DOCKET NO. 18-5793

IN THE SUPEREME COURT OF THE UNITED STATES

RAY LAMAR JOHNSTON

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING OF THE DENIAL OF THE PETITION FOR WRIT OF CERTIORARI ENTERED NOVEMBER 13, 2018

COMES NOW the Petitioner, RAY LAMAR JOHNSTON, by and through the undersigned counsel, and pursuant to Supreme Court Rule 44[1], and respectfully requests rehearing of the November 13, 2018 denial of his Petition for Writ of Certiorari to the Florida Supreme Court. In support of this motion, Petitioner, through counsel, states the following:

1. Petitioner filed his Petition for Writ of Certiorari on August 24, 2018. The State of Florida filed its Brief in Opposition on September 27, 2018. On October 12, 2018 the Petitioner filed his Reply Brief.

---

[1] As required by Supreme Court Rule 44, counsel hereby certifies that this petition is restricted to the grounds specified in paragraph 2 of Supreme Court Rule 44, the motion is being filed in good faith, and not being filed for purposes of delay.

2. Issue II of the Petition addressed the Florida courts' refusal to accept the proffered social scientific evidence clearly supporting that the *Hurst* errors were not harmless beyond a reasonable doubt. The Florida courts refused to consider the evidence in part based on *Frye* grounds. At the time that the petition was pending, there was some question in the State of Florida as to whether the courts would be moving from the *Frye* standard to the *Daubert* standard to evaluate the admissibility of scientific evidence.

3. In any event, and under any standard for admissibility of evidence, *especially* in a death penalty case, the Florida courts' strict adherence to a rule finding *Hurst* errors harmless in all cases with unanimous advisory panel recommendations while refusing to consider an accused's established scientific evidence to the contrary results in an unwarranted suspension of the Privilege of the Writ of *Habeas Corpus* in violation of the Article One Section 9 of the United States Constitution.

4. Three days after the denial of the petition, the Florida Supreme Court issued an opinion in the case of *DeLisle v. Crane Co.*, --So. 3d--, 2018 WL 5075302 (Fla. 2018), wherein they rejected the Florida legislature's attempt to transition from the *Frye* standard to the more stringent *Daubert* standard. This intervening case provides additional support for the argument that the Florida courts erred in refusing to consider the scientific evidence offered in support of harmful *Hurst* errors below, and denied Mr. Johnston due process of law. It was unfair for the Florida courts to presume harmless *Hurst* error beyond a reasonable doubt based on a mere 12-0

advisory panel recommendation without considering Dr. Moore's established scientific evidence to the contrary (which is rooted by *Caldwell*).

5. The basic facts of *DeLisle* are as follows: DeLisle was a civil plaintiff who filed a personal injury action against sixteen defendants claiming that certain exposure to asbestos caused him to develop mesothelioma after smoking a pack of Kent cigarettes per day for some time. The plaintiff's expert witnesses testified over *Daubert* objections that the Kent filters were the cause of the disease. The plaintiff won a multi-million dollar verdict against the defendants. But on appeal to Florida's Fourth District Court of Appeal, the verdict was reversed when the Florida appellate court ruled that the plaintiff's expert testimony should have been excluded based on *Daubert*. The Florida Supreme Court then reversed the appellate court, holding that the legislature's move from *Frye* to *Daubert* "infringe[d] on this Court's rulemaking authority," "reverse[d] the Fourth District and remanded for reinstatement of final judgment." *DeLisle* at 2.

6. The Florida Supreme Court stated the following about the experts' testimony: "The expert testimony in this case was properly admitted and should not have been excluded by the Fourth District. As we stated [previously], medical causation testimony is not new or novel and is not subject to *Frye* analysis." *DeLisle* at 8 (citation omitted).

7. The same is true of the proffered scientific evidence that is the subject of the second question presented in Mr. Johnston's Petition for Writ of Certiorari. Content analysis of trial transcripts and legal opinions is nothing new. The Florida

courts should have considered Dr. Moore's testimony and report in support of the Petitioner's argument that the *Hurst* errors that occurred at trial were not harmless beyond a reasonable doubt.

8. The Florida courts' refusal to consider the Petitioner's scientific evidence in the case at bar violated the Petitioner's due process rights and rights to access to the courts. Though the unanimous advisory panel recommendation from trial obviously is not necessarily a "witness" against him in a criminal prosecution, it is indeed evidence that acts as a barrier to *Hurst* relief. As such the Petitioner should be entitled to confront and rebut this evidence. The Florida courts' refusals to consider scientific evidence in rebuttal to the notion that the unanimous recommendation amounts to harmless *Hurst* error results in a violation of the Confrontation Clause. The State of Florida should not be permitted to deny the Petitioner his right to confront and rebut the alleged harmless error against him.

9. As Justice Pariente recently commented: "I write separately to express my belief that the *Daubert* amendment also has the potential to unconstitutionally impair civil litigants' right to access the courts. See art. I, § 21, Fla. Const." *DeLisle* at 9, Pariente, J. concurring. (footnotes omitted). Based on this reasoning, this Court should rehear the case and grant Certiorari. Dr. Moore's evidence is much more of a reliable indicator of whether the *Hurst* errors were harmless beyond a reasonable doubt than the unanimous recommendation from an unconstitutionally-instructed advisory panel.

10. Justice Pariente concluded in her concurring opinion: "I would also conclude that the *Daubert* amendment has the potential to unconstitutionally impair litigants' right to access the courts in civil cases. The amendment does nothing to enhance the factfinding process." *Id.* at 13.

11. The Petitioner's own life is at stake in the instant case. The stakes are as high as they could be. Death is different. Due process demands in this postconviction action that Mr. Johnston be afforded the opportunity to present evidence and witnesses to refute the Florida courts' erroneous notions that the *Hurst* errors at his trial were harmless beyond a reasonable doubt. As this Court reasoned many years ago, relaxing strict rules of evidence which would normally prohibit the introduction of hearsay in a capital case: "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Petitioner should have been permitted to present Dr. Moore's testimony and scientific evidence at an evidentiary hearing.

12. Dr. Moore's report at Appendix G (Tab A) lists the 65 specific *Caldwell* errors that occurred at trial. The three most noteworthy errors diminishing the advisory's panel's role occur when the advisory panel is given the Florida standard jury instructions on their secondary role, specifically: A) "It is the judge's job to determine a proper sentence if the defendant is found guilty." Transcript 1406 line 6; B) "The final decision as to what punishment shall be imposed rests solely with the judge of this court." Transcript 1468 line 18; C) "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge."

Transcript 1806, line 11. The errors that occurred in *Caldwell* are mild compared to the errors illustrated in Dr. Moore's report at Tab A.

13. The Florida courts ignored the results of a content analysis of the Johnston trial transcripts primarily on the grounds it was a scientifically "novel" method with "speculative" conclusions by the author evidencing ignorance of the science and the authority of its conclusions (see lower court order striking Dr. Moore's evidence at Appendix I at 178-183). Content analysis is neither new nor novel. It was suggested to the courts by the editors of *The University of Chicago Law Review* in 1948 when its editors wrote "…content analysis is unlike expert testimony founded on what judges consider to be the 'occult arts' of ballistics, chemistry and physiology. Its assumptions can be tested by one accustomed to logical reasoning." See Editors, Law Review (1948) "Content Analysis: A New Evidentiary Technique," *University of Chicago Law Review* 15(4) at p. 924. Since that time, content analysis has been admitted to and relied upon the courts on numerous occasions. *See U.S. v. Lattimore*, 127 F. Supp. 405 (D.D.C 1955), aff'd, 232 F.2d 334 (D.C. Cir. 1955), *U.S. v. Keller*, 145 F. Supp. 692 (D.N.J. 1956), and *Am. Sec. Council Ed. Found. v. F.C.C.*, 607 F.2d 438 (D.C. Cir. 1979).

14. It may not even be necessary for this Court to review the excluded report, for its method and findings are obvious and accessible to Justices who review the relevant trial transcripts. The conclusions in the report rest on the observations of four independent "judges" or "coders" at Trial Practices, Inc. who read the Johnston trial transcripts and recognized 65 statements made by the defense, prosecution,

and/or the judge. ***The*** standard that defined even a single sentence as one which would diminish a juror's awesome responsibility for deciding life or death by shifting responsibility elsewhere was not set by the study's author, as Florida's courts erroneously concluded, but by the United States Supreme Court in *Caldwell*. The rest is not speculation, but simple arithmetic by four observers who read the transcripts and counted the sentences. There was no speculation, merely 65 sentences identified in the report, taken from the trial transcripts which a panel of laypersons recognized would lead a juror to the conclusion ***responsibility for deciding whether a defendant lives or dies lies elsewhere***. What else, for example, could this sentence mean when uttered by the court: "The final decision as to what punishment shall be imposed rests solely with this court." This statement clearly establishes in plain English that the advisory panel seated in this case would not be responsible for sentencing Mr. Johnston to death and is accompanied in the transcript by 64 other similar statements.

15. The Florida courts violated the Petitioner's due process rights when they rejected established and reliable scientific evidence in support of the reasonable hypothesis and argument that the *Caldwell*, *Ring*, and *Hurst* errors that occurred during the Johnston trial were *not* harmless beyond a reasonable doubt. Dr. Moore's report is rooted by this Court's decision in *Caldwell*, which addressed harmless error analysis in this particular context as follows:

> 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.

16. As illustrated by Dr. Moore's report, this Court has already made the determination 33 years ago that when a jury's sense of responsibility is diminished at a capital trial, any resulting death sentence is presumptively unreliable under the Eighth Amendment. In other words, this Court has already held in *Caldwell* that the *Hurst* errors that occurred in this particular case are presumptively harmful. This is true in any state where a jury's role is diminished, including Mississippi, Indiana, Delaware, or Florida. *See Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Sentencing Statutes That Divide Responsibility Between Judge and Jury*, Michael Mello, 30 Boston College Law Review 283 (1989). This Court should grant this Petition for Writ of Certiorari.

WHEREFORE, Petitioner, through undersigned counsel, respectfully requests rehearing of this Court's November 13, 2018 denial of the Petition for Writ of Certiorari.

/S/ DAVID D. HENDRY
David D. Hendry
Assistant CCRC-M
Florida Bar No. 0160016

Office of the Capital Collateral Regional Counsel –
Middle Region
12973 N. Telecom Parkway
Temple Terrace, FL 33637
Telephone (813) 558-1600
Fax: (813) 558-1601

Attorney of Record for the Petitioner