Persuasion and Voir Dire Steps in Traumatic Brain Injury Cases," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015

The Consumer Product Safety Commission Regulatory Panel, Perrin Conferences-The Product Liability Conference, (Miami, FL) 2015

"Job Interviews with the Willfully Unemployed," Florida Justice Association Workhorse Seminar, (Orlando, FL) 2015

"Trying to Determine or Measure the Impact of testing the Results on Jurors in Brain Injury and Spinal Injury Cases," Traumatic Brain and Spinal Injury Medical/Legal Symposium, (Las Vegas, NV) 2015
"The Crazy Things Jurors Think About and How to Deal With It," South Carolina Association for Justice Auto Torts Seminar, (Atlanta, GA) 2015
"Using Data to Prepare Arguments for Jury Selection and Trial," Manasota Trial Lawyers Board, (Lakewood Ranch, FL) 2016
The Duodenal Theory of Damages at Trial: Jury Persuasion on Damages Issues," Barney Masterson Inn of Court, (Clearwater, FL) 2016
"Maximize Your Client's Recovery Without Litigation," Central Florida Trial Lawyers Association, (Orlando, FL) 2016
"From Jury Selection to Robot Lawyers: Big Data Changes are Coming," Invited Lecture, Stetson College of Law, (Gulfport, FL) 2017
"Data Applications and Communication in the Courtroom," Florida Bar, Annual Intellectual Property Law Symposium. (Fort Lauderdale, FL) 2017

Other Service:

Reporter, Florida Bar Special Committee to Study the Integration of Law Graduates into Practice of Law (Germany Committee), 1979-81.
Florida Bar Standing Committee on the Unauthorized Practice of Law, 1982-1994.
Founding Chairman and Member, Museum of Science and Industry Foundation, Board of Directors, 1985-; also Advisory Board, Hillsborough County Department of Museums, 1979-1984, President, 1983.
J. Clifford MacDonald Center, Tampa, Florida, Board Committees on Planning, Programs and Training, 1981-89.
President, Board of Trustees, The Downtown Retirement Center, 1987-2002.
Chair, Vice-Chairman and Member, Board of Directors, National Conference of Christians and Jews (Tampa Bay Region) 1987-91.
2012 Pilot of the Year, Central Florida West, Angel Flight Southeast, Inc.
2013 Transplant Pilot of the Year, Angel Flight Southeast, Inc.
2013 Above & Beyond Award, Angel Flight Southeast, Inc.
2014 Pilot of the Year Award, Angel Flight Southeast, Inc.
2015 Pilot of the Year Honoree, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.
2016 Pilot of the Year Honoree, Above & Beyond, Central Florida West, The Dr. Franklin G. Norris Pilot Awards Gala, Angel Flight Southeast, Inc.

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Professional Experience

Harvey Moore & Associates, Tampa, FL (2011 to present):
Senior Trial Consultant for a litigation consulting firm

The Tampa Tribune, Tampa, FL (1987 to 2011):
Senior Staff Writer. Researched and conducted interviews, condensing and compiling the information into accessible and engaging stories. Collaborated across news platforms using print, online and television. Interacted with the public and officials in person, by phone and electronically. Recently have covered the state court system but have also been responsible for the federal court system, transportation, planning, code enforcement, zoning and consumer issues. I have spent more than a decade in community journalism, covered northeastern and eastern Hillsborough County through the Northeast and Brandon bureaus. I filled in for the editors in both bureaus as needed and ran the Brandon bureau for months while the paper searched for a bureau chief. I have dealt with issues affecting the residents the residents and explored ones that they have raised. I have mentored younger reporters and edited less-experienced writers.

The Clarion-Ledger, Jackson, MS (1983-1987):
Staff Writer: Responsible for covering the state legal system including the Mississippi Supreme Court and its trial courts. Covered the legal profession and issues confronting it. Filled in as Assistant Metro Editor as needed.

The Meridian Star, Meridian MS (1979-1983):
Assistant Managing Editor, Metro Editor, State Editor and reporter. Responsible for the content of a 24,000-circulation daily covering eastern Mississippi and western Alabama. As a report covered courts and legal affairs.

Contract Legal Research, Meridian MS (1978-1979):
Performed legal research for attorneys and law firms.

Miscellaneous:
Have written for The National Law Journal, The New York Times, The Wall Street Journal, and Financial Times of London. Was State Correspondent for the Wall Street Journal while in Mississippi. Have been interviewed as an expert by the CBC, BBC and RTE Radio. Have been asked to server as an expert commentator by CNN and MS-NBC. Have appeared on public affairs programs on public television in Mississippi and Florida.
Awards:

Have received national awards in writing on race relation and business writing. Regional and state awards for news, news feature and investigative writing.

Education

Bachelors of Arts (BA) from the University of Mississippi, Oxford, MS, 1974 with majors in Political Science and History.

Course work towards a Juris Doctor (JD) from University of Mississippi School of Law, and a M.A. in American Constitutional from University of Mississippi, Oxford, MS.

Jenna Deery

50 Pelican Place ◦ Palm Harbor, FL 34683
Phone: 727-470-1454 • E-Mail: jennadeery@mail.usf.edu

JD

Objective

Highly motivated psychology student seeking internship opportunities dealing with forensic psychology, as I have prior volunteer experience in the criminal justice system. I also have an interest in counseling, specifically abuse counseling. Intermediate in Spanish, studied for 5 years, including 2 summers abroad in Spain.

Experience

Pinellas County Sheriff's Office **2009-2013**

Participated in the Explorer Program throughout high school and into college with the Sheriff's Office. Studied law, leadership, integrity, and devotion. Completed over 400 community service hours while in the program.

Education

St. Petersburg College **2011-2013**

Accepted into Early College Program at SPC and graduated high school with AA degree.

University of South Florida **2014-present**

Transferred into USF in 2014, will graduate in the fall of 2016 with a Bachelor's in Psychology.

Skills

Excellent interpersonal skills, fairly conversational in Spanish (reading and writing), willingness to learn, competent computer literacy, great time management and multi-tasking skills, open and flexible attitude, and also attended leadership trainings with Sheriff's Office.

AMYN ALI

407-259-1027
amynali@mail.usf.edu

6604 Duncaster St.
Windermere, FL 34786

Profile

An accomplished, dedicated, and well-rounded individual with a variety of leadership, computer, and interpersonal skills, along with extensive volunteer experience with a wish to expand his talents, broaden his education in forensic psychology, and improve his skills as well as make new connections.

Education

University of South Florida, Honors Student — 2015-Present
Major: Psychology and Criminology GPA: 3.94

Cypress Creek High School, IB Diploma Recipient — 2011-2015
GPA: 4.5510, Top 10% SAT/ACT: 2210/33

Work and Volunteer Experience

Tutor, The Tutoring Center; Orlando, FL — 2015
Tutored children one-on-one from ages five to seventeen in different skill areas involved with reading, writing, and math. Is experienced with individuals with attention and learning disabilities.

Volunteer, Give Kids The World; Orlando, FL — 2012-2014
Was involved with greeting guests, food delivery to various locations, serving meals to children from all over the world, along with cleanup afterwards in order to help children with compromised living conditions and/or fatal diseases.

Volunteer, Cypress Creek Peer Tutoring; Orlando, FL — 2013-2015
Tutored high school students at Cypress Creek High School since junior year. In senior year, partnered with two other peers and ran the peer tutoring for the school.

Volunteer, Partnership Walk; Orlando, FL — 2011-2015
Worked annually to prepare for the Aga Khan Foundation's Partnership Walk, a non-profit walk that working to alleviate global poverty. Worked mainly with the set up, registration, and management teams.

Teacher, EXCITE! Program; Orlando, FL — 2014
Volunteered as an EXCITE! Teacher, teaching middle-schoolers biweekly over the summer, in reading, mathematics, and critical thinking for six weeks.

Leadership Experience

Pre-Student Osteopathic Medical Association (Pre-SOMA) Fall 2016-Spring 2017
Public relations officer for Pre-SOMA at USF. In charge of social media outlets as well as recruiting members and informing others about the organization

USF Quidditch Team Fall 2016-Spring 2017
Historian and International Relations officer for the USF Quidditch team, as well as a player. In charge of taking meeting notes, keeping record of practices and competitions, and getting involved with international tournaments

Honors and Awards

National Forensic League Member
Placed second in a Florida Debate competition for Varsity level Lincoln Douglas

Business Professionals of America Member
Placed first in regional competition for Entrepreneurship and Financial Math & Analysis Concepts

Received President's Volunteer Service Award Gold Level
Received award twice for continuous dedication to service to the community

National Society of High School Scholars Member

Microsoft Office Specialist in Word, Powerpoint, and Excel

Adobe Certified Associate in Visual Communication using Adobe Photoshop CS3

Skills

Microsoft Office and iWorks

Problem Solving

Work with Mac and PC platforms

Adroit and Motivated

Great Time Management

Quick to Adapt to New Environments and Situations

Out-Going and Sociable

References Available Upon Request

APPENDIX H

Florida Senate - 2018 **SB 870** By Senator Bracy

Voted in the Florida Senate March 9, 2018 (**YEAS 33 NAYS 3**)

A bill to be entitled an act relating to capital felonies; amending ss. 921.141 and 921.142, F.S.; providing legislative findings and intent regarding the retroactive application of *Hurst v. State*, No. SC12-1947 (Fla., October 14, 2016); providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

[] Section 1. Present subsection (9) of section 921.141, Florida Statutes, is redesignated as subsection (10), and a new subsection (9) is added to that section, to read:

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(9) LEGISLATIVE FINDINGS AND INTENT.— The Legislature finds that the Florida Supreme Court decided in *Asay v. State*, No. SC16-223, SC16-102, and SC16-628 (Fla. December 2016) that Hurst v. State, No. SC12-1947 (Fla., October 14, 2016), will not apply in cases in which the death sentence became final prior to June 24, 2002, the day that the United States Supreme Court issued its opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). The Legislature find's that the Court's decision not to apply Hurst v. State in the cases of inmates whose death sentences became final before June 24, 2002, will result in a miscarriage of justice for those inmates. The Legislature further finds that the retroactive application of *Hurst v. State* to death row cases in which the death sentences became final before June 24, 2002, will provide a more just and final resolution in those cases. Therefore it is the intent of the Legislature that *Hurst v. State*, No. SC12-1947 (Fla. October 14, 2016), apply in cases in which the death sentence became final before June 24, 2002.

APPENDIX I

Filing # 55074403 E-Filed 04/14/2017 07:44:14 AM

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 97-CF-013379
Death Penalty Case

RAY LAMAR JOHNSTON,

Defendant.
_____/

STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS

The State of Florida, through the undersigned co-counsel, moves to strike the Defendant's Witness/Exhibit List and attachments and as grounds therefore, states the following:

On April 13, 2017, Johnston filed a Witness/Exhibit List attaching a report from Trial Practices, Inc. dated April 13, 2017 and authored by Harvey A. Moore, Ph.D.. This document was filed for consideration prior to a case management conference to be held by this court on Johnston's successive postconviction motion pursuant to Hurst v. State of Florida, 202 So. 3d 40 (Fla. 2016). *See* Fla. R. Crim. R. 3.851 (f)(5) (where the purpose of a case management conference is to hear argument based on "purely legal claims not based on disputed fact").

Johnston has now filed the report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript of Johnston's sentencing phase "from

a social science perspective" by conducting a "content analysis...of two principles" in Caldwell v. Mississippi, 472 U.S. 320 (1985). It would be inappropriate for this court to consider the contents of the report in determining the outcome of this purely legal claim. The report is based entirely on speculation, and it includes the wrong standard for reviewing Johnston's claim. Johnston urges entitlement to relief because his jury was not instructed according to the current state of the law which, in his view, amounts to a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, ___ So. 3d ___ 2017 WL 526509 at *25 (Fla. Feb. 9, 2017).

In sum, regardless of Johnston's protestations, the Florida Supreme Court has consistently found harmless those post-Ring[1] cases where the jury's sentencing recommendation was unanimous, as is the case here. This Court must follow that precedent, and strike Johnston's witness and report.

Johnston is not entitled to Hurst relief because his jury unanimously recommended death as the appropriate sentence in this case. The correct harmless error analysis would be based on whether the record demonstrates beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

[1]Ring v. Arizona, 536 U.S. 584 (2002).

Mosely v. State, 209 So. 3d 1248 at 1284 (Fla. Dec. 22, 2016). Because his jury's sentencing recommendation was unanimous, any Hurst error was clearly harmless. See, e.g., Davis v. State, 207 So. 3d 142 (Fla. 2016); Hall v. State, ___ So. 3d ____, 2017 WL 526509 (Fla. Feb. 9, 2017); Kaczmar v. State, ___ So. 3d ____, 2017 WL 410214, at *4 (Fla. Jan. 31, 2017); Knight v. State, ___ So. 3d ____, 2017 WL 411329 at *15 (Fla. Jan. 31, 2017), and King v. State, ___ So. 3d ____, 2017 WL 372081 at *19 (Fla. Jan. 26, 2017).

It would be improper to elicit the speculative testimony of Johnston's expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found in his expert's report when deciding whether an evidentiary hearing is warranted.

Given the inappropriate and irrelevant speculation as well as the incorrect legal theories included in the report, this court should strike the witness and exhibit. Moreover, since this is a purely legal Hurst claim which does not warrant an evidentiary hearing, or any relief for that matter, this Court should reject Johnston's arguments and motions and enter an order summarily denying review. Even if this court should desire to include the contents of the report within its consideration of Johnston's Hurst claim, the motions, files, and records in this case would still conclusively show that Johnston is

entitled to no relief, and his motion should be denied without an evidentiary hearing.

CONCLUSION

In sum, the Florida Supreme Court has consistently held that no Hurst relief is warranted in cases, like Johnston's, where the jury's sentencing recommendation was unanimous. Johnston is therefore not entitled to relief as a matter of law. Accordingly, Johnston's Witness/Exhibit list and attachments should be stricken and Johnston's motion summarily denied.

Respectfully submitted,

PAMELA JO BONDI

ATTORNEY GENERAL
STATE OF FLORIDA

s/ Timothy A. Freeland
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CO-COUNSEL, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal filing system which will

send a notice of electronic filing to the following: Honorable Michelle D. Sisco, Circuit Judge, 401 No. Jefferson Street, Tampa, Florida 33602, **heckshsl@fljud13.org;** James Driscoll, Jr., David Dixon Hendry and Gregory W. Brown, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel, 12973 No. Telecom Parkway, Temple Terrace, Florida 33637, **driscoll@ccmr.state.fl.us, hendry@ccmr.state.fl.us, brown@ccmr.state.fl.us** [and] **support@ccmr.state.fl.us;** and Jay Pruner, Assistant State Attorney, Office of the State Attorney, 419 No. Pierce Street, Tampa, Florida 33602, **pruner_j@sao13th.com, stapleton_a@sao13th.com** [and] **mailprocessingstaff@sao13th.com.**

s/ Timothy A. Freeland
CO-COUNSEL, STATE OF FLORIDA

Filing # 55925079 E-Filed 05/03/2017 02:24:30 PM

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

RAY LAMAR JOHNSTON,

Defendant.

_____/

CASE NO. 97-CF-013379

DIVISION J

RESPONSE TO THE STATE'S MOTION TO STRIKE

COMES NOW, Defendant, Ray Lamar Johnston, by and through the undersigned counsel, and responds to the State's Motion to Strike Defendant's Witness / Exhibit List and Attachments filed April 14, 2017. Defendant responds to the State's Motion as follows:

At page 1 of the motion the State claims that "Johnston has now filed the [Harvey Moore] report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript."

This claim is not purely legal in nature. It is a mixed question of fact and law. Death is different. This Court should not simply accept the advisory panel's mere recommendation in this case and ignore the United States Constitution. Death sentences cannot be carried out in an arbitrary and capricious manner. Such death sentences violate the Eighth Amendment prohibition against cruel and unusual punishment. To deny Mr. Johnston relief simply because of a mere advisory panel recommendation is the very definition of an arbitrary and capricious death sentence.

As the United States Supreme Court recognized in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the "advisory recommendation" at a Florida sentencing phase cannot be substituted for an actual

jury verdict. The United States Supreme Court has already held in *Hurst* that "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622. Therefore, this Court should not treat Mr. Johnston's advisory recommendation as such, even when the recommendation was unanimous. This is especially true in a case that has so severely violated the dictates of *Caldwell v. Mississippi*, 472 U.S. at 328 (1985).

Dr. Harvey Moore will assist the trier of fact in this case, the Court, to understand that the analysis of Mr. Johnston's Eighth Amendment claims in this case requires much more than a quick check of the advisory recommendation at the penalty phase. Any current adverse case law that suggests that a quick advisory recommendation check can swiftly dispose of Mr. Johnston's claims is ill-advised, ill-reasoned, and unconstitutional.

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. Dr. Moore did not perform "a speculative analysis of the transcript." Rather, he performed a scientific analysis of the transcript. This Court is free to judge the weight to be afforded Dr. Moore's analysis and testimony once it hears the scientific methods employed. The question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing. Mr. Johnston's claims should not be summarily denied.

At page 2 of its Motion to Strike the State claims that "the report is based entirely on speculation." This is not the case at all. Dr. Moore's report is based on record transcript that is part of the record on appeal in this case. It is also based on an analysis of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) as it relates to the transcript in the case at bar. In his report, Dr. Moore identifies

some 65 instances from actual trial transcript in this case wherein the jury was "led to believe that responsibility for determining the appropriateness of defendant's death sentence rests elsewhere." *See Caldwell v. Mississippi*, 472 U.S. at 328 (1985). The report and the conclusions therein is not based entirely on speculation. It is based on decades of established social science research. Based on a review of the Johnston trial transcripts and the United States Supreme Court case of *Caldwell v. Mississippi*, Dr. Moore ultimately concluded:

> 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 the 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 certainly 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 the prosecutor.

Report from Dr. Harvey Moore, page 4.

The State also claims that the report "includes the wrong standard for reviewing Mr. Taylor's claim." The United States Constitution is not the wrong standard for reviewing Mr. Taylor's claim. *Caldwell* is still good law. Mr. Taylor's death sentence must comport with the dictates of *Caldwell* and the Eighth Amendment. The State's suggestion at page 2 that "The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, __ So. 3d __ 2017 WL 526509 at *25 (Fla, Feb. 9, 2017)" is wrongly cited and misplaced by the State. The Florida Supreme Court never expressly rejected Mr. Johnston's current claim in *Hall*. *Hall* merely addressed an ineffective assistance of appellate counsel claim involving *Caldwell*, but analyzed the claim only in a pre-*Hurst* procedural posture. *Hurst* has now changed everything.

Death sentences must also comport with the Sixth Amendment. In *Hurst v. Florida*, 136 S.

Ct. 616, 619 (2016), the United States Supreme Court held that "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." Mr. Johnston's advisory panel did not engage in any required fact finding at the penalty phase. Dr. Moore's report identifies numerous instances where the jury was informed at the penalty phase that they were simply making a mere "recommendation" to the trial judge in Mr. Johnston's case. As a matter of standard Florida capital sentencing law at the time, there were numerous "suggestions that the sentencing jury [] shift its sense of responsibility to [the] court." *Caldwell v. Mississippi*, 472 U.S. at 330 (1985). Mr. Johnston's death sentence is a result of a death penalty system that violated both *Caldwell* and *Hurst*.

Contrary to the State's arguments in this case, the errors are harmful, not harmless. Regardless of the advisory recommendation in this case, this case clearly does not meet Eighth Amendment scrutiny. *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), courts will leave clearly established Eight Amendment violations unrectified.

Any close question of whether this Court should grant an evidentiary hearing should be resolved in Mr. Johnston's favor, in favor of an evidentiary hearing. An evidentiary hearing was denied in the case of *Cook v. State*, 792 So. 2d 1197 (Fla. 2001). The Florida Supreme Court remanded the case back to the trial court to hold an evidentiary hearing. *Id.* at 1205. In a special

concurrence in *Cook*, Justice Pariente joined by Justice Anstead, stated the following:

> I write separately for two reasons. First, I write to express my continued belief in the importance of trial judges erring on the side of granting an evidentiary hearing on an initial postconviction motion. Second, I write in response to Chief Justice Wells' concerns about the length of time this case has been in postconviction proceedings.
>
> As to the fact that no evidentiary hearing has yet been held, the failure to conduct an evidentiary hearing unless the record conclusively shows that the defendant is not entitled to relief is not only contrary to the law, but also is in itself a cause of delay in the postconviction process. *See Gaskin v. State,* 737 So. 2d 509, 519 (Fla. 1999) (Pariente, J., specially concurring) (explaining that failure to conduct an evidentiary hearing "causes delay and undermines our goal of providing a simplified, complete and efficacious remedy for postconviction claims"); *Mordenti v. State,* 711 So. 2d 30, 33 (Fla. 1998)(Wells, J., concurring) (noting that "[t]oo much judicial and counsel time and resources have been wasted in determining whether to hold an evidentiary hearing. This has added to the inordinate amount of time prisoners remain on death row"). We have urged trial judges to err on the side of granting an evidentiary hearing on the first postconviction motion on all factually-based claims such as ineffective assistance of counsel, *Brady* [footnote omitted] and newly discovered evidence. *See Gaskin,* 737 So. 2d at 516; *Ragsdale v. State,* 720 So. 2d 203, 206 (Fla. 1998). If the trial court in this case had granted an evidentiary hearing in 1996, the initial postconviction process would now likely be at an end. Instead, we face the specter of yet another delay as we return this case to the trial court.

Cook, Id. at 1205.

Contrary to the State's arguments, this Court should consider the contents of the report and permit Dr. Harvey Moore to testify on June 15, 2017.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 3, 2017, we electronically filed the forgoing Response with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to all parties and to Circuit Court Judge Michelle Sisco.

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IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA

v.

RAY LAMAR JOHNSTON,
Defendant.
_____/

CASE NO.: 99-CF-011338
97-CF-013379

DIVISION: J

ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS
and
ORDER STRIKING JUNE 15, 2017 EVIDENTIARY HEARING

THIS MATTER is before the Court on the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," filed on April 14, 2017. On May 3, 2017, Defendant filed his "Response to the State's Motion to Strike." On May 18, 2017, the Court held a hearing on the State's motion.

State's Motion to Strike Defendant's Witness/Exhibit List and Attachments

In the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," it raises concerns about Dr. Harvey Allen Moore's ability to testify at an evidentiary hearing. (*See* State's Motion to Strike Defendant's Witness/Exhibit List and Attachments, attached.) Specifically, the State argues that "[i]t would be improper to elicit the speculative testimony of [Defendant's] expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found in his expert's report." *Id.* The State argues that Dr. Moore's should not be qualified as an expert witness due to the speculative nature of his testimony and report. *Id.* The State contends that Dr. Moore's testimony and his report lack new facts for the Court to consider and are irrelevant to the issues before the Court. *Id.*

Defendant's Response to the State's Motion to Strike

In response, Defendant argues that Dr. Moore's report "is full of facts necessary for this court to consider." (*See* Response to the State's Motion to Strike, attached.) The Defendant further argues that "[t]he question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing." *Id.* As such, Defendant contends that his claims should not be summarily denied. *Id.*

Evidentiary Hearing

On May 18, 2017, an evidentiary hearing was held on the State's motion. (*See* Hrg. Trans., attached). Dr. Moore was called to testify. At the close of the hearing, both parties presented oral closing arguments. Based on the State's motion, the Defendant's response, the record, and the testimony and argument presented at the evidentiary hearing, the Court finds as follows:

Legal Standard for Expert Testimony in Florida

On February 16, 2017, the Florida Supreme Court declined to adopt the *Daubert* standard as part of the Florida Evidence Code to the extent that it is procedural. *See In re: Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). The Florida Supreme Court has the authority and obligation to adopt rules of practice and procedure for the courts of Florida. *See* Fla. Const. art. 5, § 2(a); *see also Perez v. Bell South Telecommunications*, 138 So. 3d 492, 498 n.12 (Fla. 3d DCA 2014).

In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle. In *Ramirez v. State*, 651 So. 2d 1164, 1166-67 (Fla. 1995) (internal citations omitted), the Florida Supreme Court enumerated the following four-step process in determining the admissibility of expert opinion testimony concerning a new or novel scientific principle:

> [T]he admission in evidence of expert opinion testimony regarding a new or novel scientific principle is a four-step process...First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue...Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs'...The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue...Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

The second-prong of *Ramirez*, commonly known as the *Frye* test, requires the court to determine whether the testing procedure or device utilized to apply a scientific principle or discovery is sufficiently established to have gained general acceptance in the relevant scientific community. The *Frye* test is used to guarantee the legal reliability of new or novel scientific evidence in that the trial judge is required to "determine the level of agreement or dissension" within the relevant scientific community. *Brim v. State*, 779 So. 2d 427, 434 (Fla. 2d DCA 2000). In *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997), the Florida Supreme Court explained the reliability prong of the *Frye* test as follows:

> [W]e firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence...novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

"In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedure used to

apply that principle to the facts at hand." *Ramirez,* 650 So. 2d at 1168. "The trial judge has the sole responsibility to determine this question." *Id.* at 1168; *see also Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997) (holding the *Frye* determination is a question of law for the judge rather than a matter of weight for the jury). "[G]eneral acceptance in the scientific community can be established 'if use of the technique is supported by a clear majority of the members of that community.'" *Brim*, 695 So. 2d at 272 (internal citation omitted). In determining the general acceptance in the scientific community, the court "must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique." *Id.*

"Although the *Frye* standard may be designed to 'guarantee the reliability' of new scientific evidence, the trial judge is not actually called upon to determine whether various principles and procedures are 'reliable' from a scientific perspective." *Brim*, 779 So. 2d at 434. Trial judges must determine the "legal reliability, as a threshold test of legal relevance, by judging – as an objective outsider – the level of acceptance that a principle or procedure has achieved within a scientific community." *Id.*

Analysis and Ruling

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. The Court recognizes that Dr. Moore testified he has previously been certified in one criminal case as an expert in content analysis, with the one case being in this judicial circuit. (*See* Hrg. Trans. p. 23-26, attached). However, this Court must still consider whether Dr. Moore's testimony regarding content analysis and his report in the above-listed cases can meet the necessary standard to be allowed at the evidentiary hearing. Dr. Moore testified that content analysis is a "well-established methodological

technique" and that it has "provided the approach [to] developing theory in the social and behavioral sciences since the mid sixties." (Hrg. Trans. p. 5, attached). Dr. Moore's testimony is that content analysis is commonly used in the social sciences to study and collect empirical data from various forms of media. *Id.* Dr. Moore states that he used content analysis to find sentences and phrases used during Defendant's trial and sentencing that would have improperly influenced the jury. *Id.*

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 prejudice. Dr. Moore's analysis and report may be useful for research purposes, but it is unable to meet the second prong of the *Frye* test. *See Ramirez*, 651 So.2d at 1166 ("[T]he expert's testimony is[must be] based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'").

The Court finds 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 ability. Dr. Moore's content analysis report is based on lay persons' reviews of the record. (*See* Hrg. Trans. p. 33, attached). It does not provide any additional knowledge or ability that the Court does not also possess. *Id.* Dr. Moore advised the Court that the ability to read the English language is "about all that's required" of the individuals reviewing the record. (Hrg. Trans. p. 40, attached). While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it is not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law.

Due to the Court's ruling above, it finds that Defendant's remaining claims are purely legal and can be resolved by the Court's own review of the record. As such, the Court finds no additional hearings are required. Consequently, the June 15, 2017, evidentiary hearing currently scheduled for the above-listed case numbers will be stricken.

It is therefore **ORDERED AND ADJUDGED** that the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments" is **GRANTED**.

It is further **ORDERED** that the Clerk **SHALL STRIKE** the June 15, 2017, evidentiary hearing that is scheduled in cases 99-CF-011338 and 97-CF-013379.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of June, 2017.

ORIGINAL SIGNED

MICHELLE SISCO
CIRCUIT JUDGE

MICHELLE SISCO, Circuit Judge

Attachments:

Motion to Strike Defendant's Witness/Exhibit List and Attachments
Response to the State's Motion to Strike
Hearing Transcript

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 8th day of June, 2017.

Deputy Clerk

Filing # 55074403 E-Filed 04/14/2017 07:44:14 AM

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

Case No. 97-CF-013379
Death Penalty Case

RAY LAMAR JOHNSTON,

Defendant.
_____/

STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS

The State of Florida, through the undersigned co-counsel, moves to strike the Defendant's Witness/Exhibit List and attachments and as grounds therefore, states the following:

On April 13, 2017, Johnston filed a Witness/Exhibit List attaching a report from Trial Practices, Inc. dated April 13, 2017 and authored by Harvey A. Moore, Ph.D.. This document was filed for consideration prior to a case management conference to be held by this court on Johnston's successive postconviction motion pursuant to Hurst v. State of Florida, 202 So. 3d 40 (Fla. 2016). *See* Fla. R. Crim. R. 3.851 (f)(5) (where the purpose of a case management conference is to hear argument based on "purely legal claims not based on disputed fact").

Johnston has now filed the report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript of Johnston's sentencing phase "from

a social science perspective" by conducting a "content analysis...of two principles" in Caldwell v. Mississippi, 472 U.S. 320 (1985). It would be inappropriate for this court to consider the contents of the report in determining the outcome of this purely legal claim. The report is based entirely on speculation, and it includes the wrong standard for reviewing Johnston's claim. Johnston urges entitlement to relief because his jury was not instructed according to the current state of the law which, in his view, amounts to a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985). The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, ___ So. 3d ___ 2017 WL 526509 at *25 (Fla. Feb. 9, 2017).

In sum, regardless of Johnston's protestations, the Florida Supreme Court has consistently found harmless those post-Ring[1] cases where the jury's sentencing recommendation was unanimous, as is the case here. This Court must follow that precedent, and strike Johnston's witness and report.

Johnston is not entitled to Hurst relief because his jury unanimously recommended death as the appropriate sentence in this case. The correct harmless error analysis would be based on whether the record demonstrates beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence.

[1]Ring v. Arizona, 536 U.S. 584 (2002).

Mosely v. State, 209 So. 3d 1248 at 1284 (Fla. Dec. 22, 2016). Because his jury's sentencing recommendation was unanimous, any Hurst error was clearly harmless. See, e.g., Davis v. State, 207 So. 3d 142 (Fla. 2016); Hall v. State, ___ So. 3d ____, 2017 WL 526509 (Fla. Feb. 9, 2017); Kaczmar v. State, ___ So. 3d ____, 2017 WL 410214, at *4 (Fla. Jan. 31, 2017); Knight v. State, ___ So. 3d ____, 2017 WL 411329 at *15 (Fla. Jan. 31, 2017), and King v. State, ___ So. 3d ____, 2017 WL 372081 at *19 (Fla. Jan. 26, 2017).

It would be improper to elicit the speculative testimony of Johnston's expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found in his expert's report when deciding whether an evidentiary hearing is warranted.

Given the inappropriate and irrelevant speculation as well as the incorrect legal theories included in the report, this court should strike the witness and exhibit. Moreover, since this is a purely legal Hurst claim which does not warrant an evidentiary hearing, or any relief for that matter, this Court should reject Johnston's arguments and motions and enter an order summarily denying review. Even if this court should desire to include the contents of the report within its consideration of Johnston's Hurst claim, the motions, files, and records in this case would still conclusively show that Johnston is

entitled to no relief, and his motion should be denied without an evidentiary hearing.

CONCLUSION

In sum, the Florida Supreme Court has consistently held that no Hurst relief is warranted in cases, like Johnston's, where the jury's sentencing recommendation was unanimous. Johnston is therefore not entitled to relief as a matter of law. Accordingly, Johnston's Witness/Exhibit list and attachments should be stricken and Johnston's motion summarily denied.

Respectfully submitted,

PAMELA JO BONDI

ATTORNEY GENERAL
STATE OF FLORIDA

s/ Timothy A. Freeland
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CO-COUNSEL, STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of March, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal filing system which will

send a notice of electronic filing to the following: Honorable Michelle D. Sisco, Circuit Judge, 401 No. Jefferson Street, Tampa, Florida 33602, **heckshs1@fljud13.org**; James Driscoll, Jr., David Dixon Hendry and Gregory W. Brown, Assistants CCRC-M, Law Office of the Capital Collateral Regional Counsel, 12973 No. Telecom Parkway, Temple Terrace, Florida 33637, **driscoll@ccmr.state.fl.us**, **hendry@ccmr.state.fl.us**, **brown@ccmr.state.fl.us** [and] **support@ccmr.state.fl.us**; and Jay Pruner, Assistant State Attorney, Office of the State Attorney, 419 No. Pierce Street, Tampa, Florida 33602, **pruner_j@sao13th.com**, **stapleton_a@sao13th.com** [and] **mailprocessingstaff@sao13th.com**.

s/ Timothy A. Freeland
CO-COUNSEL, STATE OF FLORIDA

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

RAY LAMAR JOHNSTON,

Defendant.
_____/

CASE NO. 97-CF-013379

DIVISION J

RESPONSE TO THE STATE'S MOTION TO STRIKE

COMES NOW, Defendant, Ray Lamar Johnston, by and through the undersigned counsel, and responds to the State's Motion to Strike Defendant's Witness / Exhibit List and Attachments filed April 14, 2017. Defendant responds to the State's Motion as follows:

At page 1 of the motion the State claims that "Johnston has now filed the [Harvey Moore] report to support his purely legal claim, but in doing so, he has introduced a speculative analysis of the transcript."

This claim is not purely legal in nature. It is a mixed question of fact and law. Death is different. This Court should not simply accept the advisory panel's mere recommendation in this case and ignore the United States Constitution. Death sentences cannot be carried out in an arbitrary and capricious manner. Such death sentences violate the Eighth Amendment prohibition against cruel and unusual punishment. To deny Mr. Johnston relief simply because of a mere advisory panel recommendation is the very definition of an arbitrary and capricious death sentence.

As the United States Supreme Court recognized in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the "advisory recommendation" at a Florida sentencing phase cannot be substituted for an actual

jury verdict. The United States Supreme Court has already held in *Hurst* that "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires." *Hurst*, 136 S. Ct. at 622. Therefore, this Court should not treat Mr. Johnston's advisory recommendation as such, even when the recommendation was unanimous. This is especially true in a case that has so severely violated the dictates of *Caldwell v. Mississippi*, 472 U.S. at 328 (1985).

Dr. Harvey Moore will assist the trier of fact in this case, the Court, to understand that the analysis of Mr. Johnston's Eighth Amendment claims in this case requires much more than a quick check of the advisory recommendation at the penalty phase. Any current adverse case law that suggests that a quick advisory recommendation check can swiftly dispose of Mr. Johnston's claims is ill-advised, ill-reasoned, and unconstitutional.

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. Dr. Moore did not perform "a speculative analysis of the transcript." Rather, he performed a scientific analysis of the transcript. This Court is free to judge the weight to be afforded Dr. Moore's analysis and testimony once it hears the scientific methods employed. The question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing. Mr. Johnston's claims should not be summarily denied.

At page 2 of its Motion to Strike the State claims that "the report is based entirely on speculation." This is not the case at all. Dr. Moore's report is based on record transcript that is part of the record on appeal in this case. It is also based on an analysis of *Caldwell v. Mississippi*, 472 U.S. 320 (1985) as it relates to the transcript in the case at bar. In his report, Dr. Moore identifies

some 65 instances from actual trial transcript in this case wherein the jury was "led to believe that responsibility for determining the appropriateness of defendant's death sentence rests elsewhere." *See Caldwell v. Mississippi*, 472 U.S. at 328 (1985). The report and the conclusions therein is not based entirely on speculation. It is based on decades of established social science research. Based on a review of the Johnston trial transcripts and the United States Supreme Court case of *Caldwell v. Mississippi*, Dr. Moore ultimately concluded:

> 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 the 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 certainly 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 the prosecutor.

Report from Dr. Harvey Moore, page 4.

The State also claims that the report "includes the wrong standard for reviewing Mr. Taylor's claim." The United States Constitution is not the wrong standard for reviewing Mr. Taylor's claim. *Caldwell* is still good law. Mr. Taylor's death sentence must comport with the dictates of *Caldwell* and the Eighth Amendment. The State's suggestion at page 2 that "The Florida Supreme Court has expressly rejected Johnston's claim in this regard. Hall v. State, __ So. 3d __ 2017 WL 526509 at *25 (Fla, Feb. 9, 2017)" is wrongly cited and misplaced by the State. The Florida Supreme Court never expressly rejected Mr. Johnston's current claim in *Hall*. *Hall* merely addressed an ineffective assistance of appellate counsel claim involving *Caldwell*, but analyzed the claim only in a pre-*Hurst* procedural posture. *Hurst* has now changed everything.

Death sentences must also comport with the Sixth Amendment. In *Hurst v. Florida*, 136 S.

Ct. 616, 619 (2016), the United States Supreme Court held that "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." Mr. Johnston's advisory panel did not engage in any required fact finding at the penalty phase. Dr. Moore's report identifies numerous instances where the jury was informed at the penalty phase that they were simply making a mere "recommendation" to the trial judge in Mr. Johnston's case. As a matter of standard Florida capital sentencing law at the time, there were numerous "suggestions that the sentencing jury [] shift its sense of responsibility to [the] court." *Caldwell v. Mississippi*, 472 U.S. at 330 (1985). Mr. Johnston's death sentence is a result of a death penalty system that violated both *Caldwell* and *Hurst*.

Contrary to the State's arguments in this case, the errors are harmful, not harmless. Regardless of the advisory recommendation in this case, this case clearly does not meet Eighth Amendment scrutiny. *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), courts will leave clearly established Eight Amendment violations unrectified.

Any close question of whether this Court should grant an evidentiary hearing should be resolved in Mr. Johnston's favor, in favor of an evidentiary hearing. An evidentiary hearing was denied in the case of *Cook v. State*, 792 So. 2d 1197 (Fla. 2001). The Florida Supreme Court remanded the case back to the trial court to hold an evidentiary hearing. *Id.* at 1205. In a special

concurrence in *Cook*, Justice Pariente joined by Justice Anstead, stated the following:

> I write separately for two reasons. First, I write to express my continued belief in the importance of trial judges erring on the side of granting an evidentiary hearing on an initial postconviction motion. Second, I write in response to Chief Justice Wells' concerns about the length of time this case has been in postconviction proceedings.
>
> As to the fact that no evidentiary hearing has yet been held, the failure to conduct an evidentiary hearing unless the record conclusively shows that the defendant is not entitled to relief is not only contrary to the law, but also is in itself a cause of delay in the postconviction process. *See Gaskin v. State,* 737 So. 2d 509, 519 (Fla. 1999) (Pariente, J., specially concurring) (explaining that failure to conduct an evidentiary hearing "causes delay and undermines our goal of providing a simplified, complete and efficacious remedy for postconviction claims"); *Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998)(Wells, J., concurring) (noting that "[t]oo much judicial and counsel time and resources have been wasted in determining whether to hold an evidentiary hearing. This has added to the inordinate amount of time prisoners remain on death row"). We have urged trial judges to err on the side of granting an evidentiary hearing on the first postconviction motion on all factually-based claims such as ineffective assistance of counsel, *Brady* [footnote omitted] and newly discovered evidence. *See Gaskin,* 737 So. 2d at 516; *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998). If the trial court in this case had granted an evidentiary hearing in 1996, the initial postconviction process would now likely be at an end. Instead, we face the specter of yet another delay as we return this case to the trial court.

Cook, Id. at 1205.

Contrary to the State's arguments, this Court should consider the contents of the report and permit Dr. Harvey Moore to testify on June 15, 2017.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on May 3, 2017, we electronically filed the forgoing Response with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to all parties and to Circuit Court Judge Michelle Sisco.

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA

vs.

Case No.: 99-CF-011338

Division: J

RAY LAMAR JOHNSTON,
Defendant.
_____/

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

This case came on to be heard before the Honorable Michelle D. Sisco, Circuit Judge, at the Hillsborough County Courthouse Annex, Tampa, Florida, on May 18, 2017, commencing at approximately 8:35 a.m., reported by Mary E. Blazer, RPR.

APPEARANCES:

Timothy A. Freeland, Assistant Attorney General and
C. Suzanne Bechard, Assistant Attorney General
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On Behalf of the State of Florida.

David D. Hendry, Capital Collateral Regional Counsel and
James L. Driscoll, Capital Collateral Regional Counsel
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On Behalf of the Defendant.

Also Present:

Staff Attorneys

I N D E X

EXHIBITS

PROCEEDINGS

THE BAILIFF: Court is back in session.

THE COURT: Hello. Good morning.

All right. So are we ready to proceed now?

Okay. All right. We're going to combine Johnston, and is it Taylor?

MS. BECHARD: Perry Alexander Taylor, yes.

THE COURT: Okay. So, do you want to call your witness?

MR. HENDRY: Yes, Your Honor.

We would call Dr. Moore.

THE COURT: Okay. Dr. Moore, come on up.

MR. HENDRY: And for the record, David Hendry from CCRC Middle. I'm here, along with James Driscoll, from CCRC on behalf of both Mr. Perry Taylor and Mr. Ray Lamar Johnston.

And, Your Honor, also we spoke in the hallway with the attorney general's office, and we are in agreement that the best way to go about both of these hearings, since they involve basically the same issue, is to consolidate the transcripts.

THE COURT: Okay.

MR. HENDRY: Because it's the same direct examination on both cases, basically.

THE COURT: Okay. Is that correct, State?

MR. FREELAND: Yes, it is, Your Honor.

MS. BECHARD: Yes, Your Honor.

THE COURT: Very good.

All right. And if you would please raise your right hand.

(Witness sworn.)

HARVEY ALLEN MOORE,

called as a witness by the Defendant, having been first duly sworn, testified as follows:

THE WITNESS: I do.

THE COURT: Okay. Very good.

You may proceed.

MR. HENDRY: Thank you.

DIRECT EXAMINATION

BY MR. HENDRY:

Q Could you please state your name for the record.

A Harvey Allen Moore. M double O-R-E.

Q Could you detail for the Court your formal educational experience.

A Yes, sir. I received a bachelor's degree from Knox College in Galesburg, Illinois, in 1968; masters's degree in social psychology from Illinois State University in 1969; and a Ph.D., in sociology from Case Western Reserve University in 1972.

Q Okay. And did you complete in those studies a master's thesis and a dissertation?

A Yes, sir.

Q Okay. And did those papers both involve the matter of content analysis?

A Yes, sir. Both, and many of my publications have involved content analysis in one form or another.

Q Okay. If you could describe for us what exactly is content analysis.

A Content analysis is a very old well-established methodological technique for doing one of two things. There are two polar ends for which it is used. Principally it's used in the development of theory, grounding theory and observations of a variety types of files, text files, audio files, video files, and so forth, with the purposes to develop theory by looking for, identifying, counting concepts to see and manipulate those as variables in some subsequent analysis. It's called grounded theory development and it's been the principle -- provided the principle approach developing theory in the social and behavioral sciences since the mid sixties.

At the other end we have a quantitative, as opposed to a qualitative, approach in which case -- in those cases where a theory or concepts are already well

developed, and the question then becomes to what extent do those concepts, variables appear in the variety types of files; as I mentioned, text files or audio files, video files, to -- to test essentially or count the concept already established.

Q Okay. When was the first time that you became involved with work that involved content analysis?

A I believe in the very first publication on reference groups of college students where we looked at the statements that people made about themselves in response to a series of questionnaires and developed categories inferring from those statements different ways in which people might apprize -- appraise their own self-concepts.

Q And is content analysis utilized regularly in social and behavioral sciences?

A Yes, sir. It's probably the most frequently used method or methodological technique employed. In the field of healthcare alone there have probably been well over 2000 refereed articles employing that method in the last ten years.

Q And was content analysis utilized in the cases of William Taylor and Ray Johnston?

A Yes, sir.

Q Okay. And in your written reports -- you

completed written reports in the Taylor and Johnston cases?

A Yes, sir.

Q Okay. And in the Taylor case, you did an amended written report?

A Yes, sir. Well, those were affidavits. I believe those were the first steps in study in establishing a principle.

Q Okay. And in those written reports, did you cite to content analysis studies in those cases?

A Yes, sir. I provided a variety of references from the different disciplines. This is something that has been used widely, of course, in sociology, my field of training, but also in psychology, anthropology, social psychology, information sciences, library sciences, business, and virtually every discipline that involves empirical study, it employs that approach in one form or another.

Q Okay. If you could tell us what professional positions have you held in your career?

A Yes, sir. I was a lecturer in sociology at Case Western Reserve University. I was a research associate in the institute in the Family of the Bureaucratic Society in 1970 at Case Western Reserve. I was and -- are you referring -- excuse me, only academic

positions?

Q Actually, everything.

A All right. I was a general staff officer in the U.S. Army between 1966 and 1974, with the rank of captain in Signal Corps. That was in a period between the Ph.D., and the end -- the award of the Ph.D., and the beginning of my teaching career -- or continuation of that career at the University of South Florida where I was an assistant professor -- an associate professor, director of the University's institute -- Human Resources Institute, which was a multidisciplinary institute in applied sociology, applied psychology. We had various centers that I was responsible for.

At the University I also became the assistant to the president and -- and essentially chief of staff under Jack Brown. I was director of the graduate program of sociology in the Department of Sociology. I was the deputy director for research for the Florida Mental Health Institute, a statewide research institute. That's 19 -- I'm up to 1989.

Throughout that period I was also a -- working as a private consultant in this field working on a variety of legal cases, again beginning in 1968 and continuing episodically throughout that period in which the same techniques were used.

MR. FREELAND: Your Honor, if I may, we would be willing to stipulate to the contents of his resumé. And I think what he's doing is basically reviewing.

THE COURT: Okay. That's fine. So you just want to go ahead and admit it as an exhibit?

MR. FREELAND: Yes.

THE COURT: Okay.

MR. HENDRY: Can I provide Your Honor with a copy?

THE COURT: Sure.

MR. HENDRY: Okay.

THE COURT: So mark it as Defense 1.

(Defendant's Exhibit 1 received in evidence.)

THE WITNESS: Thanks.

BY MR. HENDRY:

Q Okay. In your -- in your CV you say that from 1974 to 1993 you taught several subjects at the University of South Florida, one of those was sociology of law. If you could describe the course teachings of that course.

A Yes, sir. The sociology of law, which I taught at Case Western Reserve and University of South Florida, involves the study of legal institutions.

Our studies were primarily focused on the role

of the jury. Within the social sciences, historically they've taken a continental approach to law looking at it in terms of institutions. We looked at it in the social sciences in terms of the unique operations of the American jury system.

Q Okay. What about criminology?

A Yes, sir. I also taught criminology, which historically was rooted in the Department of Sociology up until it became a separate discipline at USF. I taught juvenile delinquency deviant behavior. And on both the sociology of education and the -- where I had a -- which arose -- an interest arose from a fellowship at Case, and medical sociology.

So I have a wide variety of applied research interests that are reflected in teaching.

Q Okay. Now, as an educator, is it important and do you utilize the technique of repetition with your students?

A Repetition, that's a very simple concept. Again, it's something that is -- the repeating of an action or a thought or a tone is used in teaching almost everything from -- as I mentioned in the affidavit, simple arithmetic. One learns arithmetic by repetition, and then master's number theory. You're not discover a number theory and then derive arithmetic or

multiplication from it. It's used in every manual skill. It's reflected in a number of common sense aphorisms that people use. Practice makes perfect. My mother told me if I've told you once, Harvey, I've told you a thousand times. The role of repetition in life is -- is extremely basic. It seems obvious. It's taken for granted, but its effect in learning has been well studied for many years.

Q And the purpose of repetition, is that to embed certain concepts and theories in the listener?

A It is the principle mechanism of learning in humans. When we apply it to a mechanical task, we call it muscle memory. It's neither purely intellectual, but it's -- reflects itself in every form of human interaction.

So whether you're learning golf or you're learning calculus, repetition is the key to learning.

Q Would an example of such an example be in sports for a golfer, keep your head down, is that repeated, to your knowledge?

A I don't play golf, but yes, these people who are golfers watch videos endlessly and practice with the videos playing in front of them. It's simple repetition. The count of the repetition as it goes up is a good reflection of -- of learning. For instance,

in various Olympics sports it's often reflected by commentators that it takes roughly ten thousand repetitions to master a dive or a technique or a batting skill. Repetition has a direct correlation to the effective learning.

Q Okay. You're not familiar with golf, you don't play golf, but are you familiar with voir dire?

A Yes, sir.

Q And how are you familiar with voir dire?

A Well, I've prepared text scripts for voir dire in perhaps well over 1400 trials for attorneys. I assist in writing voir dire. I study voir dire in terms of its impact in communicating concepts to jurors; how to structure it in terms of assisting parties to gain more information from voir dire. It's -- I could go on for an awful long time about the function of voir dire, but it is essentially a fundamental area of study in the social and behavioral sciences in a legal context.

Q Okay. Is repetition -- well, before I get into that. Do you work with attorneys in actual cases in designing, constructing, and utilizing certain themes during voir dire?

A Yes, sir.

Q Okay. And is repetition utilized in that endeavor?

A Well, the theme is in organizing principle first, which is used to connect different features of a story or court presentation. And the identification of themes which most effectively organize that presentation as heuristic is something that we infer through qualitative methods such as -- such as content analysis from simulations, from interviews with potential jurors, and study of the case facts themselves.

Q Okay. Are you familiar with jury instructions; and if so, tell us how you are familiar with jury instructions in cases.

A Yes, sir. Principally the jury instructions serve as -- serve a function for anyone preparing a case whether a prosecutor or a defendant or a plaintiff or -- in a civil case, provides a basic structure for understanding the law to jurors. In that sense we like to rely on pattern jury instructions, but often they're -- they're inadequate to the peculiar features of a case.

And so I've been involved in many, many, many trials, it's hard to count, in drafting prospective jury instructions from a social science perspective, to aid the triers of fact in understanding what the basic issues are that we're trying to achieve in the case no matter which side we might be on.

Q Okay. Do you work with attorneys to draft or change or suggest certain jury instructions in legal cases?

A Yes, sir. Both -- both jury instructions and verdict forms. There's often broad latitude within a case as to the type of verdict form that would be most effective from your respective position.

In a civil case, for example, it's often preferable to have a single line response with a verdict or in some states just a level of award. If they make an award as a plaintiff, it would be a single line verdict. In other cases it might be preferable to have as many lines as possible in a civil case, or as few depending on whether I'm a plaintiff or a defendant.

And so not only do we attempt to structure that or look at the structure of the verdict forms, we also empirically test their effects in simulations.

Q Okay. So when -- in the civil arena when a plaintiff's attorney hires you, typically what is the objective at a civil trial?

A The objective for a plaintiff in a civil trial is to prevail --

THE COURT: To win money.

THE WITNESS: Well, I think it --

THE COURT: Okay. We're getting a little far

afield here, okay.

BY MR. HENDRY:

Q Dr. Moore, with regards to a criminal case, a capital trial, a death penalty trial, have you been consulted by criminal defense attorneys and public defenders in a capital case?

A Yes, I have.

Q Okay. And are you familiar with the bifurcated procedure in the state of Florida?

A Yes, I am, sir.

Q Okay. And with regards to the penalty phase, okay, what are criminal defense attorneys typically -- what is their typical objective at the penalty phase in a capital case?

A It's hard to generalize and cross all the variety. I'm of the school that believes that every case is unique to its own facts and should be approached in that fashion, but one issue, for instance, of concern in the penalty phase is the balancing of mitigation effects with the general defense that's already been offered and failed. Where at a sentencing phase the party has lost, and now the issue of mitigation becomes relevant where otherwise it wasn't.

Q Okay. Is typically the objective in your experience for the defense to get a life recommendation

rather than a death recommendation?

A Yes, sir. Generally.

Q Okay. And have you assisted attorneys in these capital cases to work with repetitive claims during voir dire?

A Yes, sir.

Q And what about jury selection?

A Yes, sir.

Q And what about crafting jury instructions?

A Well, I don't practice law, so I assist attorneys in crafting their nonpattern jury instructions, I suppose. You basically try to find how, through your simulations, jurors can better understand some issues. Mitigation is a good example. It's raised at the last phase of trial when it probably would have the least effect on the outcome.

Q Okay. Are you familiar with the -- the law in the state of Florida in capital cases with regards to the advisory nature of the jury?

A Yes, sir.

Q Okay.

A From a lay perspective.

Q And have you -- have you advised attorneys on how best to navigate that situation that we encounter here in the state of Florida?

A Yes, sir.

Q Okay. Describe that.

A Well, from a defense point of view, typically we emphasize the -- the specific act which an attorney -- a juror, rather, is going to be participating in its most -- most frank sense, it is taking the life of another person, and that's a very significant responsibility.

And so we attempt, of course, to reinforce every opportunity to bring that to the attention of jurors.

Q That is a very solemn duty?

A Yes, sir.

Q A serious responsibility?

A Yes, sir.

Q Okay. Now, in your work at Trial Practices, are you qualified to -- because of your experience there, are you qualified to offer the opinions you have offered in reports in Johnston and Taylor?

A Well, I do not think that my employment at a consulting company is a qualifier. I'm qualified because of basic training, terminal training in social and behavioral sciences. What I'm talking about in this affidavit is not a function of -- of consultation, it's basic journeyman-level social science research.

Q Okay. Have you reviewed the Caldwell case?

A Yes, sir. When -- when I was asked to consult in this case I read the Caldwell decision.

Q Okay. And do you feel familiar, comfortable with the stated principles in Caldwell versus Mississippi?

A Well, yes, sir. The opinion as written by Justice Marshall is fairly simple.

Q Do you have to be a lawyer to understand the principles of Caldwell versus Mississippi?

A Well, it depends on which perspective. I do not think -- I think everyone is qualified to read the law. I'm not offering opinions about the law. I'm merely reflecting in this work statements made -- held in the opinion that are gained to be significant.

Q Okay. Now, with regards to -- with regards to statements in a capital case, which in your opinion might violate Caldwell, is the placement of these statements important in your opinion?

A Yes, sir. It's the second, in addition to repetition, well-established principle in the social and behavioral sciences and in the law, that placement affects learning. In -- in the law there probably isn't an attorney whose been to a continuing education seminar in the past 40 years where the concepts of primacy and

recency have not been discussed in some detail by a presenter. Whether one hears something first in a present complex presentation or last, both place -- both placements enhance the learning or the impact of that which is being taught on a student.

Q Okay. What are the concepts of primacy and recency in relation to this?

A Well, primacy and recency simply, as I mentioned backwards I suppose, what you are most likely to retain what you hear first and then what you hear last. It differs by individual, but the placement in a complex organization. It's a concept that first emerged in 1966 and has been employed and reflected in numerous legal journals as since its morphed a bit in psychology, social psychology, and has come under a number of different labels nominally the same.

Focalism is another way of describing it but focusing the issue to be learned at the beginning or at the end is the same principle as -- as primacy and recency, but within the legal community at least those are very well-established concepts.

Q Okay. Have social scientists like yourself worked to help draft jury instructions in capital cases?

A Yes, sir.

Q Describe that.

A Well, there's a long body of research in the social sciences on the crafting of -- of legal instructions in particular because of the tenancy in law to use language which is complicated and is not easily understood by the lay audience. And so whether one approaches as a psycholinguistics expert, for instance, in analyzing word patterns or simply applying common sense. Social scientists have been involved in almost all features of the development of instructions.

Q As a part of your experiences in this case, on these cases, Taylor and Johnston, did you have a chance to review a 1989 law review article by a law professor Michael Mellow entitled "Taking Caldwell versus Mississippi Seriously, the Unconstitutionality of Capital Statutes that Divides Sentencing Between Judge and Jury"?

A I've read that.

Q Okay.

A I've read that after, of course. I have done the work, I found nothing in it that is new from my substantive point of view in terms of the study of sociology or its application to this case.

Q Okay.

A But it illustrates, I'm sorry, the breadth of things that you are talking about in terms of how the

law might be. The triers of fact may be assisted by the application of social science research.

Q To your -- to your knowledge, how long have social scientists like yourself been studying this issue of Caldwell in relation to capital sentencing?

MR. FREELAND: Your Honor, I object on the grounds of relevance.

THE COURT: I'm going to sustain the objection.

BY MR. HENDRY:

Q That article we mentioned was 1989?

A Yes, sir. This goes back to 19 -- the early sixties.

Q Have you presented lectures in your career?

A Yes, sir.

Q Okay. On what topics?

A They're all reflected in the resumé. I think I've lectured on virtually every feature of trial, from voir dire to jury instructions, from the order of proof to the structure of opening and closing -- opening statements and closing arguments. I think --

Q Did --

A -- this approach in the social sciences applies equally to all phases of trial.

Q Did those lectures include topics involving

how and why juries reach certain decisions in legal cases?

MR. FREELAND: Again, Your Honor, I would object on the grounds of relevance. I think that his expertise is documented by his resumé, which is before the Court. I don't know that additional discussions about lectures he may have given would help the Court.

THE COURT: I'm going to sustain the objection.

BY MR. HENDRY:

Q Dr. Moore, were judges and lawyers attendee -- attending those lectures regularly?

A Yes, sir. They're very often either presentations or publications in legal journals. They are all offered for credit in continuing legal education. I think without exception all of those presentations were offered for credit in legal education.

Q Okay. In these presentations and through your education, training and experience, have you come to profess to people in the legal profession what is helpful in a legal case and what is not helpful in a legal case?

MR. FREELAND: Again, objection, Your Honor,

on the grounds of relevance.

THE COURT: He can answer yes or no.

Go ahead.

A Yes.

Q Have attorneys regularly consulted you seeking advice on the strength and weakness of their cases?

A Yes, sir. Virtually every case involves that advice.

Q Okay. Have you been qualified as an expert in this circuit before?

A Yes, I have, sir.

Q Okay.

THE COURT: On what topic?

THE WITNESS: Well, in the case of Martinez -- State versus Martinez, I testified regarding the quantity of information in a text that was required for a trier of fact to understand the message itself. In that case, Martinez -- Mr. Martinez was recorded in a listening device that was placed in a television. And when he came home to speak to his wife, who had reason to believe he had been involved in some criminal activity, a murder, they were attempting to get back together again and the children came in and were talking daddy -- they had

been separated at the time, and Mr. Martinez told his children that mommy and daddy are trying to talk to each other, why don't you watch TV. Well, that's where the bug had been placed by the sheriff's department. And we hear that conversation, and then the rest of the tape is largely Bugs Bunny. It was "That's all folks," at the end.

And the issue whether that transcript would be admitted was whether there was sufficient information in the text to -- to make -- to conclude that Mr. Martinez had actually confessed as the State argued.

So, for instance, you hear the first colloquy with the children, and then you hear Bugs Bunny for a while, and throughout that text which didn't -- the tape, rather, which didn't reflect much except "That's all folks," you could intermittently hear Mr. Martinez say things such as I -- I shouldn't have done it. It was wrong for me do that. I'll never do it again. That transcribed portion was put before the court as evidence of guilt.

Mr. Martinez said that he was simply telling his wife the reason they were separated and going through a divorce was that he had been having

relationships with her best friend and had been caught in this affair, and that's what he was referring to, I'll never do it again. But she had told her father, who was a retired police captain that -- in Tampa --

THE COURT: Okay. Well, I just want to know the area.

What was the area you --

THE WITNESS: It's content analysis. It's basically a content analysis and an evaluation of -- from a communications perspective. The sufficiency of a message to understand its content.

THE COURT: You said you actually testified as an expert before a jury or just a judge in a pretrial motion?

THE WITNESS: I've testified as an expert in the Johnston case applying --

THE COURT: In the Martinez case, was it before a jury?

THE WITNESS: It was before Judge Padgett.

THE COURT: Okay. In a pretrial motion?

THE WITNESS: Yes.

BY MR. HENDRY:

Q And what was the results of that hearing?

A The transcript was excluded --

Q Okay. If my understanding is correct --

A -- from evidence.

Q -- in a nutshell, law enforcement listened to a tape and came up with a transcript which included a confession -- alleged confession of the defendant; is that right?

A Yes, sir.

Q Okay. And you reviewed the content on this audiotape?

A Yes, sir.

Q And you reviewed the transcript --

A And the transcript of that.

Q Okay. And what was your opinion?

A That you couldn't conclude anything from the transcript. It was high proportionate but was completely unintelligible. And an analysis of that content and the intelligibility of that was -- was insufficient to meet any test.

And so I used a variety of studies applied to this that are brought to the Court's attention, rather, the number of studies that illustrated how varying levels of information in a message can dramatically change its interpretation.

Q Okay. And this was an exercise in content analysis?

A Yes, sir.

Q Is that the same thing that you've done -- basically the same thing that you've done in a different media but that you've done here in Taylor and Johnston?

A Well, it was a text file in the Martinez case. At one point in that trial the State came up with a 30-page verbatim transcript that reflected material I couldn't hear, no one else could seemingly hear, and there were a variety of transcripts.

So we looked at both the text files and the audio files and analyzed the content, which is essentially the same method employed in Johnston and Taylor.

Q Okay. Now, in criminal cases, did you -- do you work with just the defense or do you work with the prosecution? I don't want you to get into the cases, but if you could tell us your last ten cases, how is it divided between defense and prosecution?

A I would say in the last two years there have been 12 capital cases, if 13, 14. If I count, I think there are three in which I've been involved on the defense and perhaps -- well, certainly more than 11 for the prosecution.

Q Okay. How many capital death-penalty cases have you been involved in in your career?

A Slightly under 100; 96 or so.

Q Have you offered advice to capital attorneys in the past about how to better prevail in a capital case given jury instructions that keep repeating the terms "advisory" and "recommendation"?

A Yes, I have.

Q Okay. Is your written report in Taylor and Johnston based on sufficient facts and data?

A I'm sorry? Is it my -- yes -- yes, is my answer, but I don't understand the question. So, it would be hard --

Q But --

A I'm not sure I understand. Yes, I've offered my conclusions based on empirical facts that can be counted and manipulated and have traditionally done so in the social behavioral sciences.

Q Okay.

A This is a very simple method. You know, sometimes people -- and it's particularly true of the social behavioral sciences, excuse me, where often we are in a position of trying to establish as a fact something which seems obvious to everybody.

MR. FREELAND: Your Honor, I --

THE COURT: I'm going to sustain the objection.

MR. FREELAND: Thank you.

THE COURT: Nonresponsive.

What's your next question?

BY MR. HENDRY:

Q Dr. Moore, have you utilized reliable content analysis principles and methods in Taylor and Johnston?

A Yes, I have.

Q Have you applied content analysis principles and methods reliably to the facts of these particular cases?

A Yes, I have, in accord with a well-established methodological principles.

MR. HENDRY: May I have a moment, Your Honor?

THE COURT: Yes.

(Pause.)

MR. HENDRY: I just want to clarify, Your Honor, I think we might have William Taylor in the record, but just to clarify --

THE COURT: Perry.

MR. HENDRY: -- it's Perry Taylor.

THE COURT: Yes, Perry Taylor.

MR. HENDRY: Okay.

BY MR. HENDRY:

Q Dr. Moore, can you use your training, education, experience to offer an opinion in these cases

as to the effect of the instructions and statements on the advisory panel's sense of responsibility in determining whether to recommend a death sentence and how that would differ from an actual jury?

A Well, it differs for that jury itself in the two phases of trial. In an actual trial, in phase one, it reaches a verdict. A verdict means "to speak the truth" in Latin.

In the second phase, it does not reach a verdict. It provides an advisory sentence. It does not even make a decision as to -- whether life or death is the alternative.

MR. HENDRY: That's all I have, Your Honor.

THE COURT: Okay. Cross-examination.

CROSS-EXAMINATION

BY MR. FREELAND:

Q Good morning, Dr. Moore.

A Good morning, sir.

Q What is sociology?

A It's the study of humans in groups in society.

Q In this particular case, your -- and for the record, Timothy Freeland -- you attempted to apply the principles of Caldwell to this case --

A Yes, sir.

Q -- based upon your reading of Caldwell?

A Based on specific statements or concepts that Justice Marshall inserted in his opinion.

Q So yes?

A Yes, sir.

Q The answer is yes?

A Yes, I'm sorry.

Q Did you confer with counsel regarding Caldwell, particularly counsel in this case?

A He gave me the first copy of it to read; so yes, sir. I'm sorry.

Q Caldwell involved -- well, explain to me what your understanding is of the holding in Caldwell?

A Well, basic, essential tenet in Caldwell I believe is that there is a risk, an unacceptable risk that a juror's sense of responsibility will be diminished by statements which -- which reduce their responsibility for the outcome.

Q There was another ground in Caldwell, was there not, that the court addressed?

A There may be, but I'm focused on that statement.

Q Do you remember there being an issue with regard to whether or not counsel accurately advised the jury as to the state of the law in Mississippi?

A It may be another feature of it, yes, sir.

Q Are you aware whether in this case, based upon your examination of the transcript, whether counsel correctly or incorrectly advised the jury as to the state of the law at the time of Mr. Johnston's case?

MR. HENDRY: Objection; relevance.

THE COURT: Overruled. Go ahead.

A Do I -- I wouldn't offer an opinion on legal -- a legal conclusion.

Q So you didn't consider that, you weren't asked to consider that?

A I did not analyze this from a legal perspective.

Q What you did then specifically was -- I've read your report. And what you did specifically then is to read through the transcript of the trial; am I correct?

A Yes, sir.

Q Did you read the transcript of the entire trial?

A Yes, sir.

Q And did you -- who else assisted you in -- well, your report refers to coders. Who are the coders and what is a coder?

A Yes, sir. A coder -- and the objective here is to assess the accuracy of a count. If I were to read

a transcript and look for sentences, the sentence was the unit of analysis here that fit the definition of the risk the court was calling attention to, I would -- my opinion would be suspect. I'm -- for any number of reasons. And so you -- content analysis requires methodologically to have a panel of naive observers who read that. And the first question that you're addressing is whether other people readily see the same match, if you will, between a statement and its meaning.

Q A coder is someone that you use to review the transcript and make a judgment about whether this transcript violates Caldwell, specifically in this case?

A No, sir. We're not concluding whether it violates Caldwell. The method is simply to see whether there are statements, which given the definition or the concept that is propagated in Caldwell is reflected in a lay understanding of what they are reading, do other people see the same thing.

Q Who were the coders that were used in this case?

A Well, the coders were one undergraduate student, one graduate student in psychology, a journalist formerly with The Tampa Tribune, and myself.

Q So four individuals --

A Four coders, yes, sir.

Q -- reviewed the transcript to see if they could determine if there were any -- anything in the transcript that might suggest that the jury's role as a decision-maker was being minimized?

A No, sir. We're not evaluating whether the role was diminished. We're taking an established concept, not one we're inferring, but an established concept which says any statement essentially, which tends to diminish the role.

Q I'm trying --

A So the question is whether such statements appear in the text. The concept is established that one mention, one sentence such as that in Caldwell is sufficient to undermine the jury's responsibility.

So the question first is how many such sentences, if any, appear in that text.

Q And how did you go about deciding the baseline, determining whether a sentence should be selected?

A Well, that's the purpose of the method to see whether common observers, naive observers reading it, knowing the definition, see a sentence which they believe correlates with that concept that the court --

Q The basic concept --

A -- that legal concept --

Q -- minimizing the jury's role as a decision-maker?

A Yes, sir. And so the point is whatnot -- number one, whether there is -- other people see it, whether there's agreement, where's a high level of agreement. And the high level of agreement is -- is important.

Q So as I understand the methodology that you used was to review the entire transcript and pull out any sentence that you felt merited attention in terms of what you understand Caldwell to be?

A Well, I don't want to --

Q That's a yes or no. Did I get it wrong?

A I'm trying to remember the sentence. I'm being cautious about the meaning of Caldwell.

Q Understandably.

A There is a very narrow --

Q Understandably. But your understanding of what Caldwell means --

A The understanding of -- of the statement, the concept that there are sentences which would tend to diminish the role of the juror in deciding a capital case.

Q And based upon that, you and your coders went through the transcript to see if you found any

statements that met that criteria?

A Yes, sir. Simple match. Here's the statement. Is there a sentence that fits that category in the text; and if so, where is it and how many are there.

Q And my understanding is that you used essentially lay people to do this?

A Yes, sir.

Q Now, you have -- would you say that the majority of your work in terms of capital cases involves juries?

A Yes, sir.

Q Mock juries?

A No, sir.

Q You do use mock juries in some circumstances, though?

A Well, I would have to say every case involves typically simulations with mock jurors and involves real jurors as well. There are methods for study that are applied to all phases of trial. And so I consulted on many capital cases where we have no simulations, where we are developing strategy, for instance, based on social science techniques.

Q Your specific expertise today deals with whether you found evidence that the precepts of Caldwell

might be implicated. I'm being deliberately vague.

A It's simply yes, it's analysis of text files to see whether there's common agreement reflecting a meaning. A meaning that is established in a concept that's already law.

Q Have you been qualified as an expert to testify on this specific incident, this specific criteria contract we're talking about, Caldwell violations?

A No, sir. This is not a study of Caldwell violations. It is a sentence -- Caldwell violation in the legal sense is a statement which tends to do it. I'm simply performing a text analysis that counts the number of sentences that fall under that heading. A little more than that.

MR. FREELAND: If I may have a minute, Your Honor?

THE COURT: Okay.

(Pause.)

BY MR. FREELAND:

Q Dr. Moore, you were not asked to -- are you familiar with the term "retroactivity"? Generally what the means?

A No, sir.

Q Are you familiar with it?

A I probably am, if you'll just described it to me.

Q Something that occurs now is also applied in the past. Were you asked to address -- since you don't know the specifics of what I'm talking about --

A If you are asking about the meaning of the word "retroactive," yes, I'm pretty --

Q I'm sure you know what "retroactivity" means.

You were not asked to address the issue of retroactivity with regard to whether the current state of law applies in the past, were you?

A No, I'm asked to --

Q It's a simple yes or no.

A No.

Q That's fine.

MR. HENDRY: Your Honor, I'd ask that the witness be able to explain his answer.

THE COURT: Well, you've have redirect.

Any further questions?

MR. FREELAND: No, Your Honor.

THE COURT: Go ahead.

MR. HENDRY: Your Honor, just to begin, I would like to mark as an exhibit to the hearing Dr. Moore's corrected report in Taylor and his report in Johnston, and have them introduced in the

record.

THE COURT: Any objection?

MR. FREELAND: He should have done that during his initial --

THE COURT: Okay. Any objection other than that?

MR. FREELAND: Other than that, no.

THE COURT: Okay. It will be admitted.

(Defendant's Exhibit 2 received in evidence.)

MR. HENDRY: Thank you.

Can I give Your Honor a courtesy copy --

THE COURT: Sure.

MR. HENDRY: -- of the reports?

They're attached to the notice of filing.

THE COURT: I have reviewed them.

MR. HENDRY: Okay.

REDIRECT EXAMINATION

BY MR. HENDRY:

Q Dr. Moore, on cross you were asked about the coders. Tell us who -- are these employees in your office?

A Two student interns, students of the University; and another consultant.

Q Do you feel that they were qualified to engage in this exercise?

A Yes, sir. They read the English language, that's about all that's required.

Q Okay. Would these people be your average, typical jurors in a capital case, possibly?

A I could make that claim, but it's unnecessary. The question is simply whether there's agreement, do other people see it, your mileage may vary, but it is unlikely if we find 69 statements in -- in Johnston that someone will conclude --

MR. FREELAND: Your Honor, I will object as being nonresponsive.

THE COURT: I'm going to sustain the objection. Anyone over the age of 18 who is not a convicted a felon could be a potential juror. So I'll take judicial notice of that fact, all right?

BY MR. HENDRY:

Q Okay. Dr. Moore, Mr. Brennan was one of the coders. Did he have an experience personally in Mississippi with Caldwell?

A He covered the Caldwell trial before the Supreme Court.

Q In what capacity?

A As a newspaper reporter.

Q Okay. Now, with regards to the coders and the exercises that were engaged in, was there an agreement

amongst the four coders about particular statements which were identified in these transcripts?

A Was there an agreement?

Q Yes.

A No, there is not perfect agreement.

Q Not perfect agreement, but was there a general agreement or --

A Yeah, the method is very straightforward. By having independent coders, reviewers, judges that are referred variously in the literature, you are simply establishing whether there are -- whether there is, first, agreement and where there are differences, whether they can revolved.

So, for instance, there's disagreement when somebody misses something. For instance, in this study I think at least two jurors missed the fact that the verdict form itself said "advisory sentence," indicating that in a plain reading it -- it wouldn't be there.

So we -- we meet and you bring up the disagreements to see whether they can be resolved. And most often they're resolved because people simply missed something.

Q Approximately how many statements were identified in the Taylor case?

A In the Taylor case, approximately 130.

Q Okay. And with regards to any disagreements, do you remember approximately how many disagreements there might have been out of that number?

A There's roughly 96 percent agreement, that's what I recall. I didn't come today to compare the studies, but it would be -- there are obvious differences in the outcome between the two.

Q Okay. In your opinion in this exercise, the fact that the Taylor verdict was labeled "advisory verdict," did you find that to be significant in relation to Caldwell?

A Well, at first I found the sentence to be counted. Second, I do have an understanding of why, depending on which side I'm on, I emphasize advisory or do not emphasize it. And this is one of the reasons a content analysis like this that is right down the question of whether these statements reflect a certain meaning as identified in the concept are important.

If you are on one side, you emphasize significance of the responsibility as being undertaking. If you are on the prosecution side, you are more likely to emphasize, depending on the strength of evidence, for example, advisory versus -- versus just ordinary sentence.

And one of the problems in the analysis is to disentangle the issues of -- that are often completed when one talks about sentencing instructions.

For instance, when someone confesses to a crime, or where there's powerful evidence of DNA or something like that, there's less need to emphasize from a prosecution point of view the advisory nature of the decision. It's clear. In a case involving joinder trials --

MR. FREELAND: Your Honor --

THE COURT: Sustain the objection; nonresponsive.

Go ahead.

What's the next question?

BY MR. HENDRY:

Q Dr. Moore, with regards to the Ray Lamar Johnston case, approximately how many statements did the coders identify in that case?

A Approximately 60.

Q And as far as the agreement, what was the agreement rate?

A I recall very high; 94, 96 percent.

Q And is that of concern to you that it wasn't 100 percent agreement between the four coders?

A No, sir. Meaning varies by individual.

Q Okay.

A The significance of disagreement is -- is more important, the smaller that number becomes.

Q Okay. With regards to you were asked about your practice and mock juries, I just want to make clear, is your practice limited to performing mock jury trials?

A No, sir.

Q Okay. And is the Martinez case, which you've previously referenced, was that a mock jury trial?

A Yes, sir.

Q So you did do a mock jury trial?

MR. FREELAND: Your Honor, that's beyond the scope. I didn't talk about Martinez at all.

THE COURT: Well, go ahead. You can get into it if you feel it's necessary.

BY MR. HENDRY:

Q Dr. Moore, you did a mock trial in the Martinez case?

A Yes.

Q I want to talk about specifically the other exercise, which was the content analysis with the transcript and the audio file.

A Yes, sir.

Q Okay. All right. So that wasn't just a mock

jury trial?

A No, sir. The attention to it and its significance was raised in the simulation. The reason for expending effort on it was significant in the simulation.

MR. HENDRY: Okay. May I have a moment, Your Honor?

A In other --

THE COURT: Yes.

BY MR. HENDRY:

Q I'm sorry if I cut you off.

A No.

MR. HENDRY: No further questions, Your Honor.

THE COURT: Okay. All right. Thank you.

You may step down.

THE WITNESS: Thank you.

THE COURT: All right. Any additional witnesses?

MR. HENDRY: No, Your Honor.

THE COURT: Okay. For purposes of this hearing?

All right. Argument?

MR. HENDRY: State's the movant, so we would like to respond.

THE COURT: Okay, sure.

Let me ask you just this question before we get going. As far as -- go ahead, Dr. Moore, you're fine, you can keep walking.

As far as -- I'm unfamiliar with content analysis. There's never a trial that I've presided over where that's been -- or even a pretrial motion where an expert has been qualified to testify regarding content analysis.

So I just need to know, from your purposes are you just as a general feel of expertise, are you agreeing that content analysis is recognized as a field of expertise that an expert could testify to, to a fact finder, or you're not even there?

MR. FREELAND: I'm not even there, Your Honor.

THE COURT: Okay. And so under Daubert or Frye, is that where we're starting?

MR. FREELAND: We're still using Frye.

THE COURT: Okay. All right.

MR. FREELAND: So, yeah, we don't -- I mean, there isn't -- they hadn't -- there isn't any case that I'm aware of where content analysis --

THE COURT: Okay. That's fine. That's why I'm asking. So -- because I'm unfamiliar with it as well, so I just wanted to make sure I was understanding where you were coming from.

So this is essentially a Frye challenge, right?

MR. FREELAND: It is.

THE COURT: From your perspective?

MR. FREELAND: It is, Your Honor. I'm giving the Court a copy of Hildwin versus State.

THE COURT: Okay.

MR. FREELAND: I've given a copy of that to opposing counsel.

Hildwin, interestingly enough, involved this very witness in the context of a mock trial.

THE COURT: And for the record, it's 951 So.2d 784.

MR. FREELAND: Yes. And I'm looking at page 791. Exclusion of mock jury evidence. Dr. Moore testified in terms of a mock jury. And -- that the Court here -- obviously, this is not a mock jury setting.

THE COURT: Right.

MR. FREELAND: But the court looked at certain specific criteria in determining whether mock jury evidence would be admissible in a postconviction setting. And it said specifically that, first of all, postconviction court determining whether newly discovered evidence warrants a new trial is not a

trier of fact. This is something -- so we're not -- the testimony that we got from the witness and today is not in any way going to help this Court in deciding whether these facts justify a new trial.

The court also -- I mean, goes through the Frye standard which, of course, this Court is going to have to consider. It's generally accepted.

THE COURT: Right.

MR. FREELAND: My problem with his testimony is that he used content analysis -- and by his own statement used lay witnesses -- lay people to go through the transcript and determine what things were -- I'm using the phrase "violative of Caldwell" even though he was cautious enough to say "violative of Caldwell."

My -- my position is that if a layperson can do it, that does not inform the Court in any way, shape, or form.

THE COURT: Why can't the Court do it?

MR. FREELAND: I'm pretty sure that the Court can do it. I have confidence.

And so he is -- he may well be an expert in some areas, but this is not a test -- the form of expertise that would assist the Court in advancing

anything. That's my argument.

THE COURT: Okay. Ms. Bechard, do you have anything to add?

MS. BECHARD: Yes, Your Honor, just for purposes of the Perry Alexander Taylor case.

And for the record, I'm Suzanne Bechard with the Attorney General's Office for the State on Perry Alexander Taylor.

Dr. Moore's testimony derived from this content analysis, it's just inappropriate for the purposes of determining the purely legal matter that we have in this case, and that is the matter of retroactivity.

And under Hildwin the court said that it violates the province of the court, of the judge, on a purely legal matter to consider this kind of -- this kind of evidence.

So, the State would submit in this case that this does not at all reach the threshold issue of retroactivity, and it simply is irrelevant for that purpose.

Thank you.

THE COURT: Okay. Mr. Hendry.

MR. HENDRY: Thank you, Your Honor.

One issue, Your Honor, is that heretofore the

State has never cited to this Hildwin case. They filed a motion to strike. Hildwin is mentioned nowhere in there.

With regards to the Hildwin case, Your Honor, and the record on appeal will show in Hildwin is that we didn't even get an opportunity to go through this exercise. This was a Hernando County case, and it was Judge Tombrink. And what we did is, we had a case where there was newly discovered DNA evidence to show that it belonged to the perpetrator, didn't belong to Paul Hildwin.

The State argued in the eighties with the best science that they had that they -- they said that the biological fluid, the semen and saliva left at the crime scene belonged to Paul Hildwin. Even in light of newly discovered DNA evidence, the State took the position that this newly discovered DNA evidence was irrelevant. Eventually, fortunately, Hildwin obtained a new trial. He's pending in Hernandez County right now. He's represented by Lyann Goudie.

So, Your Honor, I was confronted in that case in Hildwin where I have to meet the Jones standard and I have to meet that newly discovered DNA evidence is such that there would be a different

result on retrial, and that's why I consulted Dr. Moore.

We went through these exercises, Your Honor. And -- and the Court should have -- should have considered the evidence. They didn't. Fortunately, he received a new trial, so it's kind of moot, but, Your Honor, we bussed in dozens of jurors, mock jurors from Hernando County to Dr. Moore's office in downtown Tampa to present them with this newly discover DNA evidence to see if, indeed, the jurors would rule that the newly discovered DNA evidence was significant. They all say it was. They all said you should acquit Paul Hildwin. We tried to use that evidence -- that evidence to say that Mr. Hildwin should be afforded a new trial.

Judge Tombrink, he -- the State told him don't look at those tapes, Your Honor. Those are irrelevant. Don't let your province be invaded. You can make the decision. Judge Tombrink didn't even give us an opportunity to go through this exercise. He said I'm not going to even look at the tapes. I'm going to rule that Dr. Moore can't testify. I'm going to rule that the tapes aren't admissible, and that's what Hildwin was, Your

Honor.

Several -- we went through the oral argument and the oral argument we had newly discovered DNA evidence.

THE COURT: Okay. I understand. I get it. Okay. I understand -- I understand what you're making -- the argument that you're making.

MR. HENDRY: This is apples and oranges, Your Honor.

THE COURT: Okay.

MR. HENDRY: This is a completely different situation. And here's why Hildwin shouldn't be used to grant State's motion to strike in this case, which is -- which is because there was the reasoning in the Hildwin case that -- that Dr. Moore just does mock trials, was the notion. This is a trial practice tool. You can't use this in a postconviction arena, but, Your Honor, this is different. This is content analysis. And in this circuit, in Hillsborough County, Dr. Moore's testimony was granted by Judge Padgett in that hearing in Martinez, which you've heard described.

THE COURT: What was the first name of that defendant?

MR. HENDRY: I don't know, Your Honor.

THE COURT: Was it a homicide case?

MR. HENDRY: It was a first-degree murder case.

THE COURT: Which would be homicide. So, I would assume.

MR. HENDRY: Judge Padgett was the judge. I believe Ken Littman was the defense counsel. I believe Jay Pruner was the state attorney on the case.

THE COURT: And was there a Frye hearing before he gave his opinion?

Do we know?

MR. HENDRY: It's probably been a long time, so that's a good question, Your Honor.

But, yeah, Dr. Moore has been qualified in this very --

THE COURT: Let me ask you this question, I'm sorry. Because now I would be going outside the record, because I'm just curious, because again I'm unfamiliar with this content analysis.

Anybody care if I could find it, if I took a look at the transcript in Martinez?

MR. HENDRY: No objection from the defense, Your Honor.

THE COURT: From the AG's office?

MR. FREELAND: Frankly, Your Honor, I think it's not relevant --

THE COURT: Okay.

MR. FREELAND: -- what the transcript --

THE COURT: Okay.

MR. FREELAND: I mean, the case is what it is.

THE COURT: Okay.

MR. DRISCOLL: Your Honor, it's Joaquin is the first name of Mr. Martinez.

THE COURT: Okay. All right.

MR. DRISCOLL: There's a number of ways you could spell that, but --

THE COURT: Right. Now, may I just -- I was just curious for my own education if there was, in fact, a Frye hearing that was conducted, and if, in fact, Judge Padgett found that Dr. Moore qualified as an expert in this content analysis. And then if he then, in fact, utilized that as part of the decision that he made so -- because it's a two-part test, so -- anyway...

MR. FREELAND: If I -- my objection would be that we are really bound by the four corners of Martinez.

THE COURT: Right.

MR. FREELAND: I don't know that we can go

behind, but that's my position, anyway.

THE COURT: Right. No, I understand. Understand.

So anyway, okay, go ahead.

MR. HENDRY: Thank you.

Your Honor, with regards to relevant evidence, the definition of relevance, 90.401, says that relevant evidence is evidence tending to prove or disprove a material fact.

And I think it's clear that Dr. Moore's testimony is relevant to the issue in these cases about whether there was harmful error. He identified all the statements which appeared to have violated Caldwell. And for the Florida Supreme Court to say that in a typical 12-0 case that there is no harmless -- there is no harmful error based on a 12 to 0, for the court to say that, and for the court to rule just in a counting fashion and not consider the gravity of these errors which occurred at trial. In Hurst, 2016, U.S. Supreme Court, said it's got to be juries, not judges, who make the decision in these death-penalty cases.

The whole foundation -- this whole foundation in the state of Florida is based on juries not

making decisions. These are the instructions. These are the trials which were -- which were conducted in Taylor and Johnston, and all of the other 400 people on death row, Your Honor.

Now, this evidence is relevant. This evidence should be admissible because it goes to the issue, in fact, of were there errors at, Mr. Johnston's trial and Mr. Taylor's trial, which were harmful.

And if you look at the Caldwell, the interesting thing about Caldwell, that error occurred so late in trial of the guilt phase. It occurred on rebuttal argument by the State because it was just -- the defense attorney was telling the judge -- telling the jury please, don't kill Mr. Caldwell. Don't do it. Don't let that be your decision. So the State objected, and they said, you know, Your Honor, they can't do that because the Mississippi Supreme Court is going to review this decision. And so the judge said yeah, you can tell -- you can the jury that. So the prosecutor said, you know, your decision will be reviewed by an appellate court.

And these two cases, Taylor and Johnston, the jury was repeatedly over and over and over again instructed that it was not their decision. If

Caldwell can get relief on one error that happened just by an offhanded comment by a prosecutor in his rebuttal argument, for the voir dire, the repeated statements in voir dire, the verdict form in itself, it didn't say "verdict form," it just said "advisory recommendation," Your Honor.

The errors in this case, these cases are absolutely harmful, not harmless. Hurst versus 2016 told us that you can't have -- they didn't tell me us specifically, but we can't sustain a 12-0 death recommendation just based on the number 12-0. If one juror, just one juror in the Johnston case would have voted for life rather than death, if it was a 11 to 1 decision, we wouldn't be here on Johnston. Johnston would receive a new trial.

Is there a risk that just one juror in the Johnston case, was there a risk that just one juror was -- had his sense of responsibility diminished based on 60 some-odd repeated statements about diminished role and shared sentencing for this judge.

Your Honor, what this comes down to is denial to the access of the courts. And I filed in a supplemental authority the other day, we're not a Daubert state. There was an attempt -- there was

an attempt to move to try to get to a Daubert state but the Florida Supreme Court rejected that.

One thing they cited, interestingly, is that there was going to be the risk -- there was going to be the risk that the constitution would be violated. One of the constitutional rights, which would be violated, is the right to a jury trial. The right to present your evidence.

And what the State is trying to do here, Your Honor, they're trying to prevent the defense from presenting common sense evidence against their move to strike our expert.

They're taking an unreasonable position here, Your Honor. Dr. Moore's testimony should be admitted because under 90.702 clearly we've met the standard that is Dr. Moore's testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, the witness has applied the principles and methods reliably to the facts of this case.

Now, Your Honor, this is a death case. And all the jurisprudence -- years and years and years of jurisprudence says that death is different. If death is different, and if this is going to be such serious, serious matter, we're talking about taking

the life of an individual, just to put a date cut off of June 24th --

THE COURT: That's a whole different -- listen, that's a whole different topic about whether picking a date in 2004 and saying anybody before or anybody after, whether or not that's arbitrary and capricious, ultimately the United States Supreme Court is going to decide that issue. So the Florida Supreme Court has spoken. I am bound by its controlling precedent upon me. There's no point in really discussing that any further as far as I'm concerned, okay.

MR. HENDRY: Just as an aside to that, Your Honor, because there is the adverse case law about that date, June 24, 2002, but I just want to remind the Court that in our filing on the Taylor case, we raised the issue of James because there is still good case law under James which says that it would be fundamentally unfair to deny relief to somebody when such a huge change in the law has occurred.

Mr. Taylor raised the issues of the unconstitutionality of Florida's death penalty system. He raised the lack of unanimous requirements. And he should be afforded relief under James which is still good case law.

And I think the case law, which we cited in our supplemental authority on Mr. Taylor's case, it's clear that the Florida Supreme Court has made a decision that a nonunanimous verdict is harmful error -- presumptively harmful error.

One of the cases that I cited in the Johnston case with the supplemental authority, what I submitted, Your Honor, was the 11 to 1 cases. There are about three or four 11 to 1 cases.

MR. FREELAND: Your Honor, are we arguing the merits of --

THE COURT: Okay. We need to stick to just this motion, okay.

So, anyway, talking about Dr. Moore.

MR. HENDRY: So, Your Honor, Dr. Moore's testimony goes to the very relevant question of whether the errors at Mr. Johnston's trial were harmful or not. So Dr. Moore is prepared to testify. You've seen, you've read his written reports that there's not just one error that occurred just in passing in the rebuttal argument of the State, all throughout jury selection, all throughout the voir dire, all throughout the opening statement, all throughout the evidence presented, the jury instructions, the verdict form

itself.

So, Dr. Moore should testify, should be permitted to testify that the errors were harmful, not harmless because Hurst said you can't just take the jury's recommendation as the necessary finding of fact necessary to permit a death sentence.

So just to sum up, Your Honor --

THE COURT: Okay. Well, you don't need to sum up. I've heard all the argument. I guess my one final question would be for you, why is the Court not able to read the transcript and see this purported repetition, and then the Court make the decision whether or not the error -- we're really focusing on the -- on the post-Ring 12-0 death rec., any one of those cases. Why is the Court not able itself just to read the transcript and determine if, in fact, the error was harmless or not.

MR. HENDRY: The Court, as the trier of facts, would be capable of making that decision, but what we're trying to do as the defense is to have access to the Court to present our case to make sure you are fully informed before you might render a decision which -- which denies Mr. Johnston relief on this issue.

We want to make sure that we have been able to come to court and present our witness, to present evidence, and to present arguments against you making a decision adverse to Mr. Johnston. You're fully capable of doing that, Your Honor, and that is your job, but we're just simply asking that you consider our evidence, you consider his testimony, and you consider our arguments, which will be made after Dr. Moore has an opportunity to testify.

So, just in closing, based upon Dr. Moore's education, training, experience, he should testify about the matters contained in the written reports. He has applied sound scientific and sociologic methods and principles in his analysis here that are well-established and accepted in the scientific, sociological and educational community. He is qualified to analyze the trial transcripts, analyze the principles announced in Caldwell and reach conclusions that the jury's sense of responsibility was erroneously diminished over 50 and 100-fold times in these particular cases.

His distinguished career as an educator and a jury trial consultant make him qualified to offer opinions about how the jury was instructed, educated in these cases regarding the role as an

advisory panel to recommend the appropriate sentence in these cases.

He has educated the legal community, including attorneys, judges, and litigants about how to best prepare for and present a case to a jury. And how a jury -- and how and why a jury reaches particular decisions.

And I think that he could truly aid this Court in making -- because death is different, in making a fully informed decision before it rules adversely against Mr. Johnston.

THE COURT: Okay. Thank you.

Okay. So, you-all will get an order from me in the not too distant future. And we're still on the books for evidentiary hearings on June 15th at 1:30.

MR. FREELAND: Correct.

MS. BECHARD: Yes, Your Honor.

THE COURT: Unless you hear otherwise, I'll see you June 15th at 1:30.

All right. Okay. Thank you.

MS. BECHARD: Thank you.

(Concluded at 9:54 a.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

I, Mary E. Blazer, Registered Professional Reporter, AOC Circuit Court, hereby certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true record.

I further certify that I am not employed by or related to any of the parties in this matter, nor am I financially or otherwise interested in this action.

IN WITNESS WHEREOF, I have hereunto set my hand in Tampa, Hillsborough County, Florida, this 18th day of May, 2017.

Mary E. Blazer

Mary E. Blazer, RPR
AOC Circuit Court Reporter

IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO.: 97-CF-013379**
99-CF-011338

v.

RAY LAMAR JOHNSTON, **DIVISION: J**
Defendant.
_____/

AMENDED[1] ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS AND ORDER STRIKING JUNE 15, 2017 EVIDENTIARY HEARING

ORDER VACATING ORDER GRANTING STATE'S MOTION TO STRIKE DEFENDANT'S WITNESS/EXHIBIT LIST AND ATTACHMENTS AND ORDER STRIKING JUNE 15, 2017 EVIDENTIARY HEARING AS TO CASE 99-CF-011338 ONLY

THIS MATTER is before the Court on the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," filed on April 14, 2017. On May 3, 2017, Defendant filed his "Response to the State's Motion to Strike." On May 18, 2017, the Court held a hearing on the State's motion.

State's Motion to Strike Defendant's Witness/Exhibit List and Attachments

In the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments," it raises concerns about Dr. Harvey Allen Moore's ability to testify at an evidentiary hearing. (*See* State's Motion to Strike Defendant's Witness/Exhibit List and Attachments, attached.) Specifically, the State argues that "[i]t would be improper to elicit the speculative testimony of [Defendant's] expert at an evidentiary hearing, and it would be equally improper to consider the speculative conclusions found

[1] The Court notes its original "Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing," rendered on June 8, 2017, incorrectly included case 99-CF-011338. This order is intended to amend the previous order by vacating the June 8, 2017, order as to case 99-CF-11338 only.

in his expert's report." *Id.* The State argues that Dr. Moore should not be qualified as an expert witness due to the speculative nature of his testimony and report. *Id.* The State contends that Dr. Moore's testimony and his report lack new facts for the Court to consider and are irrelevant to the issues before the Court. *Id.*

Defendant's Response to the State's Motion to Strike

In response, Defendant argues that Dr. Moore's report "is full of facts necessary for this court to consider." (*See* Response to the State's Motion to Strike, attached.) The Defendant further argues that "[t]he question of whether Dr. Moore's methods are simply speculative or grounded in sound scientific principles is an issue of fact that needs to be explored at an evidentiary hearing." *Id.* As such, Defendant contends that his claims should not be summarily denied. *Id.*

Evidentiary Hearing

On May 18, 2017, an evidentiary hearing was held on the State's motion. (*See* Hrg. Trans., attached). Dr. Moore was called to testify. At the close of the hearing, both parties presented oral closing arguments. Based on the State's motion, the Defendant's response, the record, and the testimony and argument presented at the evidentiary hearing, the Court finds as follows:

Legal Standard for Expert Testimony in Florida

On February 16, 2017, the Florida Supreme Court declined to adopt the *Daubert* standard as part of the Florida Evidence Code to the extent that it is procedural. *See In re: Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (Fla. 2017). The Florida Supreme Court has the authority and obligation to adopt rules of practice and procedure for the courts of Florida. *See* Fla. Const. art. 5, § 2(a); *see also Perez v. Bell South Telecommunications*, 138 So. 3d 492, 498 n.12 (Fla. 3d DCA 2014).

In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle. In *Ramirez v. State*, 651

So. 2d 1164, 1166-67 (Fla. 1995) (internal citations omitted), the Florida Supreme Court enumerated the following four-step process in determining the admissibility of expert opinion testimony concerning a new or novel scientific principle:

> [T]he admission in evidence of expert opinion testimony regarding a new or novel scientific principle is a four-step process...First, the trial judge must determine whether such expert testimony will assist the jury in understanding the evidence or in determining a fact in issue...Second, the trial judge must decide whether the expert's testimony is based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs'...The third step in the process is for the trial judge to determine whether a particular witness is qualified as an expert to present opinion testimony on the subject in issue...Fourth, the judge may then allow the expert to render an opinion on the subject of his or her expertise, and it is then up to the jury to determine the credibility of the expert's opinion, which it may either accept or reject.

The second-prong of *Ramirez*, commonly known as the *Frye* test, requires the court to determine whether the testing procedure or device utilized to apply a scientific principle or discovery is sufficiently established to have gained general acceptance in the relevant scientific community. The *Frye* test is used to guarantee the legal reliability of new or novel scientific evidence in that the trial judge is required to "determine the level of agreement or dissension" within the relevant scientific community. *Brim v. State*, 779 So. 2d 427, 434 (Fla. 2d DCA 2000). In *Hadden v. State*, 690 So. 2d 573, 578 (Fla. 1997), the Florida Supreme Court explained the reliability prong of the *Frye* test as follows:

> [W]e firmly hold to the principle that it is the function of the court to not permit cases to be resolved on the basis of evidence for which a predicate of reliability has not been established. Reliability is fundamental to issues involved in the admissibility of evidence...novel scientific evidence must also be shown to be reliable on some basis other than simply that it is the opinion of the witness who seeks to offer the opinion. In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

"In utilizing the *Frye* test, the burden is on the proponent of the evidence to prove the general acceptance of both the underlying scientific principle and the testing procedure used to apply that principle to the facts at hand." *Ramirez,* 650 So. 2d at 1168. "The trial judge has the sole responsibility to determine this question." *Id.* at 1168; *see also Brim v. State*, 695 So. 2d 268, 272 (Fla. 1997) (holding the *Frye* determination is a question of law for the judge rather than a matter of weight for the jury). "[G]eneral acceptance in the scientific community can be established 'if use of the technique is supported by a clear majority of the members of that community.'" *Brim*, 695 So. 2d at 272 (internal citation omitted). In determining the general acceptance in the scientific community, the court "must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique." *Id.*

"Although the *Frye* standard may be designed to 'guarantee the reliability' of new scientific evidence, the trial judge is not actually called upon to determine whether various principles and procedures are 'reliable' from a scientific perspective." *Brim*, 779 So. 2d at 434. Trial judges must determine the "legal reliability, as a threshold test of legal relevance, by judging – as an objective outsider – the level of acceptance that a principle or procedure has achieved within a scientific community." *Id.*

Analysis and Ruling

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. The Court recognizes that Dr. Moore testified he has previously been certified in one criminal case as an expert in content analysis, with the one case being in this judicial circuit. (*See* Hrg. Trans. p. 23-26, attached). However, this Court must still consider whether Dr. Moore's testimony regarding content analysis and his report in the above-listed cases can meet the necessary standard to be allowed at the evidentiary hearing. Dr.

Moore testified that content analysis is a "well-established methodological technique" and that it has "provided the approach [to] developing theory in the social and behavioral sciences since the mid sixties." (Hrg. Trans. p. 5, attached). Dr. Moore's testimony is that content analysis is commonly used in the social sciences to study and collect empirical data from various forms of media. *Id.* Dr. Moore states that he used content analysis to find sentences and phrases used during Defendant's trial and sentencing that would have improperly influenced the jury. *Id.*

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 prejudice. Dr. Moore's analysis and report may be useful for research purposes, but it is unable to meet the second prong of the *Frye* test. *See Ramirez*, 651 So.2d at 1166 ("[T]he expert's testimony is[must be] based on a scientific principle or discovery that is 'sufficiently established to have gained general acceptance in the particular field in which it belongs.'").

The Court finds 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 ability. Dr. Moore's content analysis report is based on lay persons' reviews of the record. (*See* Hrg. Trans. p. 33, attached). It does not provide any additional knowledge or ability that the Court does not also possess. *Id.* Dr. Moore advised the Court that the ability to read the English language is "about all that's required" of the individuals reviewing the record. (Hrg. Trans. p. 40, attached). While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it is not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law.

Due to the Court's ruling above, it finds that Defendant's remaining claims are purely legal and can be resolved by the Court's own review of the record. As such, the Court finds no additional

hearings are required. Consequently, the June 15, 2017, evidentiary hearing currently scheduled for the above-listed case numbers will be stricken.

It is therefore **ORDERED AND ADJUDGED** that the State's "Motion to Strike Defendant's Witness/Exhibit List and Attachments" is **GRANTED**.

It is further **ORDERED** that the Clerk **SHALL STRIKE** the June 15, 2017, evidentiary hearing.

It is further **ORDERED AND ADJUDGED** that the "Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing" is hereby **VACATED** as to case 99-CF-011338 only.

DONE AND ORDERED in Chambers in Hillsborough County, Florida this ____ day of June, 2017.

ORIGINAL SIGNED

MICHELLE SISCO CIRCUIT JUDGE

MICHELLE SISCO, Circuit Judge

Attachments:

Motion to Strike Defendant's Witness/Exhibit List and Attachments
Response to the State's Motion to Strike
Hearing Transcript

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire, and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 14th day of June, 2017.

Deputy Clerk

Filing # 57918585 E-Filed 06/19/2017 11:13:18 AM

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v.

RAY LAMAR JOHNSTON,

Defendant.

_____/

CASE NO. 97-CF-013379

DIVISION J

MOTION FOR REHEARING ON THE STRIKING OF DR. MOORE

COMES NOW, the Defendant, Ray Lamar Johnston, by and through the undersigned counsel, and pursuant to Fla. R. Crim. Proc. 3.851(f)(7), hereby moves for rehearing of the Court's "Amended Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing" rendered June 12, 2017. In support of this motion, the Defendant states as follows:

The instant case, case no. 97-CF-013379 is a post-*Ring* unanimous death recommendation that should be afforded *Hurst* relief because the sixty-plus errors that occurred at trial were harmful, not harmless. The Defendant hoped to have this Court consider the testimony of Dr. Harvey Moore because death is different, and the Defendant should have the full opportunity to present any and all relevant evidence tending to show this Court that the errors that occurred at the Defendant's trial were harmful, not harmless.

At page 2 of 6 of the Amended Order this Court states that "In response, Defendant argues that Dr. Moore's report is 'full of facts necessary for this court to consider.'" The Defendant stated much more than that in the response. Specifically, Mr. Johnston 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 Dr. Moore's evidence resulted in violations of his due process rights. There was no robust analysis conducted of Mr. Johnston's Eighth Amendment claims.

At page 2 of 6, the Court states 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)(these law review articles were previously submitted as supplemental authority on June 13, and June 16, 2017 respectively).

At page 4 pf 6, this Court states, "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 this Court is inclined to grant relief from the death sentence, the Defendant would agree with that. But if the Court is inclined to find the *Hurst* and *Caldwell* errors harmless in this case, Dr. Moore's testimony is in fact needed. Mr. Johnston has 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.")(submitted as supplemental authority in this case May 16, 2017).

At page 5 of 6 the Court states, "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 overlooks supplemental authority filed May 16, 2017 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 May 18, 2017 testimony at transcript pages 20-21. In that 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, only 18 months ago. *Hurst* and its progeny will surely be the topics of continued research and continued content analysis. This Court should not overlook Dr. Moore's report and the *Caldwell* errors that occurred in this case, especially considering the holdings of *Hurst v. Florida* (2016). The current record before this Court is full of evidentiary support for the admission Dr. Moore's evidence in this case. All prongs of *Frye* for admissibility of Dr. Moore's evidence were met by Mr. Johnston.

At page 5 of 6 "The Court finds 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. In the typical high stakes auto negligence case, for example, in a civil wrongful death suit, attorneys regularly expert present testimony from an experienced and qualified accident reconstruction expert who typically explains why a driver was or was not at fault. Yes, the jury or trial judge at a bench trial can make this decision on their own; but the parties have the right to present evidence. To deny the parties the opportunity to present their case is denial of access to the courts. Because this is a case where this Court's decision might literally determine whether Mr. Johnston lives or dies, and because death is different, this Court should consider Mr. Johnston's evidence.

On a related issue, the Florida Supreme Court once faced the issue of admissibility of expert testimony from an attorney in a postconviction death penalty case at an evidentiary hearing. Justice Pariente in a special concurrence urged the following in *Lynch v. State*, 2 So. 3d 47 (Fla. 2008):

> In this case, the trial court allowed a complete proffer of Norgard's expert testimony but then disallowed all of it. The State essentially argued that, due to his vast experience in death penalty cases, the trial judge, Judge Eaton, did not need an expert to assist him in determining whether the attorney was deficient in his

> performance. I certainly agree that Judge Eaton is among the most knowledgeable judges in Florida on the death penalty. My concern, however, is that we do not appear to predicate the admissibility of expert testimony in postconviction proceedings on a particular judge's level of experience in the area of the death penalty. Ultimately it is this Court's decision, as a mixed question of law and fact, as to whether the attorney's conduct was deficient. While expert testimony is not necessary to establish a violation of *Strickland,* it is certainly one more useful source of evidence in allowing the court to make this all-important decision.
>
> ....
>
> I would urge trial judges, as they have done in the past, to allow expert testimony on these issues if the witness is qualified, prepared and available to testify. Such testimony may not be the key element in establishing deficiency but it certainly provides a useful "guide" in determining whether counsel's performance was reasonable.

Lynch at 87-88, 88. This Court should reconsider its decision to strike Dr. Moore's testimony in this case. Dr. Moore was certainly qualified, prepared, and available to testify.

At page 5 of 6 the Court states that "While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based on the arguments and the law." If this Court is inclined to follow adverse precedent on the issue of harmless error and deny the 3.851 Motion, then Dr. Moore's testimony is absolutely necessary in this case. The adverse precedent cited by the State in similarly-situated cases completely overlooked *Caldwell* considerations in the harmless error analysis. If one *Caldwell* error is enough to overcome the State's harmless error arguments in a United States Supreme Court case, certainly 65 *Caldwell* errors in this case should overcome these arguments as well.

Respectfully, this Court should permit rehearing and Dr. Moore's testimony, and reschedule a future evidentiary hearing date.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on June 19, 2017, we electronically filed the forgoing Response with the Clerk of the Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to all parties and to Circuit Court Judge Michelle Sisco.

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IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice and Trial Division

STATE OF FLORIDA **CASE NO: 97-CF-013379**

v.

RAY LAMAR JOHNSTON, **DIVISION: J**
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING ON THE STRIKING OF DR. MOORE

THIS MATTER is before the Court on Defendant's "Notice of Supplemental Authority (for Rehearing)," on Defendant's "Notice of Supplemental Authority (for Rehearing)," filed on June 16, 2017; and on Defendant's "Motion for Rehearing on the Striking of Dr. Moore," filed on June 19, 2017. After reviewing the motion, the supplemental authority, the court file, and the record, the Court finds as follows:

In his motion, Defendant seeks rehearing of this Court's June 12, 2017, "Amended Order Granting State's Motion to Striker Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing." Defendant states that he "hoped to have this Court consider the testimony of Dr. Harvey Moore because death is different, and the Defendant should have the fully opportunity to present any and all relevant evidence tending to show this Court that the errors that occurred at the Defendant's trial were harmful, not harmless."

Defendant argues, among other things, that "the failure to consider Dr. Moore's evidence resulted in violations of his due process rights" and that "Dr. Moore's content analysis did not employ novel scientific methods in this case." Defendant contends that the "current record before this Court is full of evidentiary support for the admission of Dr. Moore's evidence in this case" and "[a]ll prongs of *Frye* for admissibility of Dr. Moore's evidence were met." Defendant

concludes by requesting the Court to permit rehearing and reschedule a future evidentiary hearing date.

After reviewing the testimony and evidence presented at the May 18, 2017, hearing, the supplemental authority provided by Defendant, the court file, and the record, the Court finds that its June 12, 2017, order adequately addressed and disposed of Defendant's request to have Dr. Moore testify on his behalf. **Accordingly, a rehearing is not warranted.**

It is therefore **ORDERED AND ADJUDGED** that Defendant's "Motion for Rehearing on the Striking of Dr. Moore" is hereby **DENIED**.

DONE AND ORDERED in Chambers, in Hillsborough County, Florida, this ____ day of June, 2017.

ORIGINAL SIGNED

JUN 28 2017

MICHELLE SISCO
CIRCUIT JUDGE

MICHELLE SISCO, Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this order has been furnished to Timothy Freeland, Esquire, and C. Suzanne Bechard, Esquire, Office of the Attorney General, 3507 E. Frontage Rd., Suite 200, Tampa, FL 33607-7013; and to David Dixon Hendry, Esquire, James Driscoll, Jr., Esquire, and Gregory W. Brown, Esquire, CCRC-M, 12973 North Telecom Parkway, Temple Terrace, FL 33637, by U.S. mail; and to Jay Pruner, Esquire, Office of the State Attorney, 419 Pierce Street, Tampa, FL 33602, by inter-office mail, on this 26th day of June, 2017.

Deputy Clerk

APPENDIX J

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: August 22, 2018

Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 269

Number of prisoners who have obtained relief under *Hurst*: 133 (48.54%)

Number of prisoners who have been denied relief under *Hurst*: 141 (51.46%)

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendations of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Abdool, Dane	Orange	N	N	10-2	Y	4/6/17
Allred, Andrew	Seminole	N	WAIVED JURY		N	11/16/17
Alston, Pressley Bernard	Duval	Y	N	9-3	N	1/22/18
Altersberger, Joshua Lee	Highlands	N	N	9-3	Y	4/27/17
Anderson, Charles L.	Broward	N	N	8-4	Y	3/9/17
Anderson, Richard	Hillsborough	Y	N	11-1	N	1/26/18
Archer, Robin Lee	Escambia	Y	N	7-5	N	3/17/17
Armstrong, Lancelot Uriley	Broward	N	N	9-3	Y	1/19/17
Asay, Marc	Duval	Y	N	9-3, 9-3	N **(EXECUTED)**	12/22/16
Atwater, Jeffrey Lee	Pinellas	Y	N	11-1	N	1/23/18
Ault, Howard Steven	Broward	N	N	9-3, 10-2	Y	3/9/17
Bailey, Robert J.	Bay	N	N	11-1	Y	7/6/17
Baker, Cornelius	Flagler	N	N	9-3	Y	3/23/17
Banks, Donald	Duval	N	N	10-2	Y	4/20/17
Bargo, Michael Shane	Marion	N	N	10-2	Y	6/29/17
Barnhill, Arthur	Seminole	N	N	9-3	Y	2/20/17
Barwick, Darryl Brian	Bay	Y	Y	12-0	N	2/28/18
Bates, Kayle Barrington	Bay	Y	N	9-3	N	1/22/18
Beasley, Curtis W.	Polk	Y	N	10-2	N	1/23/18
Belcher, James	Duval	N	N	9-3	Y	11/2/17
Bell, Michael	Duval	Y	Y	12-0, 12-0	N	1/29/18
Bevel, Thomas	Duval	N	N	8-4, 12-0	Y*	6/15/17
Blanco, Omar	Broward	Y	N	10-2	N	7/19/18
Booker, Stephen Todd	Duval	Y	N	8-4	N	1/30/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Bowles, Gary Ray	Duval	Y	Y	12-0	N	1/29/18
Braddy, Harrel	Miami-Dade	N	N	11-1	Y	6/15/17
Bradley, Brandon Lee	Brevard	N	N	10-2	Y	3/30/17
Bradley, Donald	Clay	Y	N	10-2	N	1/22/18
Branch, Eric Scott	Escambia	Y	N	10-2	N **(EXECUTED)**	1/22/18
Brookins, Elijah	Gadsden	N	N	10-2	Y	4/20/17
Brooks, Lamar	Okaloosa	N	N	9-3, 11-1	Y	3/10/17
Brown, Paul Alfred	Hillsborough	Y	N	7-5	N	1/29/18
Brown, Paul Anthony	Volusia	Y	Y	12-0	N	2/28/18
Burns, Daniel Jr.	Manatee	Y	Y	12-0	N	1/23/18
Buzia, John	Seminole	N	N	8-4	Y	4/6/17
Byrd, Milford Wade	Hillsborough	Y	Unknown	Unknown	N	2/28/18
Calloway, Tavares David	Miami-Dade	N	N	7-5, 7-5, 7-5, 7-5, 7-5	Y	1/26/17
Campbell, John	Citrus	N	N	8-4	Y	8/30/17
Card, James	Bay	N	N	11-1	Y	5/4/17
Carr, Emilia	Marion	N	N	7-5	Y	2/7/17
Carter, Pinkney	Duval	N	N	9-3, 8-4	Y	10/4//17
Caylor, Matthew	Bay	N	N	8-4	Y	5/18/17
Clark, Ronald Wayne Jr.	Duval	Y	N	11-1	N	1/23/18
Cole, Loran	Marion	Y	Y	12-0	N	1/23/18
Cole, Tiffany Ann	Duval	N	N	9-3, 9-3	Y	6/29/17
Conde, Rory	Miami-Dade	N	N	9-3	Y	8/31/17
Consalvo, Robert	Broward	Y	N	11-1	N	1/31/18
Cox, Allen	Lake	N	N	10-2	Y	7/23/17
Cozzie, Steven Anthony	Walton	N	Y	12-0	N	5/11/17
Crain, Willie Seth	Hillsborough	N	Y	12-0	N	4/5/18
Dailey, James	Pinellas	Y	Y	12-0	N	6/26/18
Damren, Floyd William	Clay	Y	Y	12-0	N	2/2/18
Darling, Dolan a/k/a Sean Smith	Orange	N	N	11-1	Y	3/29/17
Davis, Adam W.	Hillsborough	N	N	7-5	Y	5/2/17
Davis, Barry T.	Walton	N	N	9-3, 10-2	Y	5/11/17
Davis, Jr., Leon	Polk	N	Y	12-0, 12-0, 8-4	N	11/10/16
Davis, Jr., Leon	Polk	N	WAIVED JURY		N	11/10/16
Davis, Mark Allen	Pinellas	Y	N	8-4	N	1/29/18
Davis, Toney D.	Duval	Y	N	11-1	N	2/17/17
Dennis, Labrant	Miami-Dade	N	N	11-1, 11-1	Y	7/7/17
Deparvine, Williams James	Hillsborough	N	N	8-4, 8-4	Y	4/6/17
Derrick, Samuel Jason	Pasco	Y	N	7-5	N	2/2/18
Dessaure, Kenneth	Pinellas	N	WAIVED JURY		N	11/16/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Deviney, Randall	Duval	N	N	8-4	Y	3/23/17
Diaz, Joel	Lee	N	N	9-3	Y	6/15/17
Dillbeck, Donald David	Leon	Y	N	8-4	N	1/24/18
Doorbal, Noel	Miami-Dade	N	N	8-4, 8-4	Y	9/20/17
Doty, Wayne	Bradford	N	N	10-2	Y	8/7/17
Douglas, Luther	Duval	N	N	11-1	Y	6/29/17
Doyle, Daniel	Broward	Y	N	8-4	N	6/28/18
Dubose, Rasheem	Duval	N	N	8-4	Y	2/9/17
Durousseau, Paul	Duval	N	N	10-2	Y	1/31/17
Eaglin, Dwight	Charlotte	N	N	8-4, 8-4	Y	4/3/17
Ellerbee, Terry	Okeechobee	N	N	11-1	Y	12/21/17
England, Richard	Volusia	N	N	8-4	Y	5/22/17
Evans, Paul H.	Indian River	N	N	9-3	Y	3/20/17
Evans, Steven Maurice	Orange	Y	N	11-1	N	1/24/18
Evans, Wydell Jody	Brevard	N	N	10-2	Y	3/24/17
Everett, Paul Glenn	Bay	N	Y	12-0	N	5/24/18
Finney, Charles	Hillsborough	Y	N	9-3	N	1/26/18
Floyd, Maurice Lamar	Putnam	N	N	11-1	Y	5/17/17
Ford, James D.	Charlotte	Y	N	11-1, 11-1	N	1/23/18
Foster, Charles	Bay	Y	N	8-4	N	1/29/18
Foster, Kevin Don	Lee	Y	N	9-3	N	1/29/18
Fotopoulos, Konstantinos	Volusia	Y	N	8-4, 8-4	N	1/29/18
Frances, David	Orange	N	N	9-3, 10-2	Y	3/29/17
Franklin, Richard P.	Columbia	N	N	9-3	Y	11/23/16
Gamble, Guy R.	Lake	Y	N	10-2	N	1/29/18
Gaskin, Louis	Flagler	Y	N	8-4, 8-4	N	2/28/18
Geralds, Mark Allen	Bay	Y	Y	12-0	N	2/28/18
Glover, Dennis T.	Duval	N	N	10-2	Y	9/14/17
Gonzalez, Leonard	Escambia	N	N	10-2	Y	5/23/17
Gonzalez, Ricardo	Miami-Dade	Y	N	8-4	N	3/23/18
Gordon, Robert R.	Pinellas	Y	N	9-3	N	1/31/18
Gregory, William	Volusia	N	N	7-5, 7-5	Y	8/31/17
Griffin, Michael Allen	Miami-Dade	Y	N	10-2	N	2/2/18
Grim, Norman	Santa Rosa	N	Y	12-0	N	3/29/18
Guardado, Jesse	Walton	N	Y	12-0	N	5/11/17
Gudinas, Thomas Lee	Collier	Y	N	10-2	N	1/30/18
Guzman, James	Volusia	N	N	11-1	Y	2/22/18
Guzman, Victor	Miami-Dade	N	N	7-5	Y	4/6/17
Hall, Donte Jermaine	Lake	N	N	8-4	Y	6/15/17
Hall, Enoch D.	Volusia	N	Y	12-0	N	2/9/17
Hamilton, Richard	Hamilton	Y	N	10-2	N	2/18/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Hampton, John	Pinellas	N	N	9-3	Y	5/4/17
Hannon, Patrick	Hillsborough	Y	Y	12-0	N **(EXECUTED)**	11/1/17
Hartley, Kenneth	Duval	Y	N	9-3	N	1/26/18
Hayward, Steven	St. Lucie	N	N	8-4	Y	5/6/18
Heath, Ronald Palmer	Alachua	Y	N	10-2	N	2/28/18
Hernandez, Michael	Santa Rosa	N	N	11-1	Y	5/11/17
Hernandez-Alberto, Pedro	Hillsborough	N	N	10-2, 10-2	Y	5/9/17
Hertz, Gerry	Wakulla	N	N	10-2, 10-2	Y	5/18/17
Heyne, Justin	Brevard	N	N	10-2, 8-4	Y	4/6/17
Hitchcock, James	Orange	Y	N	10-2	N	8/10/17
Hobart, Robert	Santa Rosa	N	N	7-5	Y	2/21/18
Hodges, George Michael	Hillsborough	Y	N	10-2	N	2/2/18
Hodges, Willie James	Escambia	N	N	10-2	Y	3/16/17
Hojan, Gerhard	Broward	N	N	9-3, 9-3	Y	1/31/17
Huggins, John	Orange	N	N	9-3	Y	5/23/17
Hunter, Jerone	Volusia	N	N	10-2, 10-2, 9-3, 9-3	Y	6/16/17
Hurst, Timothy	Escambia	N	N	7-5	Y	10/14/16
Hutchinson, Jeffrey	Okaloosa	N	WAIVED JURY	WAIVED JURY	N	3/15/18
Israel, Connie Ray	Duval	N	N	7-5	Y	3/21/17
Jackson, Etheria Verdell	Duval	Y	N	7-5	N	1/24/18
Jackson, Kenneth R.	Hillsborough	N	N	11-1	Y	3/23/17
Jackson, Michael James	Duval	N	N	8-4, 8-4	Y	6/9/17
Jackson, Ray	Volusia	N	N	9-3	Y	4/24/17
Jeffries, Kevin G.	Bay	N	N	10-2	Y	7/13/17
Jeffries, Sonny Ray	Orange	Y	N	11-1	N	1/26/18
Jennings, Brandy Bain	Collier	Y	N	10-2, 10-2, 10-2	N	1/29/18
Jimenez, Jose	Miami-Dade	Y	Y	12-0	N	6/28/18
Johnson, Emanuel	Sarasota	Y	N	8-4, 10-2	N	2/2/18
Johnson, Paul Beasley	Polk	N	N	11-1, 11-1, 11-1	Y	12/1/16
Johnson, Richard Allen	St. Lucie	N	N	11-1	Y	3/24/17
Johnson, Ronnie	Miami-Dade	Y	N	7-5, 9-3	N	3/27/18
Johnston, Ray	Hillsborough	N	N	11-1	Y	7/21/17
Johnston, Ray	Hillsborough	N	Y	12-0	N	7/21/17
Jones, Henry Lee	Brevard	N	Y	12-0	N	3/2/17
Jones, Marvin Burnett	Duval	Y	N	9-3	N	1/22/18
Jones, Victor	Miami-Dade	Y	Y/N	10-2, 12-0	N	9/28/17
Jordan, Joseph	Volusia	N	N	10-2	Y	8/22/17
Kaczmar, III, Leo L.	Clay	N	Y	12-0	N	1/31/17
Kelley, William H.	Highlands	Y	N	8-3 [not a typo]	N	1/26/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
King, Cecil	Duval	N	N	8-4	Y	7/12/17
King, Michael L.	Sarasota	N	Y	12-0	N	1/26/17
Kirkman, Vahtiece	Brevard	N	Y	10-2	Y	1/11/18
Knight, Richard	Broward	N	Y	12-0, 12-0	N	1/31/17
Kocaker, Genghis	Pinellas	N	N	11-1	Y	10/6/17
Kokal, Gregory Alan	Duval	Y	Y	12-0	N	1/24/18
Kopsho, William M.	Marion	N	N	10-2	Y	1/19/17
Krawczuk, Anton	Duval	Y	Y	12-0	N	1/31/18
Lamarca, Anthony	Pinellas	Y	N	11-1	N	1/30/18
Lambrix, Cary Michael	Glades	Y	N	8-4, 10-2	N **(EXECUTED)**	9/29/17
Lawrence, Gary	Santa Rosa	Y	N	9-3	N	2/2/18
Lawrence, Jonathan	Santa Rosa	N	N	11-1	Y	3/17/17
Lebron, Jermaine	Osceola	N	N	7-5	Y	4/20/17
Lebron, Joel	Miami-Dade	N	N	9-3	Y	12/21/17
Lightbourne, Ian	Marion	Y	N	Unrecorded	N	1/26/18
Long, Robert Joe	Hillsborough	Y	Y	12-0	N	1/29/18
Lucas, Harold Gene	Lee	Y	N	11-1	N	1/24/18
Mansfield, Scott	Osceola	Y	Y	12-0	N	7/5/18
Marquard, John	St. Johns	Y	Y	12-0	N	1/24/18
Martin, David	Clay	N	N	9-3	Y	7/13/17
Matthews, Douglas	Volusia	N	N	10-2	Y	12/5/17
McCoy, Richard (aka Jamil Rashid)	Duval	N	N	7-5	Y	9/6/17
McCoy, Thomas	Walton	N	N	11-1	Y	11/8/17
McGirth, Renaldo Devon	Marion	N	N	11-1	Y	1/26/17
McKenzie, Norman Blake	St. Johns	N	N	10-2, 10-2	Y	6/19/17
McLean, Derrick	Orange	N	N	9-3	Y	4/24/17
McMillian, Justin	Duval	N	N	10-2	Y	4/13/17
Melton, Antonio Lebaron	Escambia	Y	N	8-4	N	2/2/18
Mendoza, Marbel	Miami-Dade	Y	N	7-5	N	1/30/18
Merck, Jr., Troy	Pinellas	N	N	9-3	Y	5/5/17
Middleton, Dale	Okeechobee	N	Y	12-0	N	3/9/17
Miller, David Jr.	Duval	Y	N	7-5	N	1/31/18
Miller, Lionel Michael	Orange	N	N	11-1	Y	5/8/17
Morton, Alvin	Pasco	Y	N	11-1, 11-1	N	2/2/18
Morris, Dontae	Hillsborough	N	Y	12-0, 12-0	N	4/27/17
Morris, Dontae	Hillsborough	N	N	10-2	Y	1/11/18
Morris, Robert D.	Polk	Y	N	8-4	N	1/26/18
Mosley, John F.	Duval	N	N	8-4	Y	12/22/16
Mullens, Khadafy	Pinellas	N	WAIVED JURY		N	6/16/16

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Murray, Gerald Delane	Duval	N	N	11-1	Y	4/4/17
Nelson, Joshua D.	Lee	Y	Y	12-0	N	1/31/18
Nelson, Micah	Polk	N	N	9-3	Y	3/8/17
Newberry, Rodney	Duval	N	N	8-4	Y	4/6/17
Oats, Jr. Sonny Boy	Marion	Y	UNKNOWN		N	5/25/17
Occhicone, Dominick A.	Pasco	Y	N	7-5	N	1/30/18
Okafor, Bessman	Orange	N	N	11-1	Y	6/8/17
Oliver, Terence Tabius	Brevard	N	Y	12-0, 12-0	N	4/6/17
Orme, Roderick	Bay	N	N	11-1	Y	3/30/17
Overton, Thomas M.	Monroe	Y	N	8-4, 9-3	N	2/2/18
Owen, Duane Eugene	Palm Beach	Y	N	10-2, 10-2	N	6/26/18
Pace, Bruce Douglas	Santa Rosa	Y	N	7-5	N	1/30/18
Pagan, Alex	Broward	N	N	7-5, 7-5	Y	2/1/18
Parker, J.B.	Martin	N	N	11-1	Y	4/20/17
Partin, Phillup Alan	Pasco	N	N	9-3	Y	3/27/17
Pasha, Khalid	Hillsborough	N	N	11-1, 11-1	Y	5/11/17
Patrick, Eric Kurt	Broward	N	N	7-5	Y	6/14/18
Peede, Robert	Orange	Y	N	11-1	N	7/19/18
Peterka, Daniel Jon	Okaloosa	Y	N	8-4	N	1/22/18
Peterson, Charles	Pinellas	N	N	8-4	Y	8/8/17
Peterson, Robert Earl	Duval	N	N	7-5	Y	7/6/17
Pham, Tai	Seminole	N	N	10-2	Y	3/22/17
Phillips, Galante	Duval	N	N	7-5	Y	4/20/17
Phillips, Harry Franklin	Miami-Dade	Y	N	7-5	N	1/22/18
Philmore, Lenard James	Martin	N	Y	12-0	N	1/25/18
Pietri, Norberto	Palm Beach	Y	N	8-4	N	2/2/18
Poole, Mark	Polk	N	N	11-1	Y	3/31/17
Pope, Thomas Dewey	Broward	Y	N	9-3	N	2/28/18
Puiatti, Carl	Pasco	Y	N	11-1	N	1/23/18
Quince, Kenneth Darcell	Volusia	Y	WAIVED JURY		N	1/18/18
Raleigh, Bobby Allen	Volusia	Y	Y	12-0, 12-0	N	2/28/18
Reaves, William	Indian River	Y	N	10-2	N	5/2/18
Reynolds, Michael	Seminole	N	Y	12-0, 12-0	N	4/5/18
Rhodes, Richard Wallace	Pinellas	Y	N	10-2	N	1/23/18
Rigterink, Thomas William	Polk	N	N	7-5, 7-5	Y	4/6/17
Rimmer, Robert	Broward	N	N	9-3, 9-3	Y	6/29/17
Robards, Richard	Pinellas	N	N	7-5, 7-5	Y	4/6/17
Rodgers, Jeremiah	Santa Rosa	N	WAIVED JURY		N	2/8/18
Rodgers, Theodore	Orange	N	N	8-4	Y	4/3/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Rogers, Glen Edward	Hillsborough	Y	Y	12-0	N	1/30/18
Rodriguez, Manuel Antonio	Miami-Dade	Y	Y	12-0, 12-0, 12-0	N	1/31/18
San Martin, Pablo	Miami-Dade	Y	N	9-3	N	2/28/18
Schoenwetter, Randy	Brevard	N	N	10-2, 9-3	Y	4/7/17
Seibert, Michael	Broward	N	N	9-3	Y	6/22/17
Serrano, Nelson	Polk	N	N	9-3, 9-3, 9-3, 9-3	Y	5/11/17
Sexton, John	Pasco	N	N	10-2	Y	6/29/17
Silvia, William	Seminole	N	N	11-1	Y	2/20/17
Simmons, Eric Lee	Lake	N	N	8-4	Y	12/22/16
Sireci, Henry Perry	Orange	Y	N	11-1	N	1/31/18
Sliney, Jack R.	Charlotte	Y	N	7-5	N	1/31/18
Smith, Corey	Miami-Dade	N	N	9-3, 10-2	Y	3/16/17
Smith, Joseph	Sarasota	N	N	10-2	Y	7/13/17
Smith, Stephen V.	Charlotte	N	Y	9-3	Y	4/21/17
Smithers, Samuel	Hillsborough	N	Y	12-0, 12-0	N	3/29/18
Snelgrove, David B.	Flagler	N	N	8-4, 8-4	Y	5/11/17
Sochor, Dennis	Broward	Y	N	10-2	N	1/30/18
Sparre, David	Duval	N	Y	12-0	N	6/20/18
Stein, Steven Edward	Duval	Y	N	10-2	N	1/31/18
Stephens, Jason Demetrius	Duval	Y	N	9-3	N	1/22/18
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	Y	4/25/17
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	N	1/26/18
Sweet, William Earl	Duval	Y	N	10-2	N	1/24/18
Suggs, Ernest	Walton	Y	N	7-5	N	3/17/17
Tanzi, Michael	Monroe	N	Y	12-0	N	4/5/18
Taylor, John Calvin	Clay	N	N	10-2	Y	10/12/17
Taylor, Perry	Hillsborough	Y	N	8-4	N	5/3/18
Taylor, Steven Richard	Duval	Y	N	10-2	N	1/24/18
Taylor, William Kenneth	Hillsborough	N	Y	12-0	N	4/5/18
Thomas, William Gregory	Duval	Y	N	11-1	N	1/24/18
Thompson, William	Miami-Dade	Y	N	7-5	N	7/20/18
Trease, Robert J.	Sarasota	Y	N	11-1	N	1/24/18
Trepal, George	Polk	Y	N	9-3	N	1/26/18
Trotter, Melvin	Manatee	Y	N	11-1	N	1/26/18
Troy, John	Sarasota	N	N	11-1	Y	6/13/17
Truehill, Quentin	St. Johns	N	Y	12-0	N	2/23/17
Tundidor, Randy W.	Broward	N	Y	12-0	N	4/27/17
Turner, James Daniel	St. Johns	N	N	10-2	Y	6/19/17
Twilegar, Mark	Lee	Y	WAIVED JURY		N	11/2/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Victorino, Troy	Volusia	N	N	10-2, 10-2, 9-3, 7-5	Y	6/14/17
Wade, Alan L.	Duval	N	N	11-1, 11-1	Y	5/1/17
Walls, Frank	Okaloosa	Y	Y	12-0	N	1/22/18
Wheeler, Jason	Lake	N	N	10-2	Y	5/23/17
White, Dwayne	Seminole	N	N	8-4	Y	3/30/17
Whitfield, Ernest	Sarasota	Y	N	7-5	Y	1/30/18
White, William Melvin	Orange	N	N	10-2	Y	4/20/17
Whitton, Gary Richard	Walton	Y	Y	12-0	N	1/31/18
Willacy, Chadwick	Brevard	Y	N	11-1	N	1/23/18
Williams, Donald Otis	Lake	N	N	9-3	Y	1/19/17
Williams , Ronnie Keith	Broward	N	N	10-2	Y	6/29/17
Windom, Curtis	Orange	Y	Y	12-0, 12-0, 12-0	N	1/23/18
Wood, Zachary Taylor	Washington	N	Y	12-0	Y**	1/31/17
Woodel, Thomas	Polk	N	N	7-5	Y	8/18/17
Zack, Michael Duane	Escambia	Y	N	11-1	N	6/15/17
Zakrzewski, Edward	Okaloosa	Y	N	7-5, 7-5, 6-6	N	5/25/17
Zommer, Todd	Osceola	N	N	10-2	Y	4/13/17

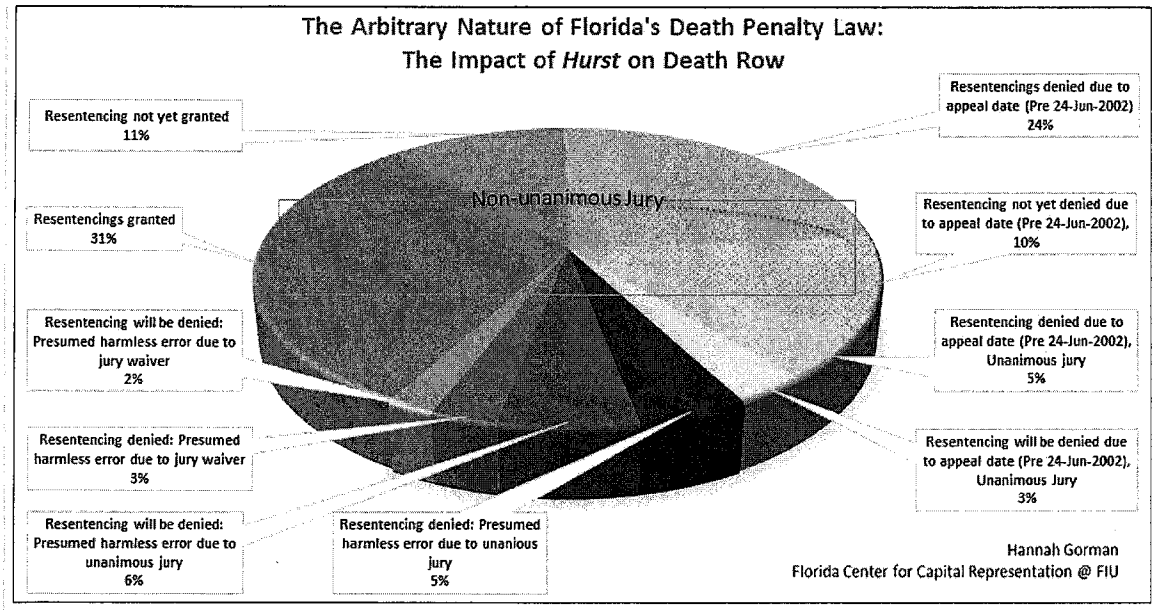
* The Florida Supreme Court granted relief under *Hurst* on Bevel's non-unanimous death sentence, but granted relief based on ineffective assistance of counsel on Bevel's unanimous death sentence.

** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. Not counted in total.

For more background on the Florida legislative and court actions related to the jury unanimity issue, see ***Hurst v. Florida* Background**.

To check on the status of cases involving Florida death-row prisoners with non-unanimous jury recommendations for death whose sentences became final after the U.S. Supreme Court's June 2002 decision in *Ring v. Arizona*, see **this chart**.

Hannah Gorman, with the Florida Center for Capital Representation at Florida International University, created the pie chart below (November 16, 2017) based on her analysis of Florida death sentences that have been or will be overturned based on *Hurst*, as well as sentences that have been or will be affirmed because they either (A) became final before *Ring* (i.e., based on the date of their appeal) or (B) were presumed harmless based on a unanimous jury verdict or the defendant's waiver of a jury sentence. This chart includes prisoners who have had their death sentences affirmed by Circuit Courts. According to this information, there are a total of 377 prisoners who were sentenced under the unconstitutional sentencing scheme, but only 42% (157) of Florida death-row prisoners who were sentenced under that scheme will be entitled to relief.


The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings granted
31%
Resentencing will be denied: Presumed harmless error due to jury waiver
2%
Resentencing denied: Presumed harmless error due to jury waiver
3%
Resentencing will be denied: Presumed harmless error due to unanimous jury
6%
Resentencing denied: Presumed harmless error due to unanious jury
5%
Non-unanimous Jury
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing denied due to appeal date (Pre 24-Jun-2002), Unanimous jury
5%
Resentencing will be denied due to appeal date (Pre 24-Jun-2002), Unanimous Jury
3%
Hannah Gorman
Florida Center for Capital Representation @ FIU