CAPITAL CASE

CASE NO. 18-5793

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

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

David D. Hendry
Florida Bar Number 0160016
Law Office of the Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 624
Fax No. (813) 558-1601
hendry@ccmr.state.fl.us
Attorney of Record for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED--REPLY

Ray Johnston relies on the questions he presented in his original Petition, and disputes the questions as presented by the State of Florida. The State of Florida unprofessionally refers to the sole victim in this case as the "final victim." There is no other victim besides Leanne Coryell in the case at bar. Though Mr. Johnston indeed received *Hurst*[1] relief on an unrelated murder following an 11-1 advisory panel recommendation, the unprofessional characterization of the victim in this case as the "final victim" is improper, and serves only to confuse the issues in this case. There was only one victim in this case.

At page i, line three, the State mentions that the victim was taken "to the grounds of a nearby Catholic church." Here the State seems to unnecessarily introduce religion into this case. The real question in this case is whether the deprivation of Mr. Johnston's Sixth Amendment right to a jury trial was at all harmful. The State as the recipient of the error has to prove beyond a reasonable doubt that the *Hurst* errors were harmless. The fact that the victim was taken to the grounds of a nearby Catholic church does not render the errors in this case harmless beyond a reasonable doubt. The Sixth Amendment does not permit the State of Florida to deprive a criminal defendant of his right to a jury trial in cases where the crime occurred on Catholic church grounds. Furthermore, it bears mention the Catholic church explicitly opposes capital punishment, and would most certainly

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

oppose the execution of an individual whose death sentence was undeniably unconstitutionally imposed.

Also in the Questions Presented section, at page one, lines 5-6, the State mentions that "strands of grass were found in the fingers of [the victim's] still clenched left hand." Here the State replaces rational, credible, legal and factual analysis with unnecessary hyperbolic, tabloid-type, sensationalist descriptions. Towards the bottom of page one, the state comments that the "sentencing judge characterized [Ray Johnston's past crimes] as 'chillingly similar' to Leanne Coryell's final hours." Very rare is the capital case in the State of Florida wherein one of the aggravators does not include a conviction of a prior violent felony. Most capital defendants indeed have prior felony convictions. This does not put such defendants in a class of the worst of the worst offenders.

Finally, at the bottom of page i, the State finally addresses the real issue in this case, arguing: "Johnston's sentencing jury was advised, in accordance with the correct law in Florida at the time, that they were required to determine" whether death was an appropriate sentence. In a nutshell, the State's argument here is that because the capital sentencing scheme in Florida was deemed constitutional *at the time of the Petitioner's trial*, he should not be afforded relief (even though this Court has now ruled Florida's capital sentencing scheme is unconstitutional in *Hurst*).

At page ii the State of Florida addresses the second component of the petition: the Florida courts' unreasonable exclusion of Dr. Harvey Moore's evidence in support of harmful *Hurst* error. Here the State places quotation marks around the word

"expert" in attempts to diminish and belittle Dr. Moore's qualifications and expertise. Dr. Moore is preeminently qualified to research and testify about the matters contained in his report located at Appendix G of the Petition for Writ of Certiorari. His 10 page *curriculum vitae* is also located at Appendix G; the qualifications of Dr. Moore's associates that the State classifies as "a team of laypeople" are also located at Appendix G following Dr. Moore's *curriculum vitae*. The State argues here that "the only 'expertise' employed was the ability to read English." Though there is a certain degree of common sense and common reading comprehension involved in the analysis of the trial transcripts and the *Caldwell* case, there was quite a bit more to the content analysis exercise employed by Dr. Moore and his associates than simply reading the English language. *See* Appendix I of the Petition for Writ of Certiorari, which includes 63 pages of testimony related to Dr. Moore's education, training, experience, and an outline of the sociological/scientific methods employed by Dr. Moore in his content analysis of the Ray Johnston trial materials and the case of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Petitioner Ray Johnston was denied his due process rights when the courts of the State of Florida refused to consider the widely accepted scientific evidence in this case supporting that the *Hurst* errors in this case were harmful. The 65 *Caldwell* errors at the Petitioner's trial certainly were not harmless beyond a reasonable doubt just because the advisory panel who was unconstitutionally instructed of their secondary role at the penalty phase voted unanimously.

At page iii the State again highlights that "an instruction [] accurately

reflected Florida law at the time of sentencing" in this case. It bears mention that it was not just one instruction that diminished the advisory panel's role at trial. There were 65 such instructions (from the court, the prosecution, and the defense) in the Petitioner's trial that served to diminish the advisory panel's role at sentencing. Following *Hurst*, it is imperative that the Petitioner be afforded relief from his death sentence. Permitting the State of Florida to deny *Hurst* relief in this single murder case but grant relief in more egregious triple murder with three 11-1 recommendations is unacceptable in a criminal justice system that is striving to embrace the evolving standards of decency. *See Johnson (Paul Beasley) v. State*, 205 So. 3d 1285 (Fla. 2016).

The *Hurst* errors in the instant case were harmful, not harmless. Though it should not require "expertise" to prove this point, the Petitioner presented unfairly disregarded expert testimony to prove this point when it became clear that the Florida Supreme Court would hold all *Hurst* errors harmless in unanimous cases.

TABLE OF CONTENTS--REPLY

TABLE OF AUTHORITIES--REPLY

CASES **Page(s)**

JURISDICTION--REPLY

Contrary to the Respondent's claim, this case *is* appropriate for the exercise of this Court's discretionary jurisdiction to prevent another wrongful execution in the State of Florida following this Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). The State of Florida continues to be an unconstitutional outlier whose decisions violate the evolving standards of decency in death penalty jurisprudence. This case is emblematic of how the State of Florida continues to violate capital defendants' Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution. This Court undeniably has clear jurisdiction to review this case under 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE--REPLY

At pages two and three, the State merely reprints the facts as stated by the Florida Supreme Court on direct appeal in 2002. Though these are the facts of the case understood by the Florida Supreme Court, no actual jury has ever determined fairly whether the facts of this case warrant the ultimate penalty of death for Mr. Johnston. No constitutionally instructed jury has ever made the necessary determination of whether the aggravating circumstances outweigh the mitigating circumstances in this case. No jury has ever been made aware that their decision and their decision alone would determine whether Mr. Johnston lives or dies.

At the bottom of page three the State claims that "the prosecution established four aggravators during the penalty phase." No actual jury ever determined whether those aggravators were proven by the State of Florida beyond a reasonable doubt.

These errors cannot be fairly deemed harmless beyond a reasonable doubt.

"REASONS FOR DENYING THE WRIT"—REPLY

At page six the State claims that because the defense did not object to the standard jury instructions which were thought to be constitutional at the time, any future claims about the constitutional infirmity of the instructions are waived. This is incorrect. There was no available legal objection at the time of the Petitioner's trial because this Court had yet to declare Florida's death penalty scheme unconstitutional. Had *Hurst* been published prior to the Petitioner's trial, surely an objection would have been raised. The State argues: "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 *Caldwell*." Yes, the Petitioner filed a timely successor motion based on *Hurst* (and *Caldwell*) after the issuance of *Hurst*. Following *Hurst*, the Petitioner has a right to a jury trial in capital sentencing, and he presumably has a right for that jury to be constitutionally instructed. This claim should not be time-barred or procedurally defaulted as the State suggests at page seven.

The State's reliance on *Romano v. Oklahoma*, 512 U.S. 1 (1994) is misplaced. In *Romano* this Court held that the admission of evidence of the defendant having been convicted of another murder and sentenced to death in that separate case did not diminish the jury's sense of responsibility. The Petitioner is not making that claim in this case. The chief complaint in this case is that the 65 instructions at his trial

had the effect of diminishing the advisory panel's sense of responsibility in recommending a death sentence for the Petitioner. The State here also quotes language from *Reynolds v. State*, --So. 3d--, 2018 WL 1633075, 9 (Fla. 2018) regarding not faulting a "trial court [for] fail[ing] to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts." It is hypocritically ironic that the State faults the Petitioner for failing to object to the standard jury instructions at trial which were erroneously thought to be constitutional at the time, then cites to the language in *Reynolds* about not faulting a trial court for failing to employ divining rods to anticipate changes in the law. The real issue here is whether the errors at the Petitioner's trial were harmful, not whether he should have employed a divining rod and objected to the standard jury instructions at trial that diminished the advisory panel's sense of responsibility in the sentencing process.

At pages 7-9 the State discusses retroactivity. This discussion is irrelevant here because the State of Florida has already decided that *Hurst v. Florida* should be retroactive back to June 24, 2002. The Petitioner's case is well within that window of retroactivity. Under Florida law, retroactivity is not a barrier to relief from this death sentence; the unanimous death recommendation is the barrier (because Florida deems *Hurst* errors harmless in unanimous cases like the case at bar). As stated in the Petition for Writ of Certiorari, *Caldwell* has already held that these errors are presumptively harmful, not harmless.

Despite *Caldwell* informing that these types of errors can never be harmless,

the Florida Supreme Court ignores this established precedent and has found these errors to be harmless simply because of the unanimous advisory recommendations. *Caldwell* instructed:

> This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." **In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.** The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

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

At page 13 the State relies on *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) to advance the argument that factual determinations need not be made by juries to decide whether aggravating circumstances outweigh mitigating circumstances. The State's reliance on this case is misplaced. This case has no application here because the death penalty system in Kansas is much different than the system that was ruled unconstitutional in Florida. Since reinstating the death penalty in 1994, Kansas

required a sentence of death to be decided by a unanimo2us jury. *Id.* at 643. Florida allowed death sentences to be imposed by trial judges with mere recommendations from non-unanimous advisory panels until this Court declared the system unconstitutional in *Hurst*.

At page fifteen the State addresses the *Caldwell* claim. The State says here that a *Caldwell* claim first requires that "a jury must be misled by jury instructions, prosecutor argument, or judicial comments." For the Petitioner's advisory panel to be misled, they would have to have been instructed constitutionally that they in fact *would* be making the ultimate determination of whether Mr. Johnston lives or dies. If the advisory panel was "misled" in such a fashion, there would cease to be a *Caldwell* claim in the case at bar because their role would be primary instead of secondary. The fact remains that the advisory panel's role at the Petitioner's trial was diminished and secondary. Though not "misleading," 65 comments made at trial certainly unconstitutionally diminished their role in the sentencing process. It would be an absurd and impossible standard to require the Petitioner to show that his panel was misled, when his actual claim is that the law as instructed at the time of trial violated *Caldwell*. Without conceding error, the State seems to agree here that *Caldwell* is violated when a jury is instructed "in a way that diminished their role in the process."

At page 16 the State suggests that because the jury was told that their "advisory sentence" would be given "great weight" by the trial judge, their role at sentencing was not actually diminished in violation of *Caldwell*. This argument

ignores the gravity of the 65 comments that undeniably make the advisory panel's decision secondary in the sentencing process. At page 17, the State claims that "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." The gravity of their task was undeniably diminished when they were advised that "The final decision as to what punishment shall be imposed rest solely with the judge of this court." (Transcript pg. 1468 at line 18). In *Caldwell*, the jury was informed that they would be deciding the defendant's sentence, but, a higher court would be reviewing their decision. In the case at bar, the advisory panel was essentially informed that the decision was not even theirs to make.

Regarding the Petitioner's equal protection claims, at page nineteen, the State claims that "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." Florida's death row inmates *are* similarly situated. An "examination" of all of the Florida Supreme Court opinions reveals that every inmate currently housed on Florida's death row did not receive a trial by jury to determine whether they should get life in prison or the death penalty. All Florida death row inmates have been sentenced to death by trial judges who unconstitutionally made factual determinations of whether aggravators were established by the prosecution, and whether those aggravators outweighed the mitigating factors presented by the defense. All inmates on Florida's death row were unconstitutionally sentenced to death. Mr. Johnston would have received *Hurst* relief but for the unanimous vote of

the advisory panel.

Paul Beasley Johnson committed three separate murders (including an unsuspecting Cab Driver, an unwitting Good Samaritan, and a dispatched Sheriff's Deputy murdered with his own service weapon), and he received *Hurst* relief. This was because of the three 11-1 advisory panel recommendations in Mr. Johnson's case (because the errors were presumably harmful based on the non-unanimous recommendations; *see Johnson (Paul Beasley) v. State*, 205 So. 3d 1285, 1290 (Fla. 2016)("we cannot conclude beyond a reasonable doubt that the *Hurst* [] sentencing error would have been harmless beyond a reasonable doubt."). The Petitioner Ray Johnston only committed one murder in the instant case, yet he did not receive *Hurst* relief (because the errors were presumably harmless based on the unanimous recommendation). Mr. Johnston and Mr. Johnson received virtually the same set of constitutionally-deficient jury instructions. Both defendants were denied their Sixth Amendment right to jury trial. Both defendants were denied their Eighth Amendment rights when the advisory panel's role was diminished by the numerous references to their secondary role at the penalty phase. Yet only Johnson received *Hurst* relief.

The death penalty is supposed to be reserved for the worst of the worst murders. Based on the facts of these two cases, it violates equal protection for Mr. Johnson to receive *Hurst* relief, and Mr. Johnston be denied *Hurst* relief. Mr. Johnston's murder was no worse than Mr. Johnson's murders. Mr. Johnston should receive the equal protection of *Hurst* relief from his unconstitutionally imposed death

sentence.

At page twenty-two the State again demeans and belittles the unfairly disregarded scientific evidence in support of his claims, characterizing it as "so-called 'expert' testimony." Sarcastically placing quotes around the word "expert" does nothing to lend support for the state courts' wrongful exclusion of this evidence. The State claims that the issue of *Frye*-barring the scientific evidence in support of his claims is "nothing more than a claim that the state court erred in its application of state law." It was much more than that. The State is trying to deprive the Petitioner of his life. The Fourteenth Amendment mandates: "nor shall any state deprive any person of life, liberty, or property without due process of law." The State of Florida denied the Petitioner access to the courts and violated due process of law in unfairly disregarding undisputed, well-established, widely-accepted sociological evidence in support of the presence of numerous harmful *Hurst* and *Caldwell* errors in this case.

There is an abundance of citations to civil cases in the State's arguments against the grant of certiorari at pages 22-24. Throughout these pages, the State suggests that this issue is not important enough to warrant review. This is a death penalty case. And death is different. The state courts violated due process by unfairly refusing to consider the widely-accepted, reliable scientific evidence in support of harmful error, and instead only considered the unreliable unanimous recommendation of an unconstitutionally instructed advisory panel.

CONCLUSION—REPLY

The petition for writ of certiorari should be granted in this case.

Respectfully submitted,

/s/ David D. Hendry
David D. Hendry
Florida Bar Number 0160016
Office of the Capital Collateral Regional Counsel – Middle Region
12973 N. Telecom Parkway
Temple Terrace, Florida 33637
Phone No. (813) 558-1600 ext. 624
Fax No. (813) 558-1601
hendry@ccmr.state.fl.us
Attorney of Record for Petitioner