DOCKET NO. 18-5793

IN THE SUPREME COURT OF THE UNITED STATES

RAY LAMAR JOHNSTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

Ray Lamar Johnston abducted his final victim, Leanne Coryell, from the apartment complex where she lived and took her to the grounds of a nearby Catholic church. There Johnston forced her to disrobe before he beat, raped, and ultimately strangled her until she died; strands of grass were found in the fingers of her still clenched left hand. Nor was this Johnston's first offense; documentation of his life-long predilection for forcible control, humiliation and sexual violence towards women was introduced at his trial. These included past convictions for rape, burglary with assault, and two counts of robbery, all committed while Johnston was living in Georgia and Alabama. Once released from prison in Georgia, Johnston moved to Florida, where he committed two armed kidnappings involving different female victims that the sentencing judge characterized as "chillingly similar" to Leanne Coryell's final hours.

Johnston's sentencing jury was advised, in accordance with the correct law in Florida at the time, that they were required to determine beyond a reasonable doubt the existence of the necessary aggravating factors before deciding whether or not to recommend a death sentence. They were also instructed, again in

accordance with Florida law, that the court would give their recommendation great weight in determining what sentence to impose. The court ultimately accepted the jury's unanimous recommendation and sentenced Johnston to death, a determination that was affirmed on direct appeal.

Following this Court's ruling in Hurst v. Florida,[1] Johnston filed a postconviction motion. In addition to asserting that his sentencing procedure suffered from the same infirmities identified by this Court in Hurst, he also claimed that his jury should not have been told that their sentencing decision was merely a recommendation. In Johnston's view, his penalty phase jury's instructions violated Caldwell v. Mississippi.[2] In support of this claim, Johnston sought to employ an "expert" sociologist, whose team of laypeople combed the record for any language that might possibly support a finding that the jury's role was diminished. The postconviction court, after noting that the only "expertise" employed was the ability to read English, excluded Johnston's proposed expert and ultimately entered an order denying relief as to all claims.

On appeal, the Florida Supreme Court agreed that no Hurst or Caldwell violations had occurred and also affirmed the lower

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[1] Hurst v. Florida, 136 S. Ct. 616 (2016).

[2] Caldwell v. Mississippi, 472 U.S. 320 (1985).

court's decision to exclude the defense expert. The Florida Supreme Court's opinion gives rise to the following questions:

1. Whether this Court should grant review of the Florida Supreme Court's determination that Johnston's jury was not misled nor was its responsibility minimized as discussed in this Court's decision in Caldwell v. Mississippi, 472 U.S. 320 (1985) by an instruction that accurately reflected Florida law at the time of sentencing?

2. Whether this Court should accept review of Johnston's claim that his right to due process was violated by the postconviction court's decision to exclude expert testimony, where the "expertise" involved the ability to read English?

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PARTIES TO THE PROCEEDINGS

The following were parties in the proceedings below:

1) Ray Lamar Johnston, Petitioner in this Court, was the appellant below.

2) The State of Florida, Respondent in this Court, was the appellee below.

CITATION TO OPINION BELOW

The published opinion of the Florida Supreme Court is reported at Johnston v. State, 246 So. 3d 266 (Fla. 2018).

STATEMENT OF JURISDICTION

The mandate of the Florida Supreme Court was entered on July 19, 2018. (Resp. App. A). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Petitioner, Ray Lamar Johnston, was convicted of first-degree murder for the murder of Leanne Coryell. The following facts are drawn from the Florida Supreme Court's opinion affirming Johnston's convictions on direct appeal:

> 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 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."
>
> 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.
>
> 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.
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> Johnston v. State, 841 So. 2d 349, 351-52 (Fla. 2002).

The prosecution established four aggravators during the penalty phase: (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. The trial court found one statutory

mitigator, that Johnston's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired, along with numerous non-statutory mitigators. Johnston v. State, 841 So. 2d 349, 355 (Fla. 2002).

In 2017, following this Court's decision in Hurst v. Florida, Johnston filed a successive postconviction motion alleging not only entitlement to relief pursuant to Hurst, but also that the jury instructions improperly diminished his sentencing jury's role in violation of Caldwell v. Mississippi. In support of his argument, Johnston sought to introduce the report and testimony of sociologist Dr. Harvey Moore, whose team had examined the trial record and, based on his understanding of the requirements of Caldwell, assessed the number of times the record contained language that might be interpreted as a Caldwell-type error. The postconviction court, after noting that Dr. Moore's content-analysis approach invaded the province of the Court (whose duty it is to read and interpret the record) and required no greater expertise than the ability to read and understand English, declined to accept Dr. Moore's assistance and granted the State's motion to strike him as a defense witness. The postconviction court's order denying relief as to all claims was affirmed on review by the Florida Supreme Court.

Johnston v. State, 246 So. 3d 266 (Fla. 2018). Johnston now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DECLINE TO GRANT REVIEW OF THE FLORIDA SUPREME COURT'S FINDING THAT JOHNSTON'S PENALTY PHASE JURY INSTRUCTIONS, WHICH ACCURATELY REFLECTED FLORIDA LAW AT THE TIME OF SENTENCING, DID NOT VIOLATE CALDWELL V. MISSISSIPPI.

Following his conviction for first-degree premeditated murder, Johnston's penalty phase jury was instructed, without objection from the defense[3] and consistent with then-existing Florida law, that its role was to advise the court as to an appropriate sentence. Johnston's jury was told to assess whether sufficient aggravating factors existed, whether any mitigating circumstances outweighed the aggravators, and that their sentencing recommendation would be given great weight by the court in deciding what sentence to impose. This was the law in effect at the time of Johnston's sentence, and it is significant here that the parties are in complete agreement regarding this important fact.

Johnston's primary argument before this Court is his claim, raised for the first time in a state postconviction motion filed over a dozen years after his conviction became final, that his penalty phase proceedings violated this Court's decision in

[3] Respondent's Appendix B, p. 1815. Petitioner's failure to preserve this claim was raised in the State's response to Johnston's postconviction motion. Johnston affirmatively told the trial judge that he had no objections to the court's penalty phase jury instructions as given.

Caldwell v. Mississippi, 472 U.S. 320 (1985). Setting aside the clear procedural default caused by Johnston's failure to raise this claim at the time of trial, it is nevertheless clear that no such violation occurred. Johnston's jury was not misled regarding their role in the sentencing process, they were accurately instructed in conformity with contemporaneous Florida law and, perhaps most significant of all, they were told that the trial judge is rarely permitted to reject their findings, and that their sentencing recommendation would be given great weight. Under these circumstances, Johnston cannot establish that a Caldwell violation occurred, which is exactly what the Florida courts concluded. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) and Reynolds v. State, 43 Fla. L. Weekly S163, 169 (Fla. April 5, 2018) (explaining that under Romano, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to Ring simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Federal versus State retroactivity standards

This case is an inappropriate vehicle for certiorari for several reasons. First of all, as this is a postconviction case, this Court would have to address retroactivity before even reaching the underlying jury instruction issue. Before this

Court could hold that Hurst v. Florida is retroactive, it would necessarily have to overturn extensive precedent establishing that Ring[4] is not. Indeed, Federal courts have had little trouble determining that Hurst, like Ring, is not retroactive under the test announced in Teague v. Lane, 489 U.S. 288 (1989).[5]

Hurst v. Florida is only applicable to Petitioner through Florida's more expansive state law test for retroactivity. And Florida has determined that Hurst v. Florida (along with those state law cases that followed) applies retroactively to the date this Court decided Ring in 2002. Federal courts, however, have declined to find that Ring is retroactive under federal law, and have, as noted above, similarly declined to grant retroactivity to Hurst v. Florida.

Florida's retroactivity test, announced in Witt v. State, 387 So. 2d 922, 926 (Fla. 1980), provides relief to a broader class of individuals than does Teague, and Florida has, as a matter of state law, granted limited retroactivity to this Court's decision in Hurst v. Florida. Consequently, in granting

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

[5] See Lambrix v. Sec'y, Fla. Dept. of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

certiorari review, this Court would find itself addressing retroactivity of Hurst v. Florida and the possibility of overruling Schriro v. Summerlin, 542 U.S. 348 (2004), before reaching the underlying question of harmlessness. See also Blakely v. Washington, 542 U.S. 296, 323 (2004) (stating "Ring (and *a fortiori* Apprendi) does not apply retroactively . . . .").

Therefore, pursuant to this Court's jurisprudence, there can be no federally based "Hurst-induced Caldwell claims." The fact that a state court has held, as a matter of state law, that a decision of this Court and a later related state supreme court decision are partially retroactive,[6] does not provide a basis for this Court to address tangentially related constitutional claims. This Court has repeatedly recognized that where a state court judgment rests on adequate and independent state law grounds, the Court's jurisdiction fails. Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Michigan v. Long, 463 U.S. 1032, 1038 (1983). Florida v. Powell, 559 U.S. 50, 57 (2010) (stating that if a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision.")

[6] This Court has held that, generally, a state court's retroactivity determinations are matters of state law, not federal constitutional law. Danforth v. Minnesota, 552 U.S. 264 (2008).

Johnston's Caldwell claim

Putting the question of retroactivity aside, Johnston's present complaint appears to arise out of the fact that his penalty phase jury's determination was merely a *recommendation*, and nothing more. His argument improperly conflates this Court's decision in Hurst v. Florida, which addressed Sixth Amendment infirmities in Florida's previous sentencing procedure, and Florida's decision in Hurst v. State. In the latter case, the Florida Supreme Court went far beyond this Court's criticism of Florida's procedure that authorized the sentencing judge, as opposed to the jury, to make critical factual findings necessary to imposing a death sentence under Florida law. The Florida Supreme Court's ruling in Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), stands as a matter of state law, and fails to provide grounds for certiorari review.

Indeed, Johnston's criticism aside, a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. See Dugger v. Adams, 489 U.S. 410 (1989). See also § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). What Johnston

seeks, even if he fails to say it precisely, is a procedure where the jury itself imposes the sentence.

Consider the essence of Johnston's Caldwell claim which, effectively, condemns any jury instruction that grants the trial judge discretion to disregard the jury's sentencing decision. Johnston's version of a Caldwell violation would apply in any case where such discretion is permitted and can only be resolved by requiring that a jury's sentencing recommendation be binding on the trial court, thus effectively shifting all responsibility for sentencing to the jury. There has never been a federal mandate requiring jury sentencing, however, and certainly no decisions impose such a requirement on the states. See Ring v. Arizona, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); Harris v. Alabama, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). This Court has never required jury sentencing in a capital case, and such a holding would require a strained and tortuous reading of the Constitution, which, after all, provides a right to **trial** by jury, not to **sentencing** by jury.

Nonetheless, Johnston claims that the Florida Supreme Court's decision violates the federal constitution because it rejected his argument that the Eighth Amendment and this Court's Caldwell decision require what effectively amounts to jury sentencing. In Johnston's view, a mere recommendation fails to meet constitutional muster where the trial judge has *any* discretion to accept or reject it. Johnston further asserts that his jury's recommendation of death, which was affirmed on direct appeal and became final in 2003, developed into structural error when the rules governing sentencing changed following the Florida Supreme Court's 2017 decision in Hurst v. State.

Johnston's argument is fundamentally flawed. First, nothing in Caldwell mandates relief merely because, after a trial in which the jury was properly instructed, the law has changed. Johnston conveniently omits any discussion of the fact that he failed to preserve his present claim by contemporaneous objection. Even if preserved, however, this Court has made clear that Caldwell violations occur only when remarks to the jury improperly describe the role assigned to the jury by local law and does so in a way that undermines the jury's sense of responsibility. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994). Therefore, the Florida Supreme Court's decision is not in conflict with this Court's Caldwell decision; rather, it is in

conformity with it.

Johnston's claim that the proposed "error" was structural merely reveals his misapprehension of the law and general disagreement with the outcome. Consider the following faulty premises advanced by Johnston: 1) his jury was affirmatively misled; 2) the Sixth and Eighth Amendments require unanimous jury findings regarding not only the existence of aggravating circumstances, but also as to the sufficiency of the aggravating circumstances and their weight relative to mitigating factors, if any; and 3) judicial fact-finding cannot be reviewed for harmless error.

Johnston is wrong on all counts. As already noted, Johnston's jury was properly instructed. Additionally, this Court has never held (as the Florida Supreme Court did in Hurst v. State) that the constitution requires a jury to determine the relative weight of aggravating circumstances and mitigating factors, let alone that it must do so unanimously. This requirement is not mandated by federal law, but was imposed by the Florida Supreme Court, and his argument erroneously conflates what the state court requires with this Court's ruling in Hurst v. Florida. Significantly, this Court has expressly stated that such findings by a jury are *not* necessary. See Kansas v. Carr, 136 S. Ct. 633, 642 (2016) (noting, "the

ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy . . .")[7] Similarly, this Court has stated that jury sentencing is not a prerequisite to the constitutionality of a death sentence. See Proffitt v. Florida, 428 U.S. 242, 252 (1976) (this Court "has never suggested that jury sentencing is constitutionally required."). Finally, this Court has expressly found the type of error Johnston claims to be structural is, instead, subject to harmless error analysis. Neder v. United States, 527 U.S. 1, 18-19 (1999) (concluding that the lack of a jury determination on an element of the offense is subject to harmless-error analysis.)

The Florida Supreme Court's decision does not conflict with Caldwell

This Court's decision in Caldwell is straightforward. A

[7] State v. Mason, 2018 WL 1872180, *5, 6 (Oh. Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); State v. Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either Apprendi or Ring to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury").

capital penalty-phase jury should not be *misled* regarding the role it plays in the sentencing process, and the jury's responsibility in determining an appropriate sentence should not be *diminished*. A Caldwell error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminished their role in the process. Examination of what took place in Johnston's penalty phase demonstrates beyond cavil that no Caldwell violation occurred; a focused consideration of Johnston's own arguments supports this view.

As the state postconviction court found, Johnston's jury was properly instructed regarding its role in the sentencing process according to contemporaneous state law. Interestingly, Johnston does not contest the State's position in this regard. Instead, he insists that a Caldwell violation occurred because the Florida Supreme Court "treats this unconstitutional recommendation as binding." (Petitioner's Brief, p. 24) Johnston fails to recognize that Caldwell focuses on the legal accuracy of the jury instructions and the effect any erroneous information may have had on its sense of responsibility. A Caldwell error does not arise out of what an appellate court does or does not do.

Johnston correctly notes that his jury was told that their recommendation was advisory and that the court was responsible for sentencing. That was true then and, with regard to a death recommendation, true now.[8] Still, Florida juries are hardly led to believe that their role in the proceedings is insignificant - even post-Ring, pre-Hurst juries. See Darden v. Wainwright, 477 U.S. 168, 183 n. 15 (1986) ("Caldwell is relevant only to certain types of comment - those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.").

Johnston's penalty phase jury was instructed that "[y]our advisory sentence is entitled by law and will be given great weight by this court in determining the sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend." (Respondent's Appendix B, p. 1806-1807). And, to reinforce the significance of the jury's undertaking, Johnston's jury was told

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[8] Under Florida's new statute, only life recommendations can be characterized as "binding." § 921.141(2)(c), Fla. Stat. (2018). Even under the previous versions of the statute, a jury's finding of no aggravating factors was, for all practical purposes, binding. Evans v. Sec'y, Fla. Dept. Corr., 699 F.3d 1249, 1256 (11th Cir. 2012) (noting the Florida Supreme Court's "stringent application" of the Tedder v. State, 322 So. 2d 908 (Fla. 1975) standard under which the last override of a life recommendation affirmed on appeal was in 1994).

that "[t]he fact that the determination of whether you recommend a sentence of death or life 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. 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." (Respondent's Appendix B, p. 1812-1813).

Because Johnston's jury was properly instructed, and nothing was said to diminish the gravity of the task they were undertaking, there is no Caldwell error. As such, there is no basis for this Court to exercise its certiorari jurisdiction because the Florida Supreme Court is not in conflict with any decision of this Court and the state court's decision does not present a question of important, unsettled federal law.

The Florida Supreme Court's decision does not conflict with that of any federal appellate court or state supreme court

The Eleventh Circuit has consistently rejected Caldwell challenges to Florida's jury instructions in capital cases in the years since Romano. As the Eleventh Circuit has explained, the infirmity identified in Caldwell is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." Davis v. Singletary, 119 F.3d

1471, 1481-82 (11th Cir. 1997) see also Johnston v. Singletary, 162 F.3d 630, 642-44 (11th Cir. 1998); Belcher v. Sec'y, Fla. Dept. of Corr., 427 Fed. Appx. 692, 695 (11th Cir. 2011).

Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate Caldwell when it accurately reflects state law. Lorraine v. Coyle, 291 F.3d 416, 446 (6th Cir. 2002); Bowling v. Parker, 344 F.3d 487, 514-15 (6th Cir. 2003); Fleenor v. Anderson, 171 F.3d 1096, 1098-99 (7th Cir. 1999); Wilson v. Sirmons, 536 F.3d 1064, 1121 (10th Cir. 2008).

Johnston cites to no federal circuit court case or state supreme court case holding to the contrary. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Therefore, this Court should deny review of this issue.

Unanimity and Equal Protection Claims

Johnston next complains that the Florida Supreme Court employed a per se harmless error rule in his case which considers only whether the jury's sentencing recommendation was unanimous, a procedure that, in Johnston's view, violates the Equal Protection clause of the Fourteenth Amendment. However, contrary to Johnston's assertions, Florida has explicitly stated that unanimity is only a part of the test it employs in

assessing harmless error.[9] Reynolds v. State, 43 Fla. L. Weekly S163, 169 (Fla. April 5, 2018). Johnston's assertion that the Florida Supreme Court's apparent focus on unanimity violates the Equal Protection clause of the Fourteenth Amendment lacks merit and merely voices Johnston's disagreement with the Florida Supreme Court's denial of relief in his case.

First of all, a criminal defendant challenging the State's application of capital punishment on equal protection grounds must show that similarly situated individuals are being treated differently. Johnston falsely posits that all death row inmates are similarly situated, when it is clear from examination of the Florida Supreme Court opinions that they are not. Indeed, close consideration of the individual cases where a violation of Hurst v. State was alleged reveals that the Florida Supreme Court has announced valid and consistent reasons for its decisions regarding whether relief is warranted. Some death row inmates have been granted relief because the Court determined that a Hurst v. State error had occurred and the State failed to prove

[9] In comparison, the Florida Supreme Court has found Hurst errors to be harmful in all post-*Ring* cases where the jury's recommendation was not unanimous, regardless of the type and nature of the aggravating factors. See e.g. Johnson v. State, 205 So. 3d 1285 (Fla. 2016); Deviney v. State, 213 So. 3d 794, 799 (Fla. 2017); Banks v. State, 219 So. 3d 32 (Fla. 2017); Abdool v. State, 220 So. 3d 1106 (Fla. 2017); Kirkman v. State, 233 So. 3d 456 (Fla. 2018); Pagan v. State, 235 So. 3d 317 (Fla. 2018); Everett v. State, 43 Fla. L. Weekly S250 (Fla. May 24, 2018).

beyond a reasonable doubt that the error was harmless. This is not a violation of equal protection; it is the correct application of due process of law.

Johnston correctly notes that many of the Florida Supreme Court's decisions have been affirmed, as in his case, after noting the fact that the defendant's penalty phase jury recommendation was unanimous. This is not to say, however, that the Court is merely counting advisory recommendations as Johnston asserts (Petitioner's Brief, p. 6). To the contrary, the Court has repeatedly explained the complex process involved in assessing harmlessness in Hurst cases. Unanimity, the Court explained in Davis v. State,[10] is a strong indicator, as it demonstrates beyond a reasonable doubt that the jury followed its instructions and made the necessary findings of fact, including the existence and respective weight of aggravators and mitigators, before determining whether to recommend a death sentence. In its recent decision in Andres v. State, 43 Fla. L. Weekly S389a (Fla. September 20, 2018), a case where the jury's death recommendation lacked unanimity, the Court explained:

> "The trial court imposed Andres' death sentence following the jury's non-unanimous recommendation of death by a vote of nine to three. This Court is unable to determine or speculate why the dissenting jurors voted for a life sentence. This Court cannot determine whether these jurors did not find that sufficient

[10] Davis v. State, 207 So. 3d 142, 174-175 (Fla. 2016).

> aggravating factors were proven to impose a sentence of death, that the aggravation did not outweigh the mitigation, or, for some other reason, determined that death was not an appropriate sentence. Thus, the Hurst error was not harmless beyond a reasonable doubt."

Contrary to Johnston's position that the lower court's focus on unanimity is unconstitutional, the Florida Supreme Court explained in Reynolds v. State that unanimity is merely a preliminary step in its assessment of harmless error; the focus then moves toward whether the court may conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. Id. at *169. In Johnston's case, while the Florida Supreme Court's opinion was abbreviated, the postconviction court's Order denying relief incorporated a full analysis of the necessary factors:

> "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. 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 (sic) to the victim, thereby further outweighing any mitigation presented on Defendant's behalf. Finally, the Court finds that to date, the Florida Supreme Court has not found Hurst error in any unanimous jury cases. Consequently, the Court concludes that there is no reasonable possibility that Hurst error affected the sentence in this case."

(Petitioner's Appendix A, p. 12-13, case citations removed).

This case is not, as Johnston suggests, a mere counting of advisory recommendations, but consists of a focused assessment of what factual determinations were made beyond a reasonable doubt by his sentencing jury, a determination that is wholly consistent with this Court's decision in Hurst v. Florida.

Postconviction Court's exclusion of Johnston's expert

Finally, Johnston boldly asks this Court to review the state court's decision to exclude so-called "expert" testimony, despite the fact that, in reality, his argument amounts to nothing more than a claim that the state court erred in its application of state law. Rule 10 of this Court's rules discourages certiorari petitions based on questions of error, and this Court has expressly rejected review where the decision turns on one of mere error correction. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (citations omitted) ("error correction . . . is outside the mainstream of

the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.") "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10 "[C]ertiorari jurisdiction exists to clarify the law, its exercise 'is not a matter of right, but of judicial discretion.'" City and County of San Francisco, California v. Sheehan, 135 S. Ct. 1765, 1774 (2015) (citations ommitted). Indeed, this Court has long held, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." Braxton v. United States, 500 U.S. 344, 347 (1991). Thus, in the absence of a conflict between decisions of this Court or other circuit courts, certiorari review is not warranted. See Bunting v. Mellen, 541 U.S. 1019, 1021 (2004) (denying certiorari review in the absence of a conflict).

There is no conflict among the state courts of last resort or the federal circuit courts on the issues presented in the instant petition and no unsettled question of federal law. Although the failure to meet the considerations in Rule 10 is not controlling, this Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit

certiorari review. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). The law is well settled that this Court does not grant certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984). This Court is "consistent in not granting the certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955); see also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction).

The State sought to exclude Johnston's expert witness because his content-based analysis of the record, as cross examination of Dr. Harvey Moore revealed, required nothing more than the ability to read English. Indeed, as Dr. Moore explained, he employed a team of laypersons who merely read the transcript and made notes whenever they encountered language that might possibly be interpreted as a Caldwell violation. The postconviction court excluded Dr. Moore because it found that this type of analysis failed to meet the Frye[11] test -

[11] Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

specifically, because Johnston failed to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue prejudice. In addition, Florida law reserves expert testimony for those cases where the trier of fact requires assistance in understanding the evidence or determining a fact in issue. § 90.702, Fla. Stat. The postconviction court noted in its Order granting the prosecution's motion to strike that Dr. Moore's particular expertise "does not provide any additional knowledge or ability that the Court does not also possess." Johnston weakly asserts that the postconviction court's decision to strike Dr. Moore amounts to a violation of due process, but he fails to identify any particular aspect of the proceeding that might so qualify. He might disagree with the outcome, but the record makes clear that Johnston was afforded all the process to which he is due.

The Florida Supreme Court properly found that the error in Johnston's case was harmless beyond a reasonable doubt. This finding neither contravenes this Court's precedent, nor violates federal law. This case presents no important, unsettled, or conflicting application of constitutional law. Thus, certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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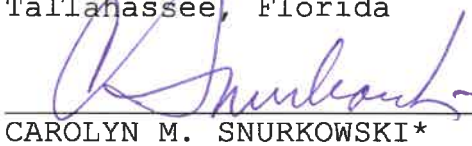

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