DOCKET NO. 20-5492

IN THE SUPREME COURT OF THE UNITED STATES

RAY LAMAR JOHNSTON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

[Capital Case]

I.

Whether certiorari should be granted to review the Eleventh Circuit Court of Appeals' denial of a Certificate of Appealability when the denial does not conflict with any decision of this court or another circuit court; the lower courts correctly applied a properly stated rule of law to the particular facts of this case; and the issue presented is fact-specific and applicable only to this case.

II.

Whether this Court should grant review of Petitioner's ineffective assistance of counsel claim based upon defense counsel's failure to investigate or call a single witness where this witness's testimony would not have changed the outcome of either the guilt or penalty phases of Petitioner's trial and the issue presents no important or unsettled question of law for this Court's review.

III.

Whether this Court should grant review in this case to consider the Florida Supreme Court decision in State v. Poole, 297 So. 3d 487 (Fla. 2020) where no lower court has had the opportunity to pass on how or if Poole affects Johnston and the Florida Supreme Court has rejected Johnston's Hurst claim for reasons not affected by its subsequent decision in Poole.

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PARTIES TO THE PROCEEDINGS

The following were parties in the proceedings below:

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

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

CITATION TO OPINION BELOW

The published opinion of the Eleventh Circuit Court of Appeals is reported at Johnston v. Sec'y, Fla. Dep't Corr., 949 F.3d 619 (11th Cir. 2020).

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals wasentered on February 3, 2020, and Petitioner's Petition for Rehearing and Petition for Rehearing en banc was denied on March 24, 2020. (Pet. Appendix 172). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF THE CASE AND FACTS

Petitioner, Ray Lamar Johnston, a counselled Florida prisoner under sentence of death for the 1997 murder of LeAnne Coryell, seeks certiorari review of the Eleventh Circuit Court of Appeals' decision in Johnston v. Sec'y, Fla. Dep't Corr., 949 F.3d 619 (11th Cir. 2020).

Johnston abducted, beat, raped, and ultimately strangled

LeAnne Coryell in 1997. Photographs of Johnston using Coryell's ATM card led to his arrest. The jury found him guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a vehicle with assault. In penalty phase Johnston testified and admitted to killing Coryell. The State presented testimony of three victims of previous violent attacks by Johnston. Each victim was a complete stranger to Johnston. One was assaulted and raped in her home after Johnston broke in and waited for her to return; the other two were attacked as they were stepping out of their cars. One victim, like Coryell, was beaten with her own belt.

After the jury recommended the death penalty by a vote of 12-0, the trial court found four aggravators- the defendant was previously convicted of violent felonies; the crime was committed while Johnston was engaged in the commission of sexual battery and a kidnapping; it was committed for pecuniary gain, and it was especially heinous, atrocious, or cruel. The court followed the jury's recommendation and sentenced Johnston to death. Johnston v. State, 841 So. 2d 349 (Fla. 2002).

Direct Appeal

The Florida Supreme Court affirmed Johnston's conviction and death sentence in Johnston v. State, 841 So. 2d 349 (Fla.

2002). Johnston did not seek certiorari review by this Court.

State Postconviction Proceedings

On postconviction, Johnston raised an assortment of ten ineffectiveness claims, including his assertion that counsel should have called Diane Busch as a defense witness in both guilt and penalty phases. The Florida Supreme Court affirmed denial of all claims. Johnston v. State, 63 So. 3d 730 (Fla. 2011).

Federal Habeas Petition

Johnston's habeas petition sought review and alleged a total of twelve claims, including the Diane Busch ineffectiveness claim. The Middle District denied relief and the Eleventh Circuit granted a Certificate of Appealability (COA) as to the Diane Busch ineffectiveness claim. While Johnston's appeal was pending, he returned to state court to advance new claims relating to this Court's decision in Hurst v. Florida and Caldwell v. Mississippi. The Eleventh Circuit Court of Appeals denied Johnston's subsequent motion to remand or expand the COA before rendering its decision. Johnston v. Sec'y, Fla. Dep't Corr., 949 F.3d 619 (11th Cir. 2020).

The Eleventh Circuit Court of Appeals' opinion addressed the single issue on which it granted a Certificate of

Appealability; counsel's failure to call witness Diane Busch during the guilt and penalty phases of Johnston's trial. The Eleventh Circuit assumed that counsel's performance was deficient, but found no prejudice under Strickland.[1] On the guilt phase, the court noted that there was ample evidence that Petitioner needed money and stole from the victim in this case. That Johnston did not steal from Busch well before the instant offenses possessed little probative value and did nothing to refute the State's strong evidence of financial motive. The Eleventh Circuit concluded:

> It is undisputed that Johnston used Coryell's ATM card to obtain $500 within an hour and a half after she was murdered. And he unsuccessfully attempted to use it to make three more withdrawals that night, all within minutes after successfully withdrawing the $500. It is also undisputed that at 7:27 a.m. the morning after the murder Johnston used Coryell's ATM card to withdraw another $500 from her bank account. And he then used the ATM card four more times in the next four minutes that same morning in unsuccessful attempts to get $500 more, then $500 more, then $100 more, and then $500 more. Johnston was desperate for money. Nothing that Diane Busch could say about Johnston not stealing from her two months earlier could change the fact that he had a motive for robbery on the night Coryell was murdered. There is no reasonable probability that if Busch had testified the jury would not have convicted Johnston of the murder.

[1] Strickland v. Washington, 466 U.S. 668 (1984).

Johnston v. Sec'y, Fla. Dep't of Corr., 949 F.3d 619, 640 (11th Circuit 2020).

On the penalty phase, the Eleventh Circuit observed that this case was heavily aggravated and that any mitigating evidence offered by Busch was offset by damaging information elicited by the State. The Eleventh Circuit stated:

> Any favorable testimony that Diane Busch might have given if she had been called as a witness was open to impeachment with her prior statements to detectives, as we have already discussed. Not only that, but as the Supreme Court said in another case, it "would have triggered admission of ... powerful ... evidence in rebuttal," which "would have made a difference, but in the wrong direction." Wong, 558 U.S. at 22, 130 S.Ct. 383. And what we have held in another case fits here as well: "Prejudice is ... not established when the evidence offered in mitigation is not clearly mitigating or would open the door to powerful rebuttal evidence." Ledford v. Warden, GDCP, 818 F.3d 600, 649 (11th Cir. 2016). Busch's testimony would have opened the door to a lot of evidence harmful to Johnston instead of altering the sentencing balance in favor of him.
>
> The brutal details of Johnston's abduction, beating, and murder of LeAnne, the lifelong pattern of his violent attacks against other women, and the victim impact evidence about the devastating loss suffered by the family members and friends LeAnne left behind still weigh overwhelmingly in favor of a death sentence. See Krawczuk v. Sec'y, Fla. Dep't of Corr., 873 F.3d 1273, 1297 (11th Cir. 2017) (concluding that there was no reasonable probability of a different result given the "substantial weight due to aggravation").

Johnston v. Sec'y, Fla. Dep't of Corr., 949 F.3d 619, 646-47 (11th Cir. 2020).

Johnston now seeks certiorari review.

REASONS FOR DENYING THE WRIT

I.

The Eleventh Circuit's failure to grant a Certificate of Appealability to review Petitioner's Hurst/Caldwell claims presents no important or unsettled question of constitutional law for this Court's review.

Johnston was convicted of the brutal slaying of LeAnne Coryell, a woman who lived nearby in the same apartment complex. She was abducted, beaten, raped, and ultimately strangled; the jury convicted Johnston of murder, kidnapping, robbery, rape, and burglary of a vehicle with assault. Johnston testified during the penalty phase and admitted that he killed LeAnne Coryell. His jury recommended by a vote of 12-0 that he be sentenced to death.

After Johnston's habeas petition was denied in the Middle District of Florida he sought appellate review. The Eleventh Circuit granted a Certificate of Appealability on two related issues dealing with counsel's ineffectiveness. While review was pending, Hurst v. Florida, 136 S. Ct. 616 (2016), was decided.

Johnston elected to return to state court where he advanced two new claims. First, he argued that his death sentence was

infirm because Florida failed to meet the requirements of Hurst v. Florida. Second, and despite the fact that he did not object or advance this claim on direct appeal, Johnston asserted that his jury instructions violated Caldwell v. Mississippi by, for example, telling the penalty phase jury that its sentencing decision was nothing more than a recommendation. Denial of these claims was affirmed by Florida's Supreme Court, and this Court declined to grant certiorari review.

With his new state court claims now exhausted, Johnston asked the appellate court to remand his pending appeal to the district court so that he could amend his habeas petition or, in the alternative, to expand the Certificate of Appealability to include his new claims. It is the Eleventh Circuit's denial of that motion that drives the instant Petition.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review. Johnston makes no effort to establish that any of these considerations are met. The Eleventh Circuit Court of Appeals properly denied Johnston's motion to expand the Certificate of Appealability (COA), there is no conflict in that decision among other circuits or this Court's

precedent, nor is there any important unsettled rule of law that requires this Court to intervene.

As this Court has explained, Congress has mandated that a prisoner seeking postconviction relief under 28 U.S.C. §2254 has no automatic right to appeal a district court's denial or dismissal of a habeas petition. Instead, the petitioner must first seek and obtain a COA. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003); 28 U.S.C. § 2253(c)(1). A COA may be granted only where there is "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), which requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000); Miller-El, 537 U.S. at 336. Johnston's motion to expand the COA was insufficient under Slack and failed to make the requisite substantial showing that he was denied a constitutional right. No reasonable jurist would conclude that Johnston was entitled to relief.

To begin with, and as Judge Martin observed below, Johnston's claims fail at the threshold because Hurst does not apply to convictions that became final before Hurst was decided. See Pet. App. 25 (Martin, J., concurring in denial of motion for

reconsideration). Thus, even had the court of appeals permitted Johnston to develop his arguments in either the court of appeals or the district court, he was not entitled to relief as a matter of federal law.

Just last term, this Court concluded that "Ring and Hurst do not apply retroactively on collateral review." McKinney v. Arizona, 140 S. Ct. 702, 708 (Feb. 25, 2020) (citing Schriro v. Summerlin, 542 U.S. 348, 358 (2004)). McKinney, a petitioner on death row, "advanced an . . . argument based on Ring and Hurst." Id. He argued that he was entitled to relief because Ring and Hurst "now requir[e]" a jury to find aggravating circumstances that make a defendant eligible for the death penalty. Id. The Court rejected that argument, pointing out that his "case became final on direct review in 1996, long before Ring and Hurst." Id. Because "Ring and Hurst do not apply retroactively on collateral review," and because McKinney's case "[came] to [the Court] on [] collateral review, Ring and Hurst do not apply." Id.

Johnston's conviction and sentence became final in 2002. He therefore cannot claim the benefit of Hurst under federal law.[2]

The same holds true for Johnston's Caldwell claim. Under

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[2] Johnston was able to raise his Hurst claim in state court only because the Florida Supreme Court has adopted a broader approach to retroactivity under state law. See Mosley v. State, 209 So. 3d 1248, 1274 (Fla. 2016).

Caldwell v. Mississippi, "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." 472 U.S. 320, 328-29 (1985).

Here, Johnston alleges that his Caldwell claim "bec[a]me much stronger" in light of Hurst because "[a]lthough Hurst did not specifically raise Caldwell concerns with the prior Florida jury instructions, it said that advisory recommendations are not enough." Pet. 9-10. In other words, Johnston's Caldwell claim travels through Hurst because, in the wake of that decision, a jury must make certain findings before a judge may impose death and thus, in Johnston's view, his jury was misled into thinking that the trial court alone was responsible for sentencing. See also Johnston, 246 So. 3d at 266 (characterizing Johnston's Caldwell claim as "Hurst-induced"). But, even assuming that theory otherwise had merit, Hurst is not retroactive on collateral review as a matter of federal law; consequently, federal law does not give Johnston a right to relief based on a Caldwell claim that requires retroactive application of Hurst.

The Petition in this case was filed six months after this Court issued its decision in McKinney. Yet Johnston does not

address the Court's recent determination that "Ring and Hurst do not apply retroactively on collateral review," McKinney, 140 S. Ct. at 708, and still less does he offer any justification for revisiting that ruling. Nor does he allege any split of authority on the retroactivity question. This Court should deny certiorari on that basis alone.

Moreover, the Florida Supreme Court's denial of Johnston's Hurst and Caldwell claims was a correct application of state law that is supported by well-established federal precedent. As will be seen in the merits analysis, Johnston has not demonstrated that there is anything debatable about the claim he is now urging this Court to review, and the Eleventh Circuit Court of Appeals properly denied his motion to expand the COA. See Miller-El, 537 U.S. at 336-338; Slack, 529 U.S. at 484. In order to obtain relief on his underlying claim, Johnston was required to show that the state court decision contradicts this Court on a settled question of law or holds differently than did this Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405, 120 S. Ct. 1495, 1519 (2000). Johnston failed to meet this standard. Accordingly, on procedural grounds alone, certiorari review should be denied.

JOHNSTON'S HURST V. FLORIDA CLAIM

The record provides ample support for the Florida Supreme Court's harmless error analysis, and this Court has repeatedly declined to review comparable determinations that Hurst violations constituted harmless error.[3] Grounds for such harmless error review in this Court are even more attenuated in this case which comes to this Court following the Eleventh Circuit's rejection of Johnston's attempt to expand the Certificate of Appealability on habeas review. Given the deferential review provided to the state court decision in this case under the AEDPA, Petitioner's Hurst claim did not warrant any encouragement to proceed further. Indeed, this Court has already

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[3] E.g., Lowe v. State, 259 So. 3d 23 (Fla. 2018), cert. denied, 139 S. Ct. 2717 (2019); Anderson v. Florida, 257 So. 3d 355 (Fla. 2018), cert. denied, 140 S. Ct. 291 (2019); Reynolds v. State, 251 So. 3d 811 (Fla. 2018), cert. denied, 139 S. Ct. 27 (2018); Tanzi v. State, 251 So. 3d 805 (Fla. 2018), cert. denied, 139 S. Ct. 478 (2018); Johnston v. State, 246 So. 3d 266 (Fla. 2018), cert. denied, 139 S. Ct. 481 (2018); Crain v. State, 246 So. 3d 206 (Fla. 2018), cert. denied, 139 S. Ct. 947 (2019); Grim v. State, 244 So. 3d 147 (Fla. 2018), cert. denied, 139 S. Ct. 480 (2018); Guardado v. State, 238 So. 3d 162 (Fla. 2018), cert. denied, 139 S. Ct. 477 (2018); Philmore v. State, 234 So. 3d 567 (Fla. 2018), cert. denied, 139 S. Ct. 478 (2018); Guardado v. Jones, 226 So. 3d 213 (Fla. 2017), cert. denied, 138 S. Ct. 1131 (2018); Morris v. State, 219 So. 3d 33 (Fla. 2017), cert. denied, 138 S. Ct. 452 (2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017), cert. denied, 138 S. Ct. 3 (2017); Truehill v. State, 211 So. 3d 930 (Fla. 2017), cert. denied, 138 S. Ct. 3 (2017).

declined to review this issue on direct review of the Florida Supreme Court's determination that any Hurst error was harmless. Johnston v. Florida, 139 S. Ct. 481 (2018).

This Court need not even reach the question of harmlessness, as there was no cognizable constitutional error requiring harmless error review. As such, this case would be a uniquely inappropriate vehicle to address the question of harmless error, as both this Court and the Florida Supreme Court have recognized that there is no underlying constitutional error where the jury findings necessarily include an aggravating circumstance as in Petitioner's case.

The Florida Supreme Court has recently receded from its Hurst v. State decision and narrowed the eligibility requirements to impose the death penalty under state law.[4] In

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[4] This Court's Hurst decision did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. However, on remand in Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017), the Florida Supreme Court greatly expanded this Court's ruling, requiring that "before 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 circumstances, and unanimously recommend a sentence of death." The court's expansion of the holding in Hurst v. Florida was not required or even suggested by this Court's decision in Hurst. This Court's

State v. Poole, 297 So. 3d 487 (Fla. 2020) (pet. for cert. filed), the Florida Supreme Court repudiated Hurst v. State's additional jury findings and what "constitutes an element," beyond those not required by this Court in Hurst v. Florida and section 921.141(3)(a), Florida Statutes. Id. at 503, 505. The Poole decision did so, "except to the extent it requires a jury to unanimously find the existence of a statutory aggravating circumstance beyond a reasonable doubt." Id. at 507-08. This is in accord with recent precedent from this Court. See McKinney v. Arizona, 140 S. Ct. 702, 707 (2020) ("Under *Ring* [*v. Arizona*, 536 U.S. 584 (2002),] and *Hurst* [*v. Florida*], a jury must find the aggravating circumstance that makes the defendant death eligible. But importantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range.").

In any case, review of the Florida Supreme Court's harmless error analysis reveals no constitutional question or fairly debatable factual question. In denying this claim, Florida's

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ruling in Hurst v. Florida was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance,** is . . . unconstitutional." Hurst, 136 S. Ct. at 624 (emphasis added).

high court cited to its own precedent in Davis v. State, 207 So. 3d 142 (Fla. 2016), and Johnston does not even attempt to identify any conflicting federal law that applies. Indeed, Johnston's case is a poor vehicle for assessing Hurst v. Florida error. Florida denied relief on the merits because state law recognizes limited retroactivity of Hurst; federal law, using a different test, denies retroactive application.[5] See McKinney v. Arizona, 140 S. Ct 702 (2020).

The state court decision denying relief to Johnston on harmless error grounds cannot be contrary to, or an unreasonable application of established Supreme Court precedent where the applicable precedent from this Court establishes there is no underlying constitutional error. The unanimous verdict by Johnston's jury establishing his guilt of contemporaneous felonies as well as his prior violent felonies were clearly sufficient to meet the Sixth Amendment's factfinding requirement, see Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (explaining that the "the fact of a prior conviction" is an exception to Apprendi's jury-finding requirement); Almendarez-Torres v. United States, 523 U.S. 224, 243-48 (1998), and he was properly rendered eligible for a death sentence.

[5] Johnston's case became final on direct appeal in 2002.

Since there is no underlying constitutional violation, it is clear that a certificate of appealability was properly denied.

When Johnston was sentenced to death in 1999, a defendant convicted of a capital crime in Florida could be sentenced to death only if the trial judge found both (1) the existence of at least one statutorily enumerated aggravating circumstance, and (2) that the aggravating circumstances outweighed the mitigating circumstances. Spaziano v. Florida, 468 U.S. 447, 451-52 & n.4 (1984), overruled in part by Hurst v. Florida, 136 S. Ct. 616 (2016) (citing § 921.141(2)(b), (3)(b), Fla. Stat. (1983)). The sentencing jury would render an advisory verdict, but the judge would make the ultimate sentencing determination. See id. (citing § 921.141(3), Fla. Stat. (1983)). This Court has upheld that procedure as constitutional, including under the Sixth Amendment. See Hildwin v. Florida, 490 U.S. 638 (1989). This system affords capital defendants the benefits flowing from jury involvement while still retaining the protections associated with judicial sentencing. See, e.g., Proffitt v. Florida, 428 U.S. 242, 252 (1976) (plurality opinion) ("[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced

in sentencing than a jury, and therefore is better able to impose a sentence similar to those imposed in analogous cases.”).

Johnston contends that his jury failed to make any of the required factual findings, and suggests that the Florida Supreme Court merely rubber-stamped his claim as harmless because his penalty phase jury was unanimous in recommending a death sentence.[6] Petitioner omits the important fact that his jury, the same panel that unanimously recommended death, also found beyond a reasonable doubt that Johnston had committed several violent felonies including rape, robbery, and burglary of a conveyance with assault. The existence of only one of these violent offenses sufficed to render him death eligible under Florida law; any federal component to his alleged Hurst v. Florida claim fails because the requisite Sixth Amendment jury fact-finding was established beyond a reasonable doubt. See Apprendi, 530 U.S. at 490. Florida’s rejection of Johnston’s Hurst v. Florida

[6] Johnston also conflates this Court’s opinion in Hurst v. Florida with the Florida decision in Hurst v. State, 202 So. 3d 40 (Fla. 2016); the former addressed Florida’s failure to require a jury determination of the initial aggravating factor necessary to render a defendant death eligible. Hurst v. State required extensive revision of Florida’s capital sentencing procedure and included new requirements such as unanimous “findings” on sentencing factors beyond the existence of at least one aggravating circumstance.

claim is consistent with this Court's precedent and certiorari review should be denied. See McKinney v. Arizona, 140 S. Ct. 702 (2020).

In sum, the denial of a COA in this case does not conflict with the relevant decisions of this Court or other circuit courts on an important legal principle and did not decide an unsettled question of federal law.

THE CALDWELL CLAIM

Next, Johnston asserts that Florida's standard jury instructions were flawed because, in his view, they diminished the jury's sentencing role in violation of Caldwell v. Mississippi. Johnston's argument fails in part because the capital sentencing procedure at issue in Caldwell is significantly different from Florida's. Mississippi employs direct jury sentencing in capital cases; the judge plays no part other than to oversee the validity of the process. See MS Code § 99-19-103.

Compared to a Mississippi jury, the sentencing role of Florida juries in capital cases is diminished, but not in a way that violates Caldwell. Under the statute in effect at the time of Johnston's sentencing, the jury was required to consider and weigh the aggravators and mitigators but its recommendation as

to whether death was warranted, while given great weight, was not binding; the court could reject a death recommendation by the jury and impose life. Johnston's failure to acknowledge this distinguishing factor substantially weakens his Caldwell claim.

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

Johnston correctly notes that his jury was told that their recommendation was advisory and that the court was responsible for sentencing. That was true then and, with regard to a death recommendation, true now. Still, Florida juries are hardly led to believe that their role in the proceedings is insignificant — even post-Ring, pre-Hurst juries. See Darden v. Wainwright, 477 U.S. 168, 183 n.15 (1986) ("Caldwell is relevant only to certain

types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.").

Johnston's penalty phase jury was instructed that "[y]our advisory sentence is entitled by law and will be given great weight by this court in determining the sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend." (Respondent's Appendix A, pp. 1806-1807). And, to reinforce the significance of the jury's undertaking, Johnston's jury was told that "[t]he fact that the determination of whether you recommend a sentence of death or life in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence." (Respondent's Appendix A, pp. 1812-1813).

The instructions used in Johnston's case were standard instructions approved by Florida's Supreme Court. Florida juries are told that their job is to make a sentencing recommendation to the trial judge who will then impose the sentence; this is

neither misleading nor detrimental to the jury's role as defined under Florida law. Indeed, this Court has addressed Florida's hybrid sentencing procedure, specifically noting the benefits of a jury's consideration of the facts adduced during the penalty phase along with the court's perhaps stronger ability to compare cases so that similar factual scenarios will result in like cases receiving like sentences. Proffitt v. Florida, 428 U.S. 242, 252 (1976).

Every capital penalty phase jury in Florida, including Johnston's, is given the same standard instruction. Taking Johnston's argument to its logical conclusion would mandate jury sentencing and effectively render Florida's hybrid sentencing system invalid. This Court has never held that jury sentencing is constitutionally required. See Ring, 536 U.S. 584. 612 (2002) (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed.").

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. Romano v. Oklahoma, 512 U.S. 1, 9 (1994). The Eleventh Circuit has consistently rejected

Caldwell challenges to Florida's jury instructions in capital cases in the years since Romano. As the Eleventh Circuit has explained, the infirmity identified in Caldwell is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." Davis v. Singletary, 119 F.3d 1471, 1481-82 (11th Cir. 1997) see also Johnston v. Singletary, 162 F.3d 630, 642-44 (11th Cir. 1998); Belcher v. Sec'y, Fla. Dep't of Corr., 427 Fed. Appx. 692, 695 (11th Cir. 2011).

UNANIMITY AND CALDWELL

Johnston next complains that the Florida Supreme Court effectively employed a per se harmless error rule in his case which is limited solely to determining whether a jury's sentencing recommendation was unanimous. Unanimity, in Johnston's view, masks a possible Caldwell error; because Florida's "flawed" instructions diminish a jury's sense of responsibility, it is impossible to tell whether a unanimous jury made the factual findings necessary to support a death sentence. But Florida has explicitly stated that unanimity is only a part of the test it employs in assessing harmless error.[7]

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[7] In comparison, the Florida Supreme Court has found Hurst errors to be harmful in all post-Ring cases where the jury's recommendation was not unanimous, regardless of the type and

Reynolds v. State, 521 So. 3d 811 (Fla. 2018). Johnston's claim in this regard is entirely speculative and merely voices his disagreement with the Florida Supreme Court's denial of relief in his case.

First of all, Johnston correctly notes that many of the Florida Supreme Court's decisions have affirmed, as in his case, after noting the fact that the defendant's penalty phase jury recommendation was unanimous. This is not to say, however, that the Court is merely rubber stamping the outcome once it sees jury unanimity. To the contrary, the Court has repeatedly explained the complex process involved in assessing harmlessness in Hurst cases. Unanimity, the Court explained in Davis v. State, is a strong indicator, as it demonstrates beyond a reasonable doubt that the jury followed its instructions and made the necessary findings of fact, including the existence and respective weight of aggravators and mitigators, before determining whether to recommend a death sentence. In its recent decision in Andres v. State, 254 So. 3d 283 (Fla. 2018), a case where the jury's death recommendation lacked unanimity, the

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nature of the aggravating factors. See, e.g., Johnson v. State, 205 So. 3d 1285 (Fla. 2016); Deviney v. State, 213 So. 3d 794, 799 (Fla. 2017); Banks v. State, 219 So. 3d 32 (Fla. 2017); Abdool v. State, 220 So. 3d 1106 (Fla. 2017); Kirkman v. State, 233 So. 3d 456 (Fla. 2018); Pagan v. State, 235 So. 3d 317 (Fla. 2018); Everett v. State, 258 So. 3d 1199 (Fla. 2018).

Court explained:

> The trial court imposed Andres' death sentence following the jury's non-unanimous recommendation of death by a vote of nine to three. This Court is unable to determine or speculate why the dissenting jurors voted for a life sentence. This Court cannot determine whether these jurors did not find that sufficient aggravating factors were proven to impose a sentence of death, that the aggravation did not outweigh the mitigation, or, for some other reason, determined that death was not an appropriate sentence. Thus, the Hurst error was not harmless beyond a reasonable doubt.

The Florida Supreme Court has repeatedly explained that unanimity is just the first step in its assessment of harmless error; the focus then turns to whether the court may conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors. Id. at 304. In Johnston's case, while the Florida Supreme Court's opinion was abbreviated, the postconviction court's Order denying relief incorporated a full analysis of the necessary factors:

> The Court finds that this was a highly aggravated case where the aggravators significantly outweighed the mitigators, that the jury was instructed the aggravators must be established beyond a reasonable doubt, that the jury was not required to recommend death if the aggravators outweighed the mitigators, and that the jury recommendation was unanimous. Further, the Court finds that the evidence supporting the previous violent felonies both due to the contemporaneous felonies of sexual assault, kidnapping, and burglary of a conveyance with an assault or battery, and due to Defendant's prior

> violent felony convictions for brutal acts of violence against women, which involved the same modus operandi as was present in the instant case, outweigh both the statutory and non-statutory mitigation that was presented on Defendant's behalf. Additionally, the Court finds that the evidence presented proving that the murders were especially heinous, atrocious, or cruel showed that the murder was clearly committed in a way unnecessarily tortuous (sic) to the victim, thereby further outweighing any mitigation presented on Defendant's behalf. Finally, the Court finds that to date, the Florida Supreme Court has not found Hurst error in any unanimous jury cases. Consequently, the Court concludes that there is no reasonable possibility that Hurst error affected the sentence in this case.

(Petitioner's Appendix P, pp. 8-9, case citations removed). This case is not, as Johnston suggests, a mere counting of advisory recommendations, but consists of a focused assessment of what factual determinations were made beyond a reasonable doubt by the jury, a determination wholly consistent with this Court's decision in Hurst v. Florida that precludes any suggestion that Caldwell was violated.

POSTCONVICTION COURT'S EXCLUSION OF JOHNSTON'S EXPERT

Johnston next asks this Court to consider the state court's decision to exclude so-called "expert" testimony. But his argument amounts to nothing more than a claim that the state court erred in its application of state law. Certiorari review is generally not granted where the case is limited to mere error correction. Rule 10 of this Court's rules discourages certiorari

petitions based on questions of mere trial court error, and this Court has expressly rejected review where the decision turns on one of mere error correction. Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (citations omitted) ("error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari.")

The State sought to exclude Johnston's expert witness because, as cross examination of Dr. Moore revealed, his analysis required nothing more than the ability to read English. Indeed, as Dr. Moore explained, he employed a team of laypersons who merely read the transcript and made notes whenever they encountered language that might possibly be interpreted as a Caldwell violation. The postconviction court excluded Dr. Moore because it found that this type of analysis failed meet the Frye[8] test — specifically, because Johnston failed to show that content analysis is widely accepted or used as a means to investigate a trial for biased language or undue prejudice.

In addition, Florida law reserves expert testimony for those cases where the trier of fact requires assistance in understanding the evidence or determining a fact in issue. §

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

90.702, Fla. Stat. The postconviction court noted in its Order granting the prosecution's motion to strike that Dr. Moore's particular expertise "does not provide any additional knowledge or ability that the Court does not also possess." Florida's decision to exclude Dr. Moore was decided by reference to Florida's evidence code; there is no federal constitutional dimension warranting certiorari review by this Court over a matter that turns on Florida's interpretation of its own evidence code.

II.

Review of Petitioner's ineffective assistance of counsel claim should be denied where the decision below does not conflict with any of this Court's precedent and presents a fact specific application of Strickland.

Johnston challenges the Eleventh Circuit's rejection of his claim that counsel ineffectively failed to call Diane Busch as a defense witness. Because his case is governed by AEDPA, review by the lower court was limited to assessing whether Florida's ruling was contrary to, or an unreasonable application of Strickland. This is necessarily different from determining correctness of the state court's decision; where there is *any* reasonable argument that counsel met the Strickland standard, habeas relief must be denied. Harrington v. Richter, 562 U.S.

86, 105 (2011).

Johnston makes no attempt to establish any valid basis for certiorari review; he merely restates the same arguments that have consistently been rejected by the state and federal courts below. Johnston does not offer any specific criticism with regard to the analysis conducted in the Eleventh Circuit opinion or identify any deficiency or flaw in the reasoning or the legal principles applied. He makes no attempt to explain how any potential error in the ruling below merits this Court's certiorari review.

The only question presented with this issue is whether relief was properly denied on the facts of this case, and Johnston's argument, which is almost wholly fact-based, inexplicably omits critical portions of the testimony relating to the wisdom of using Diane Busch as a defense witness — in particular, the extensive damage this witness would have caused to Johnston's mitigation plan. The propriety of the lower court's ruling regarding counsel's effectiveness can only be assessed by considering this negative information.

Had counsel called Diane Busch, she would have been impeached with her prior inconsistent statements to law enforcement made shortly after Johnston's arrest and her

credibility destroyed. And the jury would have heard about Johnston's abusive and inappropriate behavior that eventually motivated Ms. Busch to have him banned from the ICU. Her testimony, that Johnston was helpful, would permit the State to rebut with evidence from the nursing staff, some of whom were so fearful of Johnston that they asked security to walk them to their cars. Johnston threatened Busch's family as well.

Johnston made sexual comments about Diane Busch while she was sick and heavily medicated; at one point a member of the nursing staff found Johnston lying on top of an unconscious Diane Busch while her medical alarms were sounding, and when nurses attempted to attend to their patient Johnston refused to allow it. Diane Busch's testimony about Johnston's "good deeds" would have elicited testimony from her family that he used her car as if it were his own while Diane Busch was hospitalized and when the family asked him to return it, he threatened them, cursed and threw the keys at them.

Once she recovered the car, Diane Busch's mother found a paper bag containing a knife and surgical gloves on the floor of the back seat. Johnston used a knife and gloves during previous attacks, as described by the four victims who testified in Johnston's penalty phase. The slight mitigation Diane Busch

might have provided would have had severely negative consequences to the defense case, the lower court determined, and counsel was not ineffective in failing to use her. Johnston v. Sec'y, Fla. Dep't Corr., 949 F.3d 619, 644 (11th Cir. 2020).

The lower court's conclusion that Johnston failed to establish prejudice was not an unreasonable application of Strickland on these facts. And while Johnston also asserts that Busch's testimony would have had a positive synergistic effect in the context of his Caldwell claim, there is no logical support for such a speculative conclusion. The lower court's review was limited to assessing whether Florida's denial of his Strickland claim was unreasonable; it was not. And as his Caldwell claim is similarly without merit, no amount of synergy would revive these otherwise dead claims.

The Florida Supreme Court's decision does not conflict with any decision of this Court or involve an important, unsettled question of federal law. It is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984). Certiorari review is consistently rejected "except in cases involving principles, the settlement of which is of importance to the public as

distinguished from that of the parties." Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955). This Court should therefore decline to exercise its certiorari jurisdiction.

III.

This case is not a suitable vehicle for assessing the validity of the Florida Supreme Court's recent decision in State v. Poole, 297 So. 3d 487 (Fla. 2020), where no lower court has had the opportunity to pass on how or if Poole affects Johnston.

The Florida Supreme Court recently decided State v. Poole, 297 So. 3d 487 (Fla. 2020) and receded from changes to Florida's capital sentencing procedure previously mandated by Hurst v. State, 202 So. 3d 40 (Fla. 2016). Hurst, decided in response to this Court's Hurst v. Florida determination that Florida's death sentencing procedure was infirm, directed a vast restructuring, with the Court suddenly requiring unanimous jury findings not only as to the existence of aggravators, but also as to comparative weight of aggravators and mitigators as well as the ultimate decision of whether to recommend a death sentence.

In Poole, Florida's high court reexamined the rationale behind those changes: "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 921.141(3)(b) selection finding or that the jury recommend a sentence of death." Id. at 503.

Johnston now asks this Court to address whether Poole "undermines the rationale of the Eleventh Circuit in this case" (Petition at p. 30). At no time, however, has Johnston asked the Eleventh Circuit, or any other court, to examine how or if Poole has any relevance to his case. This Court does not typically review questions not reached by the lower court. See, e.g., Owens v. Union Pac. Railroad Co., 319 U.S. 715, 725 (1943) (declining to answer "questions the Court of Appeals did not reach" and which the Court "therefore ha[d] no occasion to decide"); Michigan v. Long, 463 U.S. 1032, 1053 (1984); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Without citation to authority, Johnston contends that remand is necessary because the Eleventh Circuit's analysis is undermined by Poole. In Johnston's view, Poole impacts his Hurst/Caldwell claim, alters the court's Strickland prejudice analysis, and mandates a remand with directions to the lower

court either to expand the COA or to amend his habeas petition in the district court. In short, Johnston now claims that Poole changes every aspect of this case. But the court below did not pass on that claim; and this Court should not be asked to do so in the first instance. See McWilliams v. Dunn, 137 S. Ct. 1790, 1801 (2017) (explaining that this Court is "a court of review, not of first view") (quotation marks and citation omitted).

In any event, this is not an appropriate vehicle for considering whether Poole properly interprets the Sixth Amendment. Though Johnston alleges that Poole "undermines" the court of appeals' resolution of his case, Pet. 30, he overlooks that Poole was not the basis for the state courts' rejection of his Hurst/Caldwell claims. Instead, the Florida Supreme Court held that any Hurst error was harmless even under Florida's then-controlling Hurst v. State decision. See Johnston, 246 So. 3d at 266. Johnston has not shown how the Florida Supreme Court's subsequent reinterpretation of this Court's decision in Hurst v. Florida would alter the nature of that harmless error inquiry. In other words, Poole is irrelevant to this dispute.

Johnston engages in speculation regarding how Florida capital cases might be tried in the wake of Poole. He asserts that Florida's legislature might change the law, dispense with

penalty phase juries, deem mitigating factors no longer relevant, allow prosecutors to take unfair advantage by manipulating evidence and procedure to preclude any proof beyond the first aggravating factor. A careful reading of Poole reveals, however, that it merely walks back unnecessary and flawed changes not mandated by Hurst v. Florida or the United States Constitution.

There is no conflict between this Court's Sixth Amendment or Due Process jurisprudence and the Florida Supreme Court's decision in Poole. Sup. Ct. R. 10(c) (listing conflict with this Court as a consideration in the decision to grant review). The Florida Supreme Court's reasoning exactly mirrors the reasoning of this Court's decisions in Kansas v. Carr, 136 S. Ct. 633 (2016), and McKinney v. Arizona, 140 S. Ct. 702 (2020). Florida is not constitutionally required to mandate that a jury weigh aggravators against mitigators or be involved in assessing any of the sentencing factors beyond that required by Hurst v. Florida And Florida's high court did not violate the United States Constitution by receding from an earlier ruling to the contrary.

This Court in Carr expressed the view that "[i]t would mean nothing . . . to tell the jury that" certain "value call[s]" –

like whether aggravators outweigh mitigators and whether the defendant deserves mercy — must be found "beyond a reasonable doubt." 136 S. Ct. 633, 642 (2016). That is because standards of proof associated with elements of the offense do not apply to value judgments. Weighing, this Court said, is neither a fact nor an element. Rather, weighing is "mostly a question of mercy." Carr, 136 S. Ct. at 642. And this Court in McKinney stated that the Sixth Amendment only requires the jury to find one aggravating factor, it does not require the jury to perform weighing. Indeed, this Court said, under "this Court's precedents, a defendant convicted of murder is eligible for a death sentence if at least one aggravating circumstance is found." McKinney, 140 S. Ct. at 705 (citing cases). Moreover, Ring and Hurst v. Florida do "not require jury weighing of aggravating and mitigating circumstances." Id. at 708.

Rather, states, like Florida, that leave the ultimate sentencing decision to the judge may continue to do so in the wake of Hurst v. Florida. Id. at 708 (quoting Ring, 536 U.S. at 612 (2002) (Scalia, J., concurring)). McKinney reaffirmed the Court's holding in Clemons v. Mississippi, 494 U.S. 738 (1990), which permitted appellate reweighing of the aggravation and

mitigation in the wake of Hurst v. Florida. McKinney, 140 S. Ct. at 708 ("Ring and Hurst did not overrule Clemons").

The Florida legislature made a policy decision years ago to have a jury recommendation of death in capital cases. It provided guidance to the jury on how to arrive at that recommendation including by weighing aggravators against mitigators. Constitutionally, it is the finding of one aggravating factor that increases the sentence to death. Under the logic of Apprendi,[9] Alleyne,[10] and McKinney, because sufficiency and weighing do not increase or aggravate the sentence to death, they are sentencing considerations, not elements. For purposes of Apprendi, once the jury finds at least one aggravating factor, the sentencing range is expanded to include death. A Florida judge in determining a sentence in a capital case may, without violating the Sixth Amendment, make factual findings regarding sufficiency, mitigation, and weighing because all those findings are "within the range." In this sense, Florida's death penalty statute does not violate the Sixth Amendment or due process, but merely returns Florida to the constitutionally sound sentencing procedure it used for years, with the modifications required by this Court in Hurst v.

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[9] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[10] Alleyne v. United States, 570 U.S. 99 (2013).

Florida. Johnston's speculative parade of horribles is no more likely to occur now as it was before Hurst v. State was decided in 2016.

In sum, the questions Johnston presents do not offer any matter which comes within the parameters of Rule 10 of the Rules of the United States Supreme Court. He does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Eleventh Circuit's refusal to expand the COA, and the Florida Supreme Court's decision to recede from its own precedent. This Court should deny the petition.

CONCLUSION

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

Respectfully submitted,

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