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 ELEVENTH CIRCUIT COURT

PETITION FOR A WRIT OF CERTIORARI

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

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit should have remanded or expanded the appeal after new law and evidence developed. The Eleventh Circuit had limited the appeal to the question of trial counsel's failure to call witness Diane Busch to refute facts in the guilt and penalty phases and to establish mitigation. *Hurst v. Florida,* 577 U.S. ___, 136 S. Ct. 616 (2016), intervened. In state court, Mr. Johnston exhausted the *Hurst* issue and presented expert evidence that the jury was misled contrary to *Caldwell v. Mississippi*, 427 U.S. 320 (1985). The Eleventh Circuit refused to remand to the district court or expand the appeal to reach the new claims.
2. Whether the Florida Supreme Court's decision in *State v. Poole*, ___ So.3d ___, 2020 WL 3116597 (Fla. 2020)[1], undermines the rationale of the Eleventh Circuit in this case when the circuit court limited its scope of review and when it affirmed the decision of the district court.

[1] Opinion initially assigned to 292 So.3d 694, Fla. Jan. 23, 2020. It was subsequently withdrawn from the bound volume and republished at ___ So.3d ___, 2020 WL 3116597, Fla., Jan. 23, 2020. Rehearing was denied and clarification granted at ___ So.3d ___, 2020 WL 3116598, Fla., April 2, 2020, and assigned a designation by Westlaw as 2020 WL 1592953. However, the case designated as 2020 WL 1592953 is also designated by Westlaw as "Republished at *State v. Poole*, ___ So.3d ___, 2020 WL 3116598, Fla., Apr. 02, 2020 (No. SC18-245)," an apparent circular reference back to the citation appearing for the rehearing and clarification. On inquiry, Thompson Reuters attorney editors advised counsel on August 19, 2020 that *State v. Poole* is preliminarily assigned citation 297 So.3d 487, subject to change, and will become final on Wednesday, August 26, 2020.

LIST OF PARTIES

All parties appear in the caption on the cover page.

CORPORATE DISCLOSURE STATEMENT

There are no corporations involved in this case.

RELATED CASES

Judgment and Sentence to Death After Trial

1. *State v. Johnston*, Fla. Cir. Ct., Mar. 13, 2000, (NO. 97-13379)

Judgment Affirmed by:

2. *Johnston v. State,* 841 So.2d 349, Fla., Dec. 05, 2002, (NO. SC00-979), *rehearing denied* (Mar. 13, 2003)

Post-Conviction Relief Denied by:

3. *State v. Johnston,* Fla. Cir. Ct., July 21, 2017, (NO. 97-CF-013379), *rehearing denied,* Fla. Cir. Ct., Aug. 17, 2017, (NO. 97-CF-013379)

Denial of Post-Conviction Relief Affirmed by:

4. *Johnston v. State,* 63 So.3d 730, Fla., Mar. 24, 2011, (NO. SC09-780, SC10-75), rehearing denied (Jun. 03, 2011)

Federal Habeas Corpus Proceedings

Habeas Corpus Denied by:

5. *Johnston v. Secretary, Florida Department of Corrections,* judgment entered on Sept. 8, 2014, M.D. Fla., (NO. 8:11-cv-2094-T-17TGW)

Denial of Habeas Corpus Affirmed by:

6. *Johnston v. Secretary, Florida Department of Corrections,* 949 F.3d 619, 11th Cir. (Fla.), Feb. 03, 2020, (NO. 14-14054)

Intervening State and Federal Proceedings after *Hurst*

Successive Post-Conviction Motion Seeking *Hurst* relief denied by:

7. *State v. Johnston*, Fla. Cir. Ct., July 21, 2017, (NO. 97-CF-013379), *rehearing denied,* Aug. 17, 2017, (NO. 97-CF-013379)

Denial of Post-Conviction Relief Affirmed by:

8. *Johnston v. State,* 246 So.3d 266, Fla., Apr. 05, 2018, (NO. SC17-1678), *rehearing denied*, Fla., July 03, 2018, (NO. SC17-1678)

Certiorari Denied by:

9. *Johnston v. Florida,* 139 S. Ct. 481, U.S. Fla., Nov. 13, 2018, (NO. 18-5793), r*ehearing denied, 1*39 S. Ct. 871, U.S. Fla., Jan. 07, 2019, (NO. 18-5793)

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

LAW REVIEW ARTICLES

CONSTITUTIONAL PROVISIONS

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Appendix A) is reported at 949 F.3d 619. The order of November 6, 2019, (Appendix B) denying the motion to reconsider the motion to expand the appeal or remand the proceedings to the Middle District of Florida to address the new *Hurst* and *Caldwell* claims is not reported. The district court's order denying the amended petition for a writ of habeas corpus (Appendix M) is unreported.

JURISDICTION

The opinion of the court of appeals issued on February 3, 2020. On March 19, 2020, this Court entered an order extending the deadline for filing a petition for a writ of certiorari to 150 days because of the COVID-19 pandemic. On March 24, 2020, the circuit court denied Mr. Johnston's petition of panel rehearing and rehearing en banc. The time within which to file a petition for a writ of certiorari in this case extends to and includes August 21, 2020.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

The Eighth Amendment provides in relevant part: "[C]ruel and unusual punishments [shall not be] inflicted."

The Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Mr. Johnston was sentenced to death under Florida's unconstitutional jury-advisory scheme which was later disapproved in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). *Johnston v. State*, 841 So.2d 349 (Fla. 2002). He proceeded to pursue postconviction claims in the original state court well before the *Hurst* decision. These were denied and the denial was affirmed by the Florida Supreme Court. *Johnston v. State*, 63 So.3d 730 (Fla. 2011).

Mr. Johnston then turned to the federal district court, where he challenged the state courts' denials of relief. The district court denied relief and denied motions to issue a certificate of appealability. Mr. Johnston appealed to the Eleventh Circuit and moved for a certificate of appealability from that court. The Eleventh Circuit refused to hear claims relating to the fact that, after the verdict of guilt and during the penalty phase testimony, the forewoman of the trial jury was arrested for charges arising from a criminal proceeding less than a year prior to trial. They also declined to hear a claim of ineffective assistance of trial counsel for

failure to pursue individual *voir dire* of eight jurors who said they had been aware of the extensive, highly prejudicial, pretrial publicity.

However, the Eleventh Circuit did grant a certificate to review claims that the state courts' refusals to grant relief for trial counsel's failure to investigate whether Diane Busch could be called as a witness in the guilt and penalty phases of trial were based on an unreasonable determination of the facts or contrary to, or an unreasonable application of, clearly established federal law. Ms. Busch testified in the post-conviction hearing to facts which would have negated the State's theory that the murder was committed for pecuniary gain and would have provided substantial mitigation by showing Mr. Johnston to be a caring and honest individual.

During the briefing on the claims under review, this Court issued its decision in *Hurst v. Florida,* 577 U.S. ___ (2016), holding Florida's capital sentencing scheme to be unconstitutional. Mr. Johnston filed a successive state postconviction motion in the state trial court. The Eleventh Circuit indicated it would not schedule oral argument until Mr. Johnston's successive *Hurst* motion was resolved.

Mr. Johnston presented his *Hurst* claim in the state circuit court. He proffered evidence from an expert sociologist who found 65 instances where the jury was told that its decision would not determine the outcome of sentencing, establishing a clear constitutional deficiency under the principles of *Caldwell v. Mississippi*, 427 U.S. 320 (1985). As a result,

> 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.

Appendix C (Letter of Harvey A. Moore, April 13, 2017) at pg. App 031.

The state circuit court refused to consider the expert testimony and denied *Hurst* relief because the jury recommendation for death was unanimous and any error was therefore purportedly harmless. The state circuit court also rejected the *Caldwell* claim, but by *non sequitor:*

> [T]he 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 [the *Caldwell* claim].

Appendix P (July 21, 2017 circuit court order denying *Hurst* relief at pg. App 346)

The Florida Supreme Court rejected the *Hurst* claim because the jury recommendation was unanimous. It rejected the *Caldwell* claim citing to its reasoning in *Reynolds v. State*, 251 So. 3d 811, 815 (Fla. 2018), *cert. denied sub nom. Reynolds v. Fla.*, 139 S. Ct. 27 (2018).

This Court denied Mr. Johnston's petition for certiorari. *Johnston v. Florida,* 139 S. Ct. 481 (2018). *Johnston* was one of several cases denied certiorari the same day as the lead case addressing Florida's application of *Hurst v. Florida,* the aforementioned *Reynolds v. Fla.*, 586 U.S. ___, 139 S. Ct. 27 (2018).

In the *Johnston* denial, Justice Thomas concurred, citing to his written concurrence in the denial of certiorari in *Reynolds*. Justice Sotomayor dissented,

citing to her written dissent in *Reynolds*. In her *Reynolds* dissent, Justice Sotomayor reasoned that the Florida Supreme Court's rejection of *Hurst* relief for any defendant who had a unanimous recommendation of death required Supreme Court review. She also reasoned that the *Caldwell* issue raised the reviewable question of "whether the Florida Supreme Court's harmless-error approach [unanimous recommendations render any error harmless] is valid in light of *Caldwell*." *Reynolds*, 586 U.S. at ___, 139 S. Ct. at 35. (Sotomayor, J. dissenting).

After the completion of the *Hurst* proceeding, Mr. Johnston sought to have the Eleventh Circuit remand the pending appeal to the district court to allow him to pursue the *Hurst* and *Caldwell* claims in the district court. The Eleventh Circuit Court refused and held oral argument on November 12, 2019. Although Mr. Johnston's counsel tried to open the door to argument on the *Caldwell* claim, the panel required counsel to limit argument to the issues in the certificate of appealability. The decision denying relief issued February 3, 2020, from the Eleventh Circuit.

Two weeks before the Eleventh Circuit's decision in this case, the Florida Supreme Court issued its radical redaction of *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) protections in *State v. Poole*, ___ So.3d ___, 2020 WL 3116597 (Fla. 2020) (Appendix R). *Poole* removes from the jury the role of unanimously: finding whether aggravating factors are sufficient to impose death; finding that they outweigh mitigation; and recommending a sentence of death. According to *Poole*, the only Constitutional requirement for a jury is "unanimously to find the existence of a

statutory aggravating circumstance beyond a reasonable doubt." ___ So.3d at ___ (slip op. at 39), holding that is the standard Florida courts should apply to *Hurst* claims, although a new state statute requires unanimity in all four steps in future cases. The remaining decisions in death sentencing are assigned to the judge in the *Hurst v. Florida* context.

In the Eleventh Circuit, the court found that Mr. Johnston was not prejudiced by any failure of counsel. 949 F.3d at 647. With *Poole*, the calculus of whether the *Hurst* and *Caldwell* claims should have been considered, and whether prejudice arose from erroneous jury instructions -- doubly erroneous, first under the *Hurst v. State* scheme, and then under the *Poole* scheme -- is fundamentally altered. The Eleventh Circuit should have remanded to the district court to reevaluate its entire decision under the radically altered state law.

This petition follows.

REASONS FOR GRANTING THE PETITION

QUESTION ONE

> Whether the Eleventh Circuit should have remanded or expanded the appeal after new law and evidence developed. The Eleventh Circuit had limited the appeal to the question of trial counsel's failure to call witness Diane Busch to refute facts in the guilt and penalty phases and to establish mitigation. *Hurst v. Florida,* 577 U.S. ___, 136 S. Ct. 616 (2016), intervened. In state court, Mr. Johnston exhausted the *Hurst* issue and presented expert evidence that the jury was misled contrary to *Caldwell v. Mississippi*, 427 U.S. 320 (1985), The Eleventh Circuit refused to remand to the district court or expand the appeal to reach the new claims.

Mr. Johnston had an absolute right to have his *Hurst/Caldwell* claims reviewed in the federal courts. Had the timing been different, Mr. Johnston would

have completed his state proceedings on the *Hurst/Caldwell* issues, and been free to include them in his federal petition for habeas corpus. However, due to the unsettled nature of the development of capital litigation issues, the state and federal courts did not recognize that the sentencing procedure violated the United States Constitution's protection of the Sixth and Fourteenth Amendments and, arguably, the Eighth Amendment, when Mr. Johnston was exhausting his postconviction claims in the state and federal district courts.

The *Hurst/Caldwell* claims did not exist and therefore could not be exhausted in state court until after the federal district court decision and partial briefing had been completed in the Eleventh Circuit. Mr. Johnston moved to stay and abate the Eleventh Circuit proceedings to allow him to pursue his claims in state court. Appendix D, Motion for Stay and Abeyance (March 3, 2016). The Eleventh Circuit denied the motion to the extent of filing the reply brief, Appendix E, Order of March 10, 2016, but ultimately advised by memorandum that it would not schedule oral argument until after completion of state proceedings. Appendix F, Memorandum of May 5, 2017.

After the state proceedings concluded, Mr. Johnston moved to remand the case to the federal district court to allow him to amend with the *Hurst* claim, including the expert sociological evidence showing harmful *Caldwell* error in the mal-instructions and the comments of court and prosecution to the jury. Counsel argued that "Appellant would be seeking a COA on these . . . broader issues concerning the constitutionality of the entire Florida capital sentencing scheme,

rather than just the current issues pending before this Court involving witness Diane Busch." Mr. Johnston argued in the alternative that the certificate of appealability be expanded to allow argument on the *Hurst* claims. Appendix G, Motion to Remand (Jan. 11, 2019).

Ten months later the Eleventh Circuit denied the motion and scheduled oral argument for November 12, 2019. Appendices H and I, Order Setting Oral Argument (October 7, 2019) and Order Denying Motion to Remand (Oct. 9, 2019).

Mr. Johnston then sought reconsideration of the motion to remand, arguing:

> This case involves unique circumstances that warrant this Court's careful consideration of the rejected sociological scientific evidence that Ray Johnston attempted to present in the Florida state courts to establish that the trial errors that occurred in this case were harmful rather than harmless beyond a reasonable doubt. Specifically, following *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Appellant sought the assistance of sociologist and jury trial scientist Harvey Moore, Ph. D. of Trial Practices, Inc. to evaluate whether certain errors at the Johnston trial were harmful or harmless. Ultimately, after performing a content analysis, Dr. Moore concluded that the errors were harmful rather than harmless (see report attached) [included herein as Appendix C]. This report was largely the Appellant's focus of his argument in the state courts in attempts to persuade the courts that the *Hurst* errors were harmful rather than harmless.
>
> The Supreme Court of Florida has continued to find *Hurst* errors harmless beyond a reasonable doubt in all cases where the advisory panel recommendation was unanimous (12-0 for death), including the case at bar (*see Johnston v. State*, 246 So. 3d 266, 266 "Johnston received a unanimous jury recommendation death and, therefore, the Hurst error in this case is harmless beyond a reasonable doubt."). Dr. Harvey Moore's report, attached to this motion, compellingly illustrates that the *Hurst* errors at the Johnston trial were harmful rather than harmless.

THE RELATIONSHIP BETWEEN *CALDWELL, RING, HURST, STRICKLAND*, THE TWO ISSUES

BEFORE THIS COURT, AND THE NEED FOR A REMAND TO THE DISTRICT COURT

The Appellant acknowledges that he is currently limited to the two sole issues before this Court. But at the crux of his argument is the issues of deficient performance and prejudice. Specifically, was Ray Lamar Johnston prejudiced when trial counsel failed to call Diane Busch as a witness to trial, and whether the lower court's decision in this regard was based on an unreasonable determination of facts, and whether the state court decisions were contrary to, or were an unreasonable application of clearly established federal law.

Following *Hurst*, the Appellant's arguments on the two issues before this Court have become much stronger. To make the strongest argument possible in this case, the Appellant needs this Court (or the District Court) to consider the contents of Dr. Moore's attached report. The Appellant's position is that he was denied due process when the state courts refused to consider the contents of Dr. Moore's report.

At issue currently before this Court is whether Mr. Johnston was prejudiced at trial. He certainly was. Not only did trial counsel fail to call a vital witness to trial (Diane Busch), but the State of Florida's entire capital system, which was once thought to be constitutional at the time of this trial, has been found unconstitutional by the United States Supreme Court in *Hurst*. Mr. Johnston had a right for a jury to consider the testimony of an available witness who would testify that Mr. Johnston saved her life. Instead, Mr. Johnston was provided a mere advisory panel who was informed unconstitutionally approximately 65 times that they would not be making the decision of whether Mr. Johnston would live or die, the trial judge would. In addition to the prejudice resulting from the advisory panel failing to hear the mitigating testimony of available witness Diane Busch, the advisory panel was instructed in unambiguous terms that they would not be responsible for the decision to sentence Mr. Johnston to death, contrary to *Caldwell* and *Hurst*.

Following *Hurst*, properly instructed juries now make the life and death decisions in capital cases in the State of Florida, not trial judges. Also following *Hurst*, Florida juries' decisions must now be unanimous. Though this trial resulted in a unanimous recommendation for death, it was the decision of a mere advisory panel, not a constitutionally and properly instructed jury. Had just one member of the advisory panel recommended life, Mr. Johnston would have received *Hurst* relief from the State of Florida. It is the Appellant's position that until he is permitted to return to the District Court to present the information contained within Dr. Moore's report

(or at least have this Court consider the contents of Dr. Moore's report), he will not be permitted to make the strongest arguments available against this unconstitutionally imposed death sentence.

Lack of diligence is not the reason for these issues not being included in the Appellant's 28 U.S.C §2254 Petition. Rather, lack of availability of caselaw at the time of the filing of his §2254 Petition in District Court is the reason. *Hurst* did not issue until 2016, long after the filing of the §2254 Petition. *Hurst* holds that juries rather than judges must make necessary factual findings [to] impose the death penalty. "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." *Id.* at 619. Although *Hurst* did not specifically raise *Caldwell* concerns with the prior Florida jury instructions, it said that advisory recommendations are not enough. It is the appellant's position that a properly instructed jury must make the necessary factual findings in capital cases. The appellant only received an improperly instructed advisory panel at his trial rather than a properly instructed jury.

Had Mr. Johnston's advisory panel heard the testimony of Diane Busch, at least one of the members of the advisory panel would have recommended life over death. Had Mr. Johnston's advisory panel been actual jury members who were constitutionally informed that they were the actual decision makers at the penalty phase, the decision would have been different. One cannot have confidence in the outcome of this case under *Strickland* when the advisory panel's decision was diminished approximately 65 times at trial. "The defendant must show that there is 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* at 694.
The current issues before this Court come into clear focus when analyzed keeping the mandates of *Hurst* and *Caldwell* in mind. Confidence in the outcome of this case for the failure to call Diane Busch as a witness is clearly undermined considering that the advisory panel's role was undermined approximately 65 times at trial. The Appellant once again requests a remand and the opportunity to present his arguments and scientific evidence refuting harmless error beyond a reasonable doubt in the district court.

. . . .

> This Court should reconsider its decision denying the motion to remand this case back to the district court to permit him the opportunity to amend his petition for writ of habeas corpus to include his scientific evidence and arguments under *Hurst* and *Caldwell*. In the alternative, the Appellant renews his request for an opportunity to move to expand the current COA and for supplemental briefing on *Hurst v. Florida*.

Appendix J, Motion for Reconsideration (October 11, 2019).

The panel denied the motion in a single perfunctory sentence, but one of the judges wrote to recognize the *Hurst/Caldwell* issue raised here:

> MARTIN, Circuit Judge, concurring in the result:
>
> I recognize that we are bound by our precedent holding that Hurst v. Florida, 577 U.S.___, 136 S. Ct. 616 (2016) is not retroactive. See Knight v. Fla. Dep't of Corr., 936 F.3d 1322, 1337 (11th Cir. 2019). For that reason, I concur in the Majority's decision to deny Mr. Johnston's motion for reconsideration.
>
> Nonetheless, I write separately because I share the concerns expressed by Justice Sotomayor in her dissent from the denial of certiorari in Reynolds v. Florida, 586 U.S._, 139 S. Ct. 27, 32-36 (2018) (Sotomayor, J., dissenting from the denial of certiorari). Following the Supreme Court's decision in Hurst, the Florida Supreme Court has consistently concluded that any claim of error pursuant to Hurst is harmless if the jury unanimously recommended a sentence of death. See Reynolds v. State, 251 So. 3d 811,815,818 (Fla.) (per curiam). cert. denied. 586 U.S._, 139 S. Ct. 27 (2018); Davis v. State, 207 So. 3d 142, 174-75 (Fla. 2016) (per curiam). It is particularly troubling that. "[b]y concluding that Hurst violations are harmless [when] jury recommendations were unanimous, the Florida Supreme Court transforms those advisory jury recommendations into binding findings of fact." Reynolds, 139 S. Ct. at 33 (Sotomayor, J., dissenting) (quotation marks omitted). I therefore subscribe to Justice Sotomayor's view that this line of cases from the Florida Supreme Court raises substantial Eighth Amendment concerns and may be invalid under Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct 2633 (1985), in which the Supreme Court held "it is 'constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'" Reynolds, 139 S. Ct. at 33 (quoting Caldwell, 472 U.S. at 328-29, 105 S. Ct. at

> 2639); see id. at 35("I would grant review to decide whether the Florida Supreme Court's harmless-error approach is valid in light of Caldwell."). Like Justice Sotomayor, I believe "the stakes in capital cases are too high to ignore such constitutional challenges." Id. (quotation marks omitted). So, while I concur in the denial of Mr. Johnston's motion for reconsideration, I am concerned that this precedent raises serious constitutional concerns for petitioners asserting Hurst claims.

Appendix B (pg. App 025-026), Order of November 6, 2019 at 2-3, Martin, J., concurring in result.

Judge Martin indicates the reason the court did not remand was because *Hurst* was not retroactive for purposes of federal review, citing to *Knight v. Fla. Dep't of Corr.,* 936 F.3d 1322, 1338 (11th Cir. 2019)(Appendix Q). The *Knight* court rejected federal review of a *Hurst* claim because, despite the Florida Supreme Court's retroactive application under state law, federal retroactivity principles did not permit retroactive application for federal review. *Knight* is currently docketed in this Court, *Knight v. Fla. Dep't of Corr.*, No.19-8341 (U.S. - state's brief in opposition filed June 25, 2020). Thus, the question of remand to the district court in this case hinges in part on the outcome of the federal retroactivity issue pending on the *Knight* petition in this Court.

This Court denied certiorari review when Mr. Johnston petitioned from his denial of *Hurst/Caldwell* relief from the state courts. *Johnston v. Florida*, 139 S. Ct. 481 (2018). But Justices Thomas and Sotomayor referenced their concurrence and dissent, respectively, in *Reynolds*. And in neither of those writings did the Justices mention retroactivity *vel non* as a basis for their positions. Thus, the retroactivity issue remains unresolved by this Court, not only in *Knight*, but in this case.

Mr. Johnston advances the *Caldwell* question with the additional weight of expert evidence, testimony and opinion, that his jury was unconstitutionally influenced by the 65 comments of the court and prosecution and faulty instructions based on *Hurst.* As illustrated in the numerous examples cited in Dr. Moore's report in his *Caldwell*-based content analysis of Mr. Johnston's trial transcripts, the case at bar clearly does not pass Eighth Amendment scrutiny (see Appendix C and discussion later herein).

Caldwell reversed a death sentence based on a prosecutor's isolated comments during closing arguments. The 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.

Id. at 341. By ignoring the established Eighth Amendment mandates of *Caldwell* and unreasonably finding harmless error in cases with unanimous recommendations, the Florida Supreme Court leaves clearly established Eighth Amendment violations unrectified.

The case at bar is distinguishable from *Caldwell* because *Caldwell* only presented one instance of the jury's role being diminished. This case presents sixty-five instances of the jury's role being diminished. For example, early in the jury

selection instructions and continuing through *voir dire*, Mr. Johnston's jury was informed: "Once a jury is sworn in this case to try the defendant, if he is found guilty of the crime of First Degree Murder, after that, the jury will be asked to give a recommendation to the Court on penalty." (*see* Appendix. C, pg. App 033 – Trial Transcript pg. 24). Later the advisory panel was informed: "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." (*see* Appendix C, pg. App 036 – Trial Transcript pg. 1806). Before the advisory panel retired for deliberations at the penalty phase they were informed: "When you have reached an advisory sentence in conformity with these instructions, that form of recommendation should be signed by your foreperson and returned to the court." (*see* Appendix C, pg. App 035 – Trial Transcript pg. 1813). All 65 examples from the trial transcripts clearly illustrating the advisory panel's secondary role are appended to Dr. Moore's report (Appendix C).

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

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

As the Florida Supreme Court acknowledged in *Hurst v. State*, "[b]ecause there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances." 202 So. 3d at 69. This Court has stated that it cannot rely upon a legally meaningless recommendation by an advisory jury. *Hurst v. Florida*, 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding" required by *Ring*).

It is difficult to comprehend how Florida can claim that its standard jury instructions, part and parcel of an unconstitutional statute, are not harmful errors that affected every single death sentence since *Ring*, until the statute was altered due to *Hurst*. It is reflective of Florida's arbitrary and misguided application of this Court's precedent.

The Florida Supreme Court believes that because the jury instructions accurately described Florida's then-unconstitutional understanding of the role of the jury, that there is no *Caldwell* error now when it treats this unconstitutional recommendation as binding. Florida cannot repeatedly instruct the jury that its findings are not final and then treat them as final. Not only did Florida's standard jury instructions explicitly state that the jury was making a recommendation and did not inform them of their factfinding capacity, an error under *Ring* and *Hurst*, but it also informed the jury that the judge was the final authority as to the sentence to be imposed. In other words, their decision was not binding, and the jury was aware of that fact. This is a direct violation of *Caldwell* where "it is unconstitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell*, 472 U.S. at 328-29.

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

aggravating factor remains unknown." *Davis v. State*, 207 So. 3d 142, 175-76 (Fla. 2016) (Perry, J. concurring in part and dissenting in part).

Mr. Johnston's penalty phase advisory panel recommended death by a vote of 12 to 0 and did not return verdicts making any findings of fact. Although these recommendations were unanimous, they reflect nothing about the jury's findings leading to the final vote. A final 12 to 0 recommendation does not necessarily mean that the other findings leading to the recommendation – that there were aggravators, that the aggravators rose to the level of warranting death, and that the mitigators did not outweigh the aggravators -- were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. It simply cannot be said that all the jurors agreed as to each of the necessary findings for the imposition of the death penalty. The unanimous votes could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendations. This also impermissibly relieved jurors of their individual responsibility.

Whether "a conviction for a crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Chapman v. California*, 386 U.S. 18, 21 (1967). In fulfilling its "responsibility to protect" federal constitutionally guaranteed rights "by fashioning the necessary rule[s]," *id.*, this

Court has distinguished between two classes of constitutional errors: trial errors and structural errors. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

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

In Mr. Johnston's case, the jury was able to agree unanimously to a death sentence, but the record holds no clues as to what - if any - findings the jury may have made. Further, their recommendation was admittedly flawed because the jury was unable to fulfill its statutory role-- even under the unconstitutional scheme Florida had in place -- because they were unable to determine if sufficient mitigating circumstances exist which outweigh the aggravating circumstances.

The state courts should have considered the expert evidence of *Caldwell* error. Instead, the state courts barred sound, scientific, sociological evidence confirming that the errors in the Mr. Johnston trial were harmful. They did so in contravention of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Dr. Moore concluded on page 4 of his report that "Based on the socio-legal standard established in *Caldwell v. Mississippi* we may conclude to a reasonable

degree of sociological certainty the jury which recommended a sentence of death for Mr. Johnston *in Johnston v. State* was persuaded against the requisite level of attention to its responsibility through comments made by the court and prosecutor." (*see* Appendix C).

On one front, the lower state court ruled that Dr. Moore's report was barred under *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). (*See* Appendix K, Hillsborough County Circuit Court pleadings and testimony related to Dr. Moore's evidence). The lower court's striking of Dr. Moore resulted in due process violations and denial of access to the courts. The Florida Supreme Court failed to cure this error on appeal; the opinion did not even mention the specific claim on appeal that the lower court improperly *Frye*-barred Dr. Moore's evidence. The entirety of the Florida Supreme Court's decision was thus:

> Mr. 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 Mr. Johnston's *Hurst*-induced *Caldwell* claim. *See Reynolds v. State*, No. SC 17-793, -- So. 3d --, [] slip op. at 26-26, 2018 WL 1633075, at *10-12 (Fla. Apr. 5, 2018).

Johnston v. State, 246 So.3d 266, 266 (Fla. 2018).

The Florida state courts should have considered the following evidence:

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

> "It is constitutionally impermissible to rest death a sentence on a determination made by a sentencer who has been led to believe that responsibility for determining the appropriateness of defendant's death rests elsewhere." (footnote omitted).
> "There are specific reasons to fear substantial unreliability as well as bias in favor of death sentences where there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." (footnote omitted).

The results of this analysis are summarized in Table I, attached at Tab A.

Method. "Content Analysis" is a methodology common to many disciplines in the social and behavioral sciences including Sociology, Psychology, Social Psychology, Information and Library Sciences. Typically, it is used for the evaluation of text, video, audio and other observational data and may include both qualitative, quantitative and mixed modes of research frameworks. (footnote omitted). At its most fundamental level, the technique provides a systematic means of codifying and counting references based on explicit coding standards executed by multiple coders. "Basic content analysis relies mainly on frequency counts of low-inference events that are manifest or literal and that do not require the researcher to make extensive interpretive judgements." (footnote omitted).
A panel of four coders read the trial transcript and recorded observations which fit any of the following categories derived from *Caldwell*:
* Any suggestion the jurors might make with respect to the ultimate recommendation for punishment can be corrected on appeal by the sitting judge, appellate court or executive decision-making; or,
* Any suggestion that only a death sentence and not a life sentence will subsequently be reviewed; or,
* Any *uncorrected* suggestions the jury's responsibility for any ultimate determination of death will rest with others, *e.g.* an alternative decision maker such as the judge or a higher state court.
. . . .
Results. Table I identifies 65 sentence-long statements by Judge Diana M. Allen, the State Prosecutor, Jay Pruner, or, by jurors who directly or implicitly repeated questions posed by the State during *voir dire* which the coders found to fit the categories described above. On their face, these sentences appear to diminish the role of jurors or the jury as the final arbiter of the punishment in accord with existing

> Florida law. A total of 61 sentences or 94% ***directly*** reflected the juror's inferior position in setting punishment while 4 or 6% ***implicitly*** asserted sentencing would actually be determined by some other party. Finally, 43% (28) of these statements were made to the jury before the trial began and 57% (37) were made after the presentation of evidence concluded. (See Table I at Tab A.)
>
> **Analysis**. These results are not surprising given that Florida law directly tasked the sitting judge in the trial with the actual sentencing decision in death penalty cases.
>
> . . . .
>
> **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.

Appendix C (pg. App 028-031), 4/13/2017 Trial Practices, Inc. Report.

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

At page 2 of 6 of the 6-15-17 amended order granting the state's motion to strike Dr. Moore's evidence, the state circuit court stated that "In response, Defendant argues that Dr. Moore's report is 'full of facts necessary for this court to consider.'" (Appendix K at App 092). Mr. Johnston stated much more than that in the response. Specifically, he stated that "Dr. Harvey Moore's report is full of facts necessary for this Court to consider and analyze if it is to conduct a robust analysis

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

At page 2 of 6 of that order (Appendix K at App 092), the court stated: "In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle." The content analysis did not employ novel scientific methods. 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* C*ontent Analysis of Judicial Opinions,* 96 Cal. L. Rev. 63 (2008).

At page 4 of 6 of the order, the court stated, "After reviewing the State's motion, Defendant's response, and the evidence and argument presented at the May 18, 2017, hearing, the Court finds that Dr. Moore's testimony is not needed to resolve the outstanding issues in Defendant's Rule 3.851 motion." (Appendix K at App 094)

If the court was inclined to grant relief from the death sentence, the Petitioner would have agreed with that. But since the court was inclined to find the *Hurst* and *Caldwell* errors harmless in this case, Dr. Moore's testimony was in fact needed. Mr. Johnston had a right to access to the courts to present evidence in support of his claims. *See In re: Amendments to the Florida Evidence Code,* 210 So.

3d 1231, 1239 (Fla. 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 [ ] constitutional concerns.").

At page 5 of 6 of the order, the court stated, "The Court does not take issue with the use of content analysis as a means of researching and collecting data. However, there was little to no evidence presented to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue influence." (Appendix K at App 095). In making this finding, the court overlooked the article entitled *Taking Caldwell v. Mississippi Seriously: The Unconstitutionality of Capital Statutes that Divide Sentencing Between Judge and Jury,* 30 B.C. L. Rev. 283 (1989) (Asst. 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 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]. There is, simply no way, that one can confidently conclude that the [ ] statutes of Alabama, Florida, and Indiana do not yield such a result. Such a degree of unreliability in a capital sentencing scheme is constitutionally unacceptable.").

This article was acknowledged and mentioned by Dr. Moore in his 5-15-17 testimony at transcript pages 20-21 (Appendix K at App 127-128). In the law review

article, illustratively as far back as 1989, Michael Mello used content analysis to investigate trials in Alabama, Indiana, and Florida for biased language and undue influence in light of a comparison of the selected trials to the *Caldwell* decision.

Another compelling 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, more than four years ago. *Hurst* and its progeny will surely be the topics of continued research and continued content analysis. The Florida courts should not have overlooked Dr. Moore's report and the *Caldwell* errors that occurred in this case, especially considering the holdings of *Hurst v. Florida* (2016). The record before the Florida courts was full of evidentiary support for the admission Dr. Moore's evidence. All prongs of *Frye* for admissibility of Dr. Moore's evidence were met by Mr. Johnston.

At page 5 of 6 of the order, the court found "that even if Dr. Moore's testimony and methods could meet the required standards, his testimony is still inadmissible as it enters into the purview of the Court's decision-making authority." (Appendix K at App 095). 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 because it might "invade" the purview of the factfinder. The parties have the right to present evidence, especially in a death penalty case. To deny the parties the opportunity to present their case is denial of access to the courts. Because death is different, the Florida courts should have at least afforded Mr.

Johnston an opportunity to present evidence in support of his harmful error arguments.

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

The federal courts should reach the *Caldwell* question raised by *Hurst*. The question of federal retroactive application of *Hurst* under the circumstances in Mr. Johnston's case (and the cases of dozens if not hundreds of similarly situated Florida death row inmates) remains unresolved. That question should be answered to allow application of *Hurst* to some or all of the remaining prisoners on death row under principles of the Equal Protection clause and fundamental fairness after recognition that Florida's sentencing scheme, until remedies made after *Hurst*, was fatally flawed from its inception, and compounded by the mal-instructions and improper arguments presented to the juries.

WITNESS DIANE BUSCH

The Eleventh Circuit limited its review to the question of ineffective assistance of trial counsel for failure to investigate and call Diane Busch as a witness at the guilt and penalty stages of trial. Ms. Busch testified that she had met Mr. Johnston at a church in 1997. She said they had dated on several occasions, and that Mr. Johnston had treated her like a perfect lady, had entertained her and her children, and had always paid for the outings. He never asked her for money.

She fell ill with a severe asthma attack which required hospitalization for four months. Mr. Johnston was with her when she had the attack, assisted until she was transported to the hospital, and managed her hospital care. While she was hospitalized, Mr. Johnston had access to her house, her credit cards, and her car. At one point he accompanied a friend of hers to the house to recover $10,000 in cash she had hidden there, and he assisted in getting the money into the bank. There was additional testimony from Ms. Busch establishing Mr. Johnston's honesty and caring nature. She said he saved her life when, early in the hospitalization, her body was shutting down from organ failure and Mr. Johnston instigated a change of hospitals and pressed medical personnel to recognize and treat the condition, avoiding her death.

Ms. Busch was still in the hospital when she learned Mr. Johnston had been arrested for murder. Police interviewed her and developed some negative information such as Mr. Johnston using abusive language to her family, and that she had asked hospital personnel to keep Mr. Johnston out of her ICU room because

she felt things were out of control. In the state postconviction hearing, she said she did not recall telling police much of the negative information.

Ms. Busch was available to testify, but defense counsel never contacted her. Mr. Johnston testified he told counsel to contact her because of the positive information she could provide.

Mr. Johnston urged that his case was fatally prejudiced by ineffective counsel because:

1. At guilt phase, Ms. Busch's testimony would show he was compassionate and caring during the medical emergency at her house and her hospitalization. This would have refuted the brutal characterization of the attack and murder of the victim.
2. At guilt phase, testimony about the money matters would have shown Mr. Johnston did not need to kill the victim for pecuniary gain. He had access to Ms. Busch's checks and credit cards, and, until she told her friend who assisted in retrieving the $10,000 cache, only she and Mr. Johnston knew where it was located, yet he did not take the money or access the checks or credit cards.
3. Ms. Busch trusted Mr. Johnston with her life. He stayed with her during the initial emergency and pressed for additional diagnosis and treatment which revealed her esophagus had been ruptured during intubation by the EMTs.

4. The fact that Mr. Johnston was in a relationship with Ms. Busch, an attractive businesswoman, would refute the State's contention at trial that the victim would not have dated Mr. Johnston.
5. These and other factors would have created a reasonable doubt in the guilt phase, where most of the evidence was circumstantial and Ms. Busch's testimony was substantial and factual.
6. Her testimony in the penalty phase would have shown the caring and compassionate side of Mr. Johnston, which could have convinced one or more of the jurors to reject a death recommendation.
7. Her testimony in the penalty phase would have refuted the State's theory that Mr. Johnston had a bondage and discipline fetish with women. Ms. Busch would have shown he was respectful and caring with women, he was not always predisposed to abuse or mistreat women. Her evidentiary hearing testimony credited Mr. Johnston with saving her life while she was in a serious medical crisis.
8. Mr. Johnston's actions in saving Ms. Busch's life during her medical emergencies could have convinced one or more jurors to reject a death recommendation. Also, if doubt raised by her testimony in the guilt phase was insufficient to rise to a reasonable doubt, it still could have motivated one or more jurors to reject a death recommendation.
9. Finally, had Ms. Busch testified, Mr. Johnston would have been acquitted, or, if the trial went to a penalty phase, Mr. Johnston would not have chosen to

testify and falsely confess in an attempt to curry favor or sympathy with the jury as Ms. Busch's testimony would have been sufficient.

The Eleventh Circuit focused on the negative information in the police reports of the interview with Ms. Busch and their investigation. How much negative information could have been presented from Ms. Busch, and the degree to which it might have actually supported the mental health mitigation case, are issues that would have to be alleged and presented to the district court on a remand. *Sears v. Upton,* 561 U.S. 945 (2010).

The Eleventh Circuit ignored the question of whether counsel was deficient in failing to develop and call Ms. Busch. Instead, the court focused on victim impact evidence and the prejudice element of the ineffective assistance paradigm and found that there was no prejudice.

The Eleventh Circuit focused solely on the prejudice prong. Due process requires the court to have been properly informed with the evidence of the 65 instances of *Caldwell* misdirection embodied in the expert's report. Even if the improper comments and instructions did not rise to the level of a *Caldwell* Eighth Amendment violation, they should have been factored into the weighing of prejudice – a jury instructed it had a reduced responsibility in sentencing, presented with the mitigation evidence from Ms. Busch, would not have unanimously voted to recommend death. As the only reason for affirming was lack of prejudice, the Eleventh Circuit's deliberate refusal to allow further evidence establishing prejudice, alone, requires remand to allow the evidence to be addressed.

QUESTION TWO

Whether the Florida Supreme Court's decision in *State v. Poole*, ___ So.3d ___, 2020 WL 3116597 (Fla. 2020), undermines the rationale of the Eleventh Circuit in this case when the circuit court limited its scope of review and when it affirmed the decision of the district court.

The Florida Supreme Court altered Florida's capital sentencing scheme to be consistent with this Court's decision in *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616 (2016). The change was set out in *Hurst v. State*, 202 So.3d 40 (Fla. 2016). The decision eliminated the unconstitutional assignment of all sentencing decisions to the trial judge and required the jury to unanimously concur at every step of the capital sentencing paradigm:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating factors, and unanimously recommend a sentence of death.

202 So. 3d at 57.

Four years later, the Florida Supreme Court receded almost in its entirety from the *Hurst* decision:

> It helps first to consider *Hurst v. Florida* in light of the principles underlying the Supreme Court's capital punishment cases. Those cases "address two different aspects of the capital decision-making process: **the eligibility decision and the selection decision."** *Tuilaepa v. California*, 512 U.S. 967 (1994). **As to the eligibility decision, the Court has required that the death penalty be reserved for only a subset of those who commit murder.** "To render a defendant eligible for the death penalty in a homicide case, [the Supreme Court has] indicated that **the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."** *Id.* at 971-72 . . . .

By contrast, the selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972, 114 S. Ct. 2630. . . . .

***Hurst v. Florida* is about eligibility, not selection.**

. . . .

Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. **The eligibility finding is in section 921.141(3)(a): "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5).**" The selection finding is in section 921.141(3)(b): **"[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."**

. . . .

Poole's suggestion that "sufficient" implies a qualitative assessment of the aggravator—as opposed simply to finding that an aggravator exists—is unpersuasive and contrary to this decades-old precedent. Likewise, our Court was wrong in Hurst v. State when it held that the existence of an aggravator and the sufficiency of an aggravator are two separate findings, each of which the jury must find unanimously. Under longstanding Florida law, there is only one eligibility finding required: the existence of one or more statutory aggravating circumstances.

. . . .

This Court clearly erred in *Hurst v. State* by requiring that the jury make any finding beyond the section 921.141(3)(a) eligibility finding of one or more statutory aggravating circumstances. Neither Hurst v. Florida, nor the Sixth or Eighth Amendment, nor the Florida Constitution mandates that the jury make the section 941.121(3)(b) selection finding or that the jury recommend a sentence of death.

. . . .

Unanimous Jury Recommendation. The *Hurst v. State* requirement of a unanimous jury recommendation similarly finds no

> support in *Apprendi*, *Ring*, or *Hurst v. Florida*. As we have explained, the Supreme Court in *Spaziano* upheld the constitutionality under the Sixth Amendment of a Florida judge imposing a death sentence even in the face of a jury recommendation of life—a jury override. It necessarily follows that the Sixth Amendment, as interpreted in *Spaziano*, does not require any jury recommendation of death, much less a unanimous one. And as we have also explained, the Court in *Hurst v. Florida* overruled *Spaziano* only to the extent it allows a judge, rather than a jury, to find a necessary aggravating circumstance. *See* *Hurst v. Florida*, 136 S. Ct. at 624.
>
> Even without *Spaziano*, the *Apprendi* line of cases cannot be read to require a unanimous jury recommendation of death. Those cases are about what "facts"—those that are the equivalent of elements of a crime—the Sixth Amendment requires to be found by a jury. Sentencing recommendations are neither elements nor facts.
>
> . . . .
>
> **There is no basis in state or federal law for treating as elements the additional unanimous jury findings and recommendation that we mandated in *Hurst v. State***

State v. Poole, ___ So.3d at ___, 2020 WL 3116597 (Fla. 2020) (slip op. at 10-13) (emphasis added).

What the *Poole* decision has done is remove the final three of the four *Hurst* protections required by the Fifth, Sixth, Eighth, and Fourteenth Amendments: unanimous jury verdicts on whether the aggravators are sufficient to impose death; unanimous jury verdicts on whether aggravators are outweighed by the mitigators; and unanimous jury verdicts recommending death.

The only constitutional protection the *Poole* court left intact was the initial step in the four constitutional steps to a death sentence: "a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt." *Poole*, slip op. at 15. In most death cases, the State charges additional offenses intertwined with the

actual act of murder. In Mr. Johnston's case, the jury found him guilty of kidnapping, robbery, sexual battery, and burglary of a conveyance with assault. Conviction for only one violent felony is alone enough to support a death sentence in Florida. Thus, the contemporaneous crimes of conviction in Mr. Johnston's case rendered him "eligible" for the death penalty, yet the trial court went on to find additional aggravators for which there is no indication the unanimously jury found beyond a reasonable doubt. The judge thus weighed aggravating factors unsupported by unanimous jury verdicts beyond a reasonable doubt.

The trial court found 4 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." *Johnston*, 841 So.2d at 355, n.3. Only 2 of the 4 aggravating factors were found unanimously beyond a reasonable doubt by a jury. The prior violent felonies were convictions in prior trials, hence the result of a unanimous jury verdict (arguably, those convictions should not be aggravators under *Caldwell* because the juries were not instructed that their guilty verdicts could pave the way for execution). The kidnapping and sexual battery were separate convictions during the murder trial (again, potentially not valid findings for aggravation because of the *Caldwell* failure to instruct that guilty verdicts made Mr. Johnston eligible for death).

The pecuniary gain aggravator must be found unanimously and beyond a reasonable doubt under *Poole*. The record is silent on the jury's vote on this factor.

Likewise, the heinous, atrocious or, cruel aggravating factor requires a unanimous verdict beyond a reasonable doubt. Again, the record is silent. If *Poole* is left to stand, the courts must eliminate the aggravating factors found only by the judge and reweigh whether the two remaining aggravators, despite *Caldwell,* are sufficient to render Mr. Johnston eligible, that the mitigators do not outweigh the aggravators, and that he should be sentenced to death.

The *Poole* decision suggests that capital defendants in the future (if the state legislature changes the law to follow *Poole*, much as it did to follow the lead from *Hurst)* may well have no jury in the penalty phase if the *Poole* paradigm prevails. The State could waive additional aggravators requiring a verdict from the trial jury, and the jury would be discharged. Also, in light of the *Poole* decision's rejection of any role for the jury as to mitigation, should the jury remain impaneled for some sort of penalty phase, the State would be able to exclude, in the jury's penalty phase, all evidence of mitigation as irrelevant. And the State would be well-served if it threaded the needle to avoid seeking an aggravator which would even allow rebuttal evidence sympathetic to the defendant.

Under this new framework of what the constitutions of Florida and the United States required to protect the rights of Mr. Johnston and all other similarly situated capital defendants (i.e. those seeking *Hurst*), the only question, as with Mr. Poole, is whether a jury found any aggravating circumstance beyond a reasonable doubt. Once that question is answered, the *Hurst* inquiry is over.

Under this new paradigm of death, all jury verdicts on facts supporting aggravators (prior violent felony convictions and collateral criminal convictions in the murder trial) take on more significance than ever. It is the *Poole* court's monomaniacal focus on a jury's finding of aggravating **facts**, to the exclusion of the question of sufficiency and the remaining prongs of the death paradigm, that requires a reevaluation of any judicial conclusion that the penalty phase in this case met constitutional requirements. In Mr. Johnston's case, there is no evidence that the jury found any **fact** amounting to or supporting a specific aggravating factor. Florida's death sentencing scheme at the time of Mr. Johnston's trial kept the jury's **fact** basis for recommending death opaque, as there were no detailed verdict forms to show what the jury found or did not find. The verdict form provided for only the recommendation for death (or life), and the vote thereon.

What the jury may have found as **fact** to support any of the aggravators is and will remain unknown. As such, the failings of trial counsel in handling the jury issues (the lying criminal jury foreperson and the publicity-tainted jurors) as alleged in the initial postconviction motion, take on critical significance. It would take only one juror to have rendered the death recommendation non-unanimous. Absent a clear indication of the **facts** required by *Poole*, it is impossible to know whether every **fact** supporting death was unanimously found by the jury, beyond a reasonable doubt. A plurality vote is just as likely as unanimity for every **fact** required to sustain the death penalty in this case, so long as all the jurors agreed

that some combination of aggravation and mitigation added up to a death recommendation.

The *Poole* case also changes the *Hurst/Caldwell* analysis. If the *Poole* paradigm is to persist, then the jurors were misled even more than the mal-instructions contrary to *Hurst*. The jurors should have been told they had to unanimously find **facts** beyond a reasonable to support each aggravator, without regard to whether the aggravator was sufficient to make the defendant eligible for the death penalty. They would have been told their unanimous verdicts on **facts** in the penalty phase would have little to no direct influence on whether Mr. Johnston would be sentenced to death. As with *Hurst*, times three, their fact-finding was only the first step in a process that lay solely in the hands of the trial judge. The jury could be told: "Don't worry if you don't think, for instance, that the 'heinous, atrocious, or cruel' **facts** would justify executing Mr. Johnston, your only task is to find if there are **facts**. The judge will take those **facts**, and some other facts that are not for you to find, or even know the nature of. The judge will do some more things, none of which you can or even legally are allowed to know or consider. Then the judge, not you, the jury, will decide whether to kill Mr. Johnston. Nothing you say or do may ultimately lead to Mr. Johnston's sentence, life or death."

Eliminating all other aspects of the sentencing paradigm makes it critically important, pursuant to *Caldwell*, that the jury be told, from jury selection onwards, that their verdicts on the collateral crimes will be used to decide whether Mr. Johnston will be sentenced to death. The jury needs to be told that their decisions

on the collateral offenses may be the end of their contributions to the sentencing and they could be released after the verdict. The jury needs to be told that the trial for guilt, and their unanimous verdicts, may inherently embody elements as to whether the conviction for murder will result in a death sentence.

The 65 instances of misdirection found by Dr. Moore in the *Hurst* contact would appear to be a major undercount, once the trial is examined for deviations from the *Poole* paradigm.

Remand to the Eleventh Circuit is necessary for the court to reevaluate its finding that there was no prejudice arising from the failure to investigate and call Ms. Busch. Prejudice under *Poole*, with its requirement for unanimous **fact** finding, arises if even one juror might have been swayed by Ms. Busch on one or more of the **facts** supporting conviction and the sentencing recommendation.

Ms. Busch' testimony in the guilt phase might have persuaded one or more jurors that Mr. Johnston did not kill the victim for money, that his post-homicide use of the victim's ATM card was a crime of opportunity rather than a motive for murder. This could have caused one or more jurors to favor conviction for theft rather than robbery and might also have caused one or more jurors to favor a lesser homicide conviction, e.g. second degree. A juror might especially be likely to favor a theft conviction if they had known it could not be used to support an aggravating factor (pecuniary gain).

Over several decades, Florida's courts have disregarded this Court's mandates to ensure constitutionally sound capital sentencing procedures. Florida

has arguably violated the mandates of *Caldwell* (1985) for 35 years. Florida spent years attempting to thread the needle to survive the mandates of *Ring* (2002). Then, after this Court called the State of Florida on said perseverations in *Hurst* (2016), Florida once again has disregarded further mandates with this year's reinstatement of the post-*Hurst* vacated death sentence in *Poole*.

Questions of retroactivity of *Hurst* applied to this case should not even be an issue because Mr. Johnston's advisory panel was advised 65 times contrary to *Caldwell* (1985) that they would not be making the life or death decision, the court would. Evolving standards of decency of a maturing society should include a recognition that Florida has violated *Caldwell* for decades, and include a mandate that all Florida death sentences the state obtained contrary to *Caldwell* should be ordered vacated under the Sixth Amendment, the Eighth Amendment, or both. The Court should not permit the State of Florida to continue to execute individuals who were clearly sentenced to death under an unconstitutional system.

The Eleventh Circuit engaged in substantial speculation as to what a **juror** might think about the evidence from Ms. Busch, including how much possibly negative information arising from Ms. Busch's appearance would have been admitted. Unfairly, a majority of the opinion was devoted to victim impact evidence and cumulative negative information. On a remand, if the appeal remains limited to the Busch evidence, the Eleventh Circuit should be compelled to speculate in light of the new *Poole* standard.

Even if this Court finds *Poole* has strayed from the "labyrinthine restrictions on capital punishment promulgated by this Court," *Glossip v. Gross*, 576 U.S. ___, ___, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring), quoted in *Reynolds*, 586 U.S. ___, 139 S. Ct. 27, 31 (2018) (Thomas, J., concurring in denial of cert.), the intermediate and thus controlling paradigm of *Hurst v. State* compels remand to the Eleventh Circuit for remand to the district court to allow amendment and development of the *Hurst* and *Caldwell* claims, or reevaluation by the Eleventh Circuit of its limitation in its certificate of appealability and on its reasoning.

Even if *Poole* is left to define incredibly limited constitutional protections, remand is necessary to allow amendment of the habeas petition in district court, or reevaluation of the certificate of appealability and the decision in the Eleventh Circuit.

CONCLUSION

Two cases that will be pending before this Court this term raise critical issues challenging the legitimacy of the Eleventh Circuit's decisions in this case. The Eleventh Circuit's refusal to allow remand or amendment to address the *Hurst* and *Caldwell* issues was grounded on *Knight v. Fla. Dep't of Corr.,* 936 F.3d 1322 (11th Cir. 2019). *Knight* is pending before this Court on the question of federal *Hurst* retroactivity. If *Knight* is reversed, the Eleventh Circuit's rationale for denying remand or amendment is eliminated. At least one judge on the circuit panel favors reaching the *Hurst/Caldwell* claims and, perhaps, additional judges en banc might be predisposed to reach the matter. Even if a *Caldwell* reversal is not

compelled in this case, the prejudice arising from the improper jury instructions should be addressed in the Eleventh Circuit's analysis of prejudice regarding Busch.

The second case is *State v. Poole*, ___ So.3d ___, 2020 WL 3116597 (Fla. 2020). Counsel in the instant case is secondarily involved in preparing a certiorari petition in *Poole*, but an earlier deadline has compelled filing the instant petition first. *Poole* has eliminated the rationale the Eleventh Circuit used to justify denying relief in this case. If *Poole* is allowed to stand, the Eleventh Circuit must either be reversed, or remand must issue to require the circuit to reconsider in light of *Poole*. Actually, *Poole* so fundamentally alters the *Hurst* analysis that it may be impossible for the federal courts to address *Hurst* claims without a return first to the state labyrinth to reconsider Mr. Johnston's claims.

Finally, the expert evidence addressing a *Caldwell* violation in the context of *Hurst* provides an enhanced opportunity to address *Caldwell* claims which are apparent on the face of the record and confirmed by expert evidence.

The petition for a writ of certiorari should be granted.

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