CAPITAL CASE

DOCKET NO. 20-5492

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. PRELIMINARY DISCUSSION

The State claims that "the Florida Supreme Court has found *Hurst* errors to be harmful in all post-*Ring* cases where the jury's recommendation was not unanimous." Brief in Opposition at 22. The State overlooks its most recent victory in destroying this "perfect record," *State v. Poole*, 297 So.3d 487 (2020) (11-1 death vote notwithstanding, convictions for contemporaneous violent felonies sufficient to affirm death penalty).

The State asserts that the Eleventh Circuit "assumed that counsel's performance was deficient." Brief in Opposition at 4. Actually, the circuit court chose to ignore deficiency and address solely prejudice because:

> Where a state court denies an ineffective assistance of counsel claim for failure to show that counsel performed deficiently, without reaching the prejudice issue, we may skip over the deficiency issue and deny the claim if we determine for ourselves that the petitioner has not established prejudice.

Johnston v. Sec'y, Fla. Dep't of Corr., 949 F.3d 619, 638 (11th Cir. 2020).

The State also claims Mr. Johnston's direct appeal became final in 2002, which might be inferred to suggest finality prior to *Ring v. Arizona*, 536 U.S. 584 (2002), decided June 24, 2002. To the contrary, *Johnston v. State*, 841 So.2d 349 (Fla. 2002) did not become final until the 90 days for petitioning for certiorari expired, and that clock did not start until the state court denied rehearing on March 13, 2003. June 11, 2003 is the "final" date for Mr. Johnston.

> By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.

Griffith v. Kentucky, 479 U.S. 314, 321 (1987).

2. THIS CASE IS APPROPRIATE TO ADDRESS THE *CALDWELL* ISSUE

The State's assertion there is no important or unsettled question of constitutional law ignores the important and unsettled question of whether post-*Ring* Florida defendants were deprived of their Eighth Amendment rights recognized by *Caldwell*.

The fact that Justice Sotomayor found it necessary to write a substantive dissent in *Reynolds v. Florida*, 139 S. Ct. 27, 32-36 (2018), belies the State's claim that there is no important or unsettled question of constitutional law for this Court's review. As set out in the Petition, Justice Sotomayor recognizes the important and unsettled questions of whether *Ring* and *Hurst* allow the mere unanimity of a death recommendation to preclude *Ring/Hurst* relief, and whether *Ring* and *Hurst* establish *Caldwell* error.

Further, in *Reynolds,* Justice Breyer recognized that the cases disposed of by *Reynolds* included important and unsettled questions, including whether *Ring* relief should extend beyond all Florida death cases which became final after *Ring* (not after *Hurst*).

> Many of these cases raise the question whether the Constitution demands that *Hurst* be made retroactive to all cases on collateral review, not just to cases involving death sentences that became final after *Ring*. I believe the retroactivity analysis here is not significantly

> different from our analysis in *Schriro v. Summerlin,* 542 U.S. 348, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004), where we held that *Ring* does not apply retroactively. Although I dissented in *Schriro,* I am bound by the majority's holding in that case. I therefore do not dissent on that ground here.

Reynolds v. Florida., 139 S. Ct. 27, 28 (2018) (Breyer, J., Statement Respecting the Denial of Certiorari). Justice Breyer recognized that retroactivity only barred relief in cases final before *Ring*, pursuant to *Schriro v. Summerlin,* 542 U.S. 348 (2004). Mr. Johnston's case became final after *Ring*, and therefore is not barred from federal relief.

The State argues that *McKinney v. Arizona*, 140 S. Ct. 702, 708, 206 L. Ed. 2d 69 (2020), conclusively disposes of his claim for relief under *Ring* and *Hurst*:

> 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*.

Brief in Opposition at 9.

However, *McKinney* is factually divergent and its holding mere dicta vis-à-vis Florida death row defendants whose cases became final after *Ring*. *McKinney* merely held in a 5-4 decision that neither *Ring* nor *Hurst* could be retroactively applied on collateral review of an Arizona case that became final years before *Ring*.

> McKinney's case became final on direct review in 1996, long before *Ring* and *Hurst*. *Ring* and *Hurst* do not apply retroactively on collateral review. See *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004).

McKinney v. Arizona, 140 S. Ct. 702, 708, 206 L. Ed. 2d 69 (2020). Given that petitioner McKinney was seeking *Ring/Hurst* relief from an Arizona sentence, he in no way could be deemed to have been seeking relief from a Florida sentence by operation of *Hurst*.

Hurst merely recognizes that the Sixth Amendment protection from judicial usurpation of a jury's exclusive fact-finding role recognized in *Ring* had always extended to Florida sentences. The Florida Supreme Court recognized this identity of principle in interpreting its own post-*Ring* cases attempting to avoid the application of *Ring* and looked only to *Ring* for the question of retroactivity. The recognition of identity for purposes of retroactivity was separate from the Florida Supreme Court's decade and a half of attempts to find a distinction for which there was no difference to avoid the mandate of *Ring*.

Ring is the demarcation recognized by the *McKinney* decision. *McKinney* cites to *Schriro*, which held that *Ring* was not retroactive. There is no case from this Court that squarely addresses whether *Hurst* is somehow divergent enough from *Ring* to create a new demarcation exclusive to Florida cases. The majority would have had no reason to cite *Hurst* in the Arizona circumstance in *McKinney* unless *Hurst* somehow offered an avenue for relief. And *Hurst* could offer an avenue for relief from an Arizona sentence only if it somehow interpreted *Ring* in a manner applicable to the original intent of *Ring*.

A review of McKinney's brief shows he relied on *Hurst* only as an adjunct to *Ring*, most of the time citing as *Ring* **and** *Hurst*. The only times McKinney relied on express language from *Hurst* were to utilize language in *Hurst* that explicated *Ring*.

> As the Court stated in *Hurst,* the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 146 S. Ct. at 619.

Brief of Petitioner, *McKinney v. State of Arizona*, 2019 WL 3958378, at *16 (U.S., 2019).

> In *Hurst,* the Court reaffirmed its ruling in *Ring,* holding that Florida's death penalty scheme, which "does not require the jury to make the critical findings necessary to impose the death penalty," was inconsistent with the Sixth Amendment. 136 S. Ct. at 622. Instead, the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id.* at 619;

Brief of Petitioner, *McKinney* at *30.

> In *Hurst,* the Court examined Florida's capital sentencing scheme, which - like Arizona's capital sentencing scheme - permitted a judge to find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 136 S. Ct. at 622 (internal quotation marks omitted). The Court described this inquiry as a finding of "fact[]" that is necessary to make the defendant eligible for the death penalty. *Id.* (internal quotation marks omitted).

Brief of Petitioner, *McKinney* at *31.

> More fundamentally, both *Cabana* and *Clemons* rely on the conclusion that a jury need not "make the findings prerequisite to imposition" of a death sentence, *Clemons,* 494 U.S. at 745; *see also Cabana,* 474 U.S. at 385-386. That logic has since been rejected in *Ring* and *Hurst*. *Compare Hurst,* 136 S. Ct. at 623 (overruling *Spaziano v. Florida,* 468 U.S. 447 (1984)), *with Clemons,* 494 U.S. at 746 (relying on *Spaziano* for the proposition that a jury is not necessary to impose the death penalty).

Brief of Petitioner, *McKinney* at *43.

In other words, *Ring* and *Hurst* are unitary, with the demarcation for retroactivity the date of *Ring*. Justice Breyer recognized the identity of the *Ring* and *Hurst* holdings in his *Reynolds* statement when he characterized them identically, verbatim:

> In *Hurst,* this Court concluded that Florida's **death penalty scheme violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence.** . . .[Ring] similarly held that the **death penalty scheme of a different State, Arizona, violated the Constitution because it required a judge rather than a jury to find the aggravating circumstances necessary to impose a death sentence.**

Reynolds v. Florida, 139 S. Ct. 27, 27 (2018) (Statement of Justice Breyer respecting the denial of certiorari, emphasis added).

Even if *Hurst* extends *Ring* protections in some limited way, Mr. Johnston claims relief under the principles of *Ring*, for which he has undisputed standing. Any broader interpretation of *McKinney* to bar all Florida *Ring* claims would be dicta, inapplicable to deny Mr. Johnston relief.

3. *CALDWELL* CONSIDERATIONS IN LIGHT OF *POOLE*

Justice Sotomayor's *Caldwell* concerns remain unresolved. The jury in this case was misled as set out in the Petition. In addition, compelling expert social science evidence existed to establish the fact of and the extent of the *Caldwell* violation, as well as the prejudicial effects.

The Florida Supreme Court's drastic retreat from its *Hurst* decision in *State v. Poole*, 297 So. 3d 487 (Fla. 2020), pending on a petition for certiorari in this Court, Case 20-250, Petition filed August 28, 2020, Response due November 30, 2020, only renders the *Caldwell* prejudice more dire. The Florida Supreme Court removed virtually all sentencing authority from juries, leaving them with the sole duty to find aggravating circumstances. In *Poole* the contemporaneous convictions for violent offenses occurring during the murderous episode were deemed all that was needed to send the case to the judge for a sentence of death.

> The jury in Poole's case unanimously found that, during the course of the first-degree murder of Noah Scott, Poole committed the crimes of attempted first-degree murder of White, sexual battery of White, armed burglary, and armed robbery. Under this Court's longstanding precedent interpreting *Ring v. Arizona* and under a correct understanding of *Hurst v. Florida*, this satisfied the requirement that a jury unanimously find a statutory aggravating circumstance beyond a reasonable doubt. *See Poole II*, 151 So. 3d at 419. In light of our decision to recede from *Hurst v. State* except to the extent it requires a jury unanimously to find the existence of a statutory aggravating circumstance, we reverse the portion of the trial court's order vacating Poole's death sentence.

State v. Poole, 297 So. 3d 487, 508 (Fla. 2020).

In the instant case, as in *Poole*, the jury was misled when it was not told that its decision to convict for contemporaneous violent felonies in the guilt phase would qualify the defendant to be sentenced to death. A jury uninformed of the consequences of its guilty verdicts for contemporaneous violent felonies, combined with the information that they would have the later opportunity of a penalty phase to recommend whether their guilty verdicts and other fact-findings justified killing

the defendant, is a jury constitutionally misled under the Eighth Amendment protections of *Caldwell*. A remand to the district court to allow Mr. Johnston to present the *Caldwell* claim, under either the *Hurst* or the *Poole* paradigm, is necessary to protect Mr. Johnston's rights under the Sixth and Eighth Amendments.

4. CONCLUSION

This case is an appropriate vehicle for deciding the effect of *Ring* and *Hurst* on capital defendants who suffered deprivation of their Eight Amendment protections under *Caldwell*. Mr. Johnston was tried by a jury mal-instructed under an unconstitutional sentencing scheme. Expert evidence established that the jury was wrongfully instructed more than five dozen times, and that the statements to the jury misled them: "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 of Petition).

The pending case of *Poole* likewise requires attention to determine what effect it will have upon the circuit court's decision to deny *Caldwell* review, and to deny relief on the ineffectiveness claim for which review was granted.

Wherefore Mr. Johnston respectfully urges this Court to take certiorari to address the claims in the petition.

Respectfully submitted,

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