IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-1678

RAY LAMAR JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA**

INITIAL BRIEF OF THE APPELLANT

JAMES L.DRISCOLL JR.
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us

DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us

GREGORY W. BROWN
ASSISTANT CCRC
FLORIDA BAR. NO.86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600
COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Johnston lives or dies. This Court has not hesitated to allow argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case because of the seriousness of the claims at issue and the penalty that the State seeks to impose on Mr. Johnston.

PRELIMINARY STATEMENT REGARDING REFERENCES

The postconviction record on appeal of the denial of Mr. Johnston's Successive Motion to Vacate Death Sentence is comprised of four volumes, initially compiled by the clerk, successively paginated beginning with page one. References to the record include volume and page number and are of the form, e.g., (R. 123). There are also three volumes of transcripts, and a supplemental ROA volume.

Mr. Johnston had one guilt phase trial and a penalty phase trial in this case. Following this Court's affirmance of his postconviction denial, Mr. Johnston filed a Successive Motion under Florida Rule of Criminal Procedure 3.851. Following the trial court's denial of relief, Mr. Johnston now appeals the decisions adverse to him in those lower court proceedings. To the extent that any citations to the record are made from Mr. Johnston's prior trial, penalty phases or postconviction hearings, the citations

will be explained herein.

Generally, Ray Lamar Johnston is referred to as Mr. Johnston throughout this brief. The Office of the Capital Collateral Regional Counsel - Middle Region, representing the Appellant, is shortened to “CCRC.”

STATEMENT OF THE CASE AND FACTS

In 1997 Mr. Johnston was arrested for the murder of Leanne Coryell. In 1999, a "jury found Mr. Johnston guilty of first-degree murder, kidnapping, robbery, sexual battery, and burglary of a conveyance with assault." *Johnston v. State*, 841 So. 2d 349, 353 (Fla. 2002). This Court affirmed his convictions and death sentence. *Johnston v. State*, 841 So.2d 349, 361 (Fla. 2002).

Rehearing was denied in 2003. This Court appointed CCRC-M to represent Mr. Johnston in postconviction proceedings. The postconviction court denied relief. This Court affirmed the denial of postconviction relief. *Johnston v. State*, 63 So. 3d 730 (Fla. 2011).

The Federal District Court for the Middle District of Florida denied federal relief. The appeal of that particular denial is currently pending in the Eleventh Circuit Court of Appeals. The Eleventh Circuit granted a Certificate of Appealability on both guilt and penalty phase issues concerning the failure to call witness Diane Busch.

During the pendency of the appeal in the Eleventh Circuit, on January 5, 2017, Mr. Johnston filed a successor motion in Hillsborough County Circuit Court based primarily on *Hurst v. Florida*, 136 S. Ct. 616 (2016). 2017 ROA Vol. I 116-158. In support of that motion, Mr. Johnston filed his Witness/Exhibit List on April 13, 2017. 2017 ROA Vol. II 231-257. The Appellant listed

Harvey A. Moore, Ph. D. as a witness, and attached Dr. Moore's report to the pleading in accordance with the rule. 2017 ROA Vol. II 233-257. Dr. Moore identified approximately 65 *Caldwell*-type errors from trial, ultimately concluding:

> [A] jury which is told its work will not determine the outcome of sentencing necessarily is less likely to take its role as seriously as would be the case if it actually bore more direct responsibility for execution of sentence. . . .Based on the socio-legal standard established in *Caldwell v. Mississippi*, 472 U.S. 320 (1985) we may conclude to a reasonable degree of sociological certainly the jury which recommended a sentence of death for Mr. Johnston [] was persuaded against the requisite level of attention to its responsibility through comments made by the court and the prosecutor, and repeated by fellow members of the venire.

Dr. Moore's Report at 2017 ROA Vol. II 236.

On April 14, 2017, the State filed a Motion to Strike the Appellant's witness/exhibit list and attachments. 2017 ROA Vol. II 259-264. The Appellant responded to that motion on May 3, 2017. 2017 ROA Vol. II 264-269. On May 18, 2017 the lower court heard testimony from Harvey A. Moore, Ph.D. discussing his extensive qualifications, training, and experience in the areas of sociology as applied to law, as well as his training and experience in content analysis of legal cases.

In his witness and exhibit list, Mr. Johnston listed Dr. Moore as a witness and listed his report as am exhibit, and informed the following: "[he] provides this notice of witnesses and exhibits that he intends to present at an evidentiary hearing, primarily to

lend evidentiary support for arguments against the State's contention that *Hurst* error is harmless in this case. *See e.g. Caldwell v. Mississippi*, 472 U.S. 320 (1985).

> 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 (emphasis added)." 2017 ROA Vol. II 231. Notwithstanding Dr. Moore's extensive qualifications, training, and experience, and his learned content analysis of the Johnston trial transcripts and the *Caldwell* opinion, the trial court granted the State's Motion to Strike Witness/Exhibit List and evidentiary hearing on June 8, 2017. 2017 ROA Vol. II-III, 380-461. The previously scheduled evidentiary hearing date of June 15, 2017 was stricken, and Mr. Johnston was prohibited from presenting Dr. Moore as an expert witness on the harmless error issue. Denial of access to the courts is an issue in this case.

The lower court primarily cited to *Frye* considerations in striking Dr. Moore's report and proposed testimony (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)). Supplemental Authority and

Motions for Rehearing were filed in support of an evidentiary hearing and the reconsideration of the proposed evidence, but the lower court denied the same. 2017 ROA Vol. III-IV, 563-621. The Appellant submitted a revised report to the lower court dated June 30, 2017 specifically addressing further the *Frye* considerations in support of admissibility, but the court "dismissed" the revised report on July 20, 2017. 2017 ROA Vol. IV 622-661. The Appellant submits that the lower court should not have been so dismissive of the Harvey Moore report.

On July 21, 2017 the lower court issued a Final Order Denying the Appellant's successive *Hurst* motion. 2017 ROA Vol. IV 662-675. On August 17, 2017 the court denied the Appellant's Motion for Rehearing. 2017 ROA Supp. 692-93. This appeal follows.

SUMMARY OF ARGUMENT

Florida has never had a constitutional system for capital punishment. The State failed to comply with the United States Constitution and Florida Constitution in obtaining this death sentence.

Hurst v. Florida, 136 S. Ct. 616 (2016) is a landmark decision issued by the United States Supreme Court that declared Florida's death penalty system unconstitutional. Based on *Hurst*, other case law, and the implications arising therefrom, Mr. Johnston's death sentence violates the United States and Florida Constitutions. This Court should vacate Mr. Johnston's death sentence.

Hurst v. Florida and this Court's subsequent decisions were not available for Mr. Johnston to present the claims he raised in the successive postconviction motion at issue. *Hurst* gave the expanded claims contained in the motion viability. Mr. Johnston submits that the decisions in *Hurst v. Florida* and the decisions that followed are changes in the law, clarification of existing law, and newly discovered evidence in the sense that *Hurst* overcame prior unconstitutional decisions that prevented a remedy for all of the constitutional violations that occurred in his case. Mr. Johnston asserts unequivocally that these decisions should afford him relief, and that any decision to the contrary violates his rights. Any decision not affording Mr. Johnston *Hurst* relief is arbitrary and capricious, violating the Eighth Amendment, Equal Protection Clause, and Due Process Clause of the United States and Florida Constitutions.

For several reasons, *Hurst v. Florida* should provide relief in this case because of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Caldwell* clarified that a jury's role cannot be diminished at trial. *Caldwell* clarified that any comments at trial that might act to diminish a juror's sense of responsibility for imposing the ultimate sentence of death cannot be constitutionally tolerated. The State of Florida has managed to disavow these *Caldwell* principles for over 30 years. Through the lens of *Hurst*, it should now be crystal clear that death sentences like Mr. Johnston's

resting on a flawed capital punishment system cannot stand. *See* the recent dissents from denial of certiorari in *Truehill v. Florida*, --U.S.--, 2017 WL 2463876 (Oct. 16, 2017).

Caldwell held that just ***one*** comment at trial which carries the risk of diminishing the jury's sense of responsibility for decision-making in the death penalty process results in an unacceptable Eighth Amendment violation. Following such a comment, the United States Supreme Court ruled that the death sentence must be vacated. As Dr. Harvey Moore's report in this case details, because of Florida's flawed capital sentencing scheme, there were ***65*** such comments made at Mr. Johnston's trial. (2017 ROA Vol. II 234, 2017 ROA Vol. IV 628).

The lower court should have accepted Dr. Moore's report, should have permitted Dr. Moore to testify, and should have followed the dictates of *Caldwell* and vacated the death sentence in this case. There is nothing new or novel about applying the sociological methods of content analysis to legal analysis. This type of research has been conducted since 1948 (see fn 11 of Dr. Moore's report, 2017 ROA Vol. IV 626-27). *Frye* should not act to bar the consideration of this evidence at an evidentiary hearing. At the very least, this Court should remand this case for an evidentiary hearing for full consideration of this vital evidence ignored and stricken by the lower court.

Following *Furman v. Georgia*, 408 U.S. 238, 379, 92 S. Ct.

2726 (1972), Florida enacted a system, upheld by the courts, that prevented any of the decision makers from ultimately taking responsibility for imposing a sentence of death. For years, Florida trial judges instructed an advisory panel, incorrectly called a jury, that the weighing of aggravating factors was advisory and that the responsibility lies with the trial judge. The trial judge "gave great weight" to the "recommendation" of the sentencing panel limiting the responsibility of the trial judge. When reviewing the decisions of the trial court, this Court, and the federal courts under AEDPA, gave great deference to each previous court. Florida ultimately had no decision maker with the ultimate responsibility for determining a death sentence. *Hurst* made clear that the responsibility lies with a jury. The right to a jury trial predates the United States Constitution and is the mark of a civilized society. Mr. Johnston was sentenced to death without a jury trial on the essential elements that purported to justify his death. Mr. Johnston's death sentence violates the Sixth, Eighth and Fourteenth Amendments and the Florida Constitution. This Court should grant relief.

STANDARD OF REVIEW

The lower court summarily denied Mr. Johnston's motion without conducting an evidentiary hearing. Mr. Johnston's factual assertions should be accepted as true and the review of this Court should be *de novo*. *Peede v. State*, 748 So. 2d 253, 257 (Fla. 1999);

Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999).

ARGUMENT I

THIS COURT SHOULD CONSIDER THE MOST RECENT REPORT FROM DR. HARVEY MOORE DETAILING 65 *CALDWELL* VIOLATIONS THAT OCCURRED AT TRIAL IN THE INSTANT CASE. THIS COURT SHOULD GRANT *HURST* RELIEF BASED ON *CALDWELL V. MISSISSIPPI* (1985), OR AT THE VERY LEAST, SHOULD REMAND THIS CASE BACK TO THE LOWER COURT FOR A FULL EVIDENTIARY HEARING. THE SCIENTIFIC AND SOCIOLOGOCAL EVIDENCE PRESENTED IN FAVOR OF FURTHER RETROACTIVITY AND RELIEF FROM THE DEATH SENTENCE SHOULD NOT HAVE BEEN *FRYE*-BARRED BY THE LOWER COURT.

The errors that occurred at Mr. Johnston's trial were not harmless. The advisory panel at Mr. Johnston's penalty phase returned with a unanimous recommendation for death, but, they were informed that it was a mere recommendation and the trial judge would actually be responsible for making the decision. *Hurst* and *Caldwell* individually and in tandem logically mandate that a defendant has a right to a jury determination of a death sentence, and, the right to have that jury instructed that the death sentence is their determination, not simply an advisory recommendation to the trial judge. The only barrier to the lower court granting *Hurst* relief and vacating the death sentence in this case was the 12-0 recommendation from the advisory panel in this case.

Mr. Johnston submits that after the issuance of the United States Supreme Court opinion in *Caldwell v. Mississippi,* 472 U.S. 320 (1985), the State of Florida was on notice that "It is unconstitutionally impermissible to rest a death 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." *Caldwell* at 328-29. Florida's entire death penalty system was unconstitutionally premised on informing the jury that it was the trial judge and the trial judge alone who would be making the life or death decision in a capital case. The Florida legislature could have re-written our death penalty statute in accordance with the dictates of *Caldwell* after 1985, but it did not. Mr. Caldwell's death sentence was vacated by the United States Supreme Court because the prosecutor made ***one comment*** to the jury that indicated that ultimate responsibility for the death sentence was with a higher court who would review the death sentence. If the State of Florida was truly being responsible and was prudently relying on decisions from the United States Supreme Court for guidance on the constitutionality of its death penalty system, the legislature had a duty to change the state death penalty system to bring it in accordance with *Caldwell* and the United States Constitution. The errors that occurred at trial were certainly harmful. The *Hurst* decision is why this Court changed the standard jury instructions and removed all of the harmful *Caldwell*-violative language.

Mr. Johnston should be afforded *Hurst* relief because of the dictates of *Caldwell*. Relatively recently, in the case of *McCloud v. State*, 208 So. 3d 668 (Fla. 2016), a death penalty case in a

post-*Hurst* landscape, this Court was confronted with just a handful of cited *Caldwell* errors in that appeal. This Court addressed the errors as follows:

> McCloud claims that the trial court erred by "advis[ing] the jury on five or six occasions that the ultimate decision to impose the death penalty rested with the court," in violation of the United States Supreme Court holding in *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 [] (1985)("[I]t 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.") We decline to address this argument in light of our decision to vacate McCloud's death sentence on other grounds.

McCloud, Id. at 681-82. Mr. Johnston now asks this Court to address and rectify the documented 65 *Caldwell* errors that occurred in this post-*Hurst* landscape.

Dr. Harvey Moore's Revised Report: Dr. Harvey Moore completed two reports in this case. His first report is dated April 13, 2017 and is located at 2017 ROA Vol. II 233-257. After the trial court struck his report purportedly on *Frye* grounds (*see* Order at 2017 ROA Vols. II-III 380-461), Dr. Moore completed a revised report more specifically addressing the trial court's concerns. The revised report dated June 30, 2017 is located at 2017 ROA Vol. IV 624-659. The revised report most definitively demonstrates that the trial court should not have stricken the contents of the report based on *Frye v. United States*, 294 F. 1013 (D.C. Cir. 1923) considerations.

There is nothing irrelevant, speculative, or unreliable about the report from Trial Practices. Dr. Moore's first report dated April 13, 2017 was submitted as an exhibit at the hearing on the State's Motion to Strike his report and the scheduled evidentiary hearing. *See* 2017 ROA Vol. II 231-257. As seen at "TAB A" of the report, Table I, Dr. Moore and his team of coders identified 65 *Caldwell* errors from the trial transcripts. This evidence should have been considered by the lower court. Again, Dr. Moore's report is far from unreliable.

What is unreliable is the death sentence imposed in this case following the recommendation from a mere advisory panel instructed that they were not actually responsible for any resulting death sentence. After being distributed for conference multiple times, certiorari was denied in *Truehill v. Florida* on October 16, 2017, Though certiorari was denied, three Justices from the United States Supreme Court dissented, reasoning as follows:

> Justice BRYER, dissenting from denial of certiorari.
>
> In part for the reasons set forth in my opinion in *Hurst v. Florida*, 577 U.S. – [] (2016) (concurring opinion in judgment), I would vacate and remand for the Florida Supreme Court to address the Eighth Amendment issue in these cases. I therefore join the dissenting opinion of Justice SOTOMAYOR in full.
>
> Justice SOTOMAYOR, with whom Justice GINSBERG and Justice BREYER join, dissenting from the denial of certiorari.
>
> At least twice now, capital defendants in Florida have raised an important Eighth Amendment challenge to their

death sentences that the Florida Supreme Court has failed to address. Specifically, those capital defendants, petitioners here, argue that the jury instructions in their cases impermissibly diminished the jurors' sense of responsibility as to the ultimate determination of death by repeatedly emphasizing that their verdict was merely advisory. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task," and we have thus found unconstitutional under the Eighth Amendment comments that "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi*, 472 U.S. 320, 341 [] (1985).

Although the Florida Supreme Court has rejected a *Caldwell* challenge to its jury instructions in capital cases in the past, it did so in the context of its prior sentencing scheme, where "the court [was] the final decision-maker and the sentencer—not the jury." *Combs v. State*, 525 So. 2d 853, 857 (1988). In *Hurst v. Florida*, 577 U.S. – [] (2016), however, we held that process, "which required the judge alone to find the existence of an aggravating circumstance," to be unconstitutional. With the rationale underlying its previous rejection of the *Caldwell* challenge now undermined by this Court in *Hurst*, petitioners ask that the Florida Supreme Court revisit the question. The Florida Supreme Court, however, did not address that Eighth Amendment challenge.

This Court has not in the past hesitated to vacate and remand a case when a court has failed to address an important question that was raised below. See, *e.g.*, *Beer v. United States*, 564 U.S. 1050 [] (2011) (remanding for consideration of unaddressed preclusion claim); *Younblood v. West Virginia*, 547 U.S. 867 [] (2006) (*per curiam*) (remanding for consideration of unaddressed claim under *Brady v. Maryland*, 373 U.S. 83 (1963)). Because petitioners here raised a potentially meritorious Eighth Amendment challenge to their death sentences, and because the stakes in capital cases are too high to ignore such constitutional challenges, I dissent from the Court's refusal to correct that error.

Truehill v. Florida, -- S.Ct. --, 2017 WL 2463876 at 1 (October 16, 2017).

Had just one more Justice agreed with the reasoning above and joined the dissent from the Court's decision not to accept the *Truehill* case based on *Caldwell* considerations, certiorari would have been granted.

Caldwell is an integral part of Mr. Johnston's appeal. The lower court did not address the *Caldwell* issues discussed by Dr. Harvey Moore from Trial Practices. The stakes are indeed too high in the instant case to simply accept the State's position that the 12-0 advisory recommendation was a reliable indicator of whether the errors in this case were harmless beyond a reasonable doubt. Additionally, since the role Mr. Johnston's jury played was merely advisory, we cannot now convert that recommendation to a verdict, which carries a different weight, gravity and responsibility, in determining whether the *Hurst* error was harmless in this case.

Caldwell has already held that this type of error ***can never be deemed harmless error beyond a reasonable doubt.*** The United States Supreme Court stated the following in *Caldwell*:

> 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**.

Caldwell at 341 (emphasis added). S*ee also* J. Quince's dissent in

Truehill v. State, 211 S. 3d 930, 961-62 (2017)(J. Quince dissenting for reasons other than *Caldwell*). In the case at bar, had just one juror recommended life over death, Mr. Johnston would have received *Hurst* relief.

In *Caldwell*, the United States Supreme Court vacated a death sentence because of just ***one comment*** from the prosecutor in his responsive closing argument that served to diminish the jury's role in sentencing. As Dr. Moore's report reveals, there were **65 *such comments*** from all of the participants at Mr. Johnston's trial, including the prosecutor, the defense attorney, and the trial judge. This is because Florida's entire capital sentencing scheme was unconstitutionally premised upon a diminished jury role. *Hurst v. Florida* instructs that this is unconstitutional. Properly instructed juries, not judges, need to be the responsible parties at a penalty phase.

In *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) this Court stated that "We now know after *Hurst v. Florida* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring*. From *Hurst*, it is undeniable that *Hurst v. Florida* changed the calculus of capital sentencing in this State." *Id.* at 1281. Florida should know now after *Hurst* that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Caldwell*, not just *Ring*.

Juries obviously need to be properly instructed as such to fulfill Sixth and Eighth Amendment protections. The role of Florida juries in capital sentencing has been regularly diminished up until the enactment of the new capital sentencing statute and jury instructions. No Florida jury in a capital case pre-dating *Hurst* has ever been properly instructed. The jury in this case clearly was not properly and constitutionally instructed. Mr. Johnston should receive relief.

The "Amended Order Granting State's Motion to Strike Defendant's Witness/Exhibit List and Attachments and Order Striking June 15, 2017 Evidentiary Hearing" rendered June 13, 2017 (2017 ROA Supp. 850-936)

The lower court should have considered Dr. Moore's report, and should have permitted Dr. Moore to testify at an evidentiary hearing. At page 2 of 7 of the order (2017 ROA Vol. II 381), the lower court states that "In Florida, novel scientific methods are admissible when the relevant scientific community has generally accepted the reliability for the underlying theory or principle." Dr. Moore's content analysis did not employ novel scientific methods in this case. Content analysis of legal authority is a not a new or novel scientific principle. It has been around since at least 1948. *See* fn 11 of Dr. Moore's revised report: *CONTENT ANALYSIS—A NEW EVIDENTIARY TECHNIQUE*, Univ. of Chicago Law Review, Vol. 15 No. 4, pp. 910-925 (Summer of 1948)(2017 ROA Vol. IV 626-27); *see also SYSTEMATIC CONTENT ANALYSIS OF JUDICIAL OPINIONS,* 96

Cal. L. Rev. 63 (2008). There is nothing scientifically novel about a trained sociological team performing legal content analysis of a court case: i.e., reading a trial transcript and reporting on perceived errors and events that occurred at the trial.

At page 4 of 7 of the order, the lower court states, “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.” (2017 ROA Vol. II 383). If the lower court were inclined to grant relief from the death sentence, the Appellant would agree with that. But in light of the court’s denial of his motion, Dr. Moore’s testimony and report 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 (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 the constitutional concerns raised.”)(also submitted as supplemental authority in this case May 16, 2017). 2017 ROA Vol. II 346-357.

At page 5 of 7 (2017 ROA Vol. II 384) the lower court states, “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 prejudice." In making this finding, the lower court overlooks supplemental authority filed May 16, 2017 in this case 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)(Assistant 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 can not 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.

2017 ROA Vol. II 308-345. This article was acknowledged and mentioned by Dr. Moore in his May 18, 2017 testimony at transcript pages 20-21 (2017 ROA Vol. IV T1-T64 at 20-21). In that article from 1989, Michael Mello used content analysis to investigate trials in Alabama, Indiana, and Florida for biased language and undue prejudice in light of a comparison of the selected trials to the *Caldwell* decision. So not only has content analysis been generally used and widely accepted in the legal context, it has

been specifically used to evaluate death penalty cases in states like Florida and Alabama who clearly have violated the dictates *Caldwell* for over 30 years.

The previously-referenced 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, less than two years ago. *Hurst* and its progeny will surely be the topics of continued research and continued content analysis. The lower court 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 current record before this Court is full of evidentiary support for the admission Dr. Moore's evidence in this case. All prongs of *Frye* for admissibility of Dr. Moore's evidence were met by Mr. Johnston.

At page 5 of 7(2017 ROA Vol. II 384) the lower court "f[ound] 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 ability." 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 just because it might "invade" the purview of the factfinder. In the typical high stakes auto negligence case, for

example, in a civil wrongful death suit, attorneys regularly present expert testimony from experienced and qualified accident reconstruction experts who typically explain the factors which led to an accident, and who assist the trier of fact in determining fault. Yes, the jury or trial judge at a bench trial can make this determination on their own; but the parties have the right to present evidence in support of their claims (*see* Fla. Stat. 90.703 "Opinion on Ultimate Issue--Testimony in the form of an opinion [] otherwise admissible is not objectionable because it includes an ultimate issue to be decided by the trier of fact.").

To deny the parties the opportunity to present their case is denial of access to the courts. Because this is a case where this Court's decision might literally determine whether Mr. Johnston lives or dies, and because death is different, this Court should consider Mr. Johnston's evidence and grant relief, or remand to the lower court for proper consideration.

On a related/similar issue, this Court once faced the question of admissibility of expert testimony from an attorney in a postconviction death penalty case at an evidentiary hearing. The issue was whether it was proper for expert testimony to be used to establish ineffective assistance of counsel. In essence, the proposed attorney expert would be conducting a content analysis of the trial transcripts to determine if counsel fell below standards. Justice Pariente in a special concurrence urged the following in

Lynch v. State, 2 So. 3d 47 (Fla. 2008):

> In this case, the trial court allowed a complete proffer of Norgard's expert testimony but then disallowed all of it. The State essentially argued that, due to his vast experience in death penalty cases, the trial judge, Judge Eaton, did not need an expert to assist him in determining whether the attorney was deficient in his performance. I certainly agree that Judge Eaton is among the most knowledgeable judges in Florida on the death penalty. My concern, however, is that we do not appear to predicate the admissibility of expert testimony in postconviction proceedings on a particular judge's level of experience in the area of the death penalty. Ultimately it is this Court's decision, as a mixed question of law and fact, as to whether the attorney's conduct was deficient. While expert testimony is not necessary to establish a violation of *Strickland,* it is certainly one more useful source of evidence in allowing the court to make this all-important decision.
>
> …
>
> I would urge trial judges, as they have done in the past, to allow expert testimony on these issues if the witness is qualified, prepared and available to testify. Such testimony may not be the key element in establishing deficiency but it certainly provides a useful "guide" in determining whether counsel's performance was reasonable.

Id. at 87-88, 88. This Court should consider Dr. Moore's report, or at the very least, remand to the trial court and direct that his testimony be heard and considered. Dr. Moore was certainly qualified, prepared, and available to testify.

At page 5 of 7 (2017 ROA Vol. II 384) the lower court states that "While grateful for the assistance offered by Dr. Moore and his staff, the Court finds it not necessary, as it is the Court's duty to review the record and draw appropriate conclusions based

on the arguments and the law." Since the lower court was simply inclined to follow adverse precedent on the issue of harmless error and deny the 3.851 Motion, Dr. Moore's testimony was absolutely necessary in this case. The adverse precedent cited by the State in similarly-situated cases ignores *Caldwell* considerations. If one *Caldwell* error is enough to overcome the State's harmless error arguments in a United States Supreme Court case, certainly some 65 *Caldwell* errors in this case should overcome these arguments as well. The mere recommendation of this advisory panel should not be used as a substitute for an actual jury verdict. This Court has now addressed and cured most *Caldwell* errors prospectively issuing *IN RE: STANDARD JURY INSTRUCTIONS IN CAPITAL CASES*, 214 So. 3d 1236 (Fla. 2017), but the time has come to retroactively cure these errors. (See Notice of Supplemental Authority filed May 10, 2017 (2017 ROA Vol. II 271-307)).

Capital cases in the State of Florida will no longer be using archaic instructions and language describing a jury's role as merely "advisory." To satisfy evolving standards of decency in capital cases, even death sentences following unanimous 12-0 recommendations need to be vacated as well as non-unanimous post-*Ring* cases. To satisfy equal protection considerations, every capital defendant who received what we now-know-to-be unconstitutional instructions at trial should receive relief by virtue of the *Caldwell*, *Ring*, and *Hurst* rulings. Juries in the

State of Florida played a mere advisory role in all cases that were tried prior to the *Hurst* decision, and tried prior to the recent change in jury instructions. From now on, individuals facing a death sentence will have the protection of a jury. They will receive an actual sworn jury fully and constitutionally instructed on the jury's role as the ultimate decision maker.

This Court should consider the report of Dr. Harvey Moore and vacate the death sentence in this case. In the alternative, this Court should remand this case to the lower court to hear Dr. Moore's testimony and consider the contents of his report. The errors in this case were not harmless beyond a reasonable doubt based on a mere advisory panel's unanimous recommendation whose deliberation instructions so clearly violated *Caldwell, Ring,* and *Hurst*.

ARGUMENT II

THIS COURT SHOULD VACATE MR. JOHNSTON'S DEATH SENTENCE BECAUSE IN LIGHT OF *HURST* AND SUBSEQUENT CASES, THE DEATH SENTENCE VIOLATES THE SIXTH AND EIGHTH AMENDMENTS BECAUSE IT WAS RECOMMENDED BY AN ADVISORY PANEL WHO DID NOT HEAR ALL OF THE AVAILABLE MITIGATION. THE PANEL WAS NOT ADVISED THAT MERCY WAS AN OPTION, IT WAS IMPOSED CONTRARY TO EVOLVING STANDARDS OF DECENCY, AND IT IS ARBITRARY AND CAPRICIOUS.

There are several other reasons why the *Hurst* errors in this case are not harmless beyond a reasonable doubt. The unanimous recommendation for death in this case came from an advisory panel who did not hear all of the available mitigation for Mr. Johnston.

For example, this 12-0 recommendation for death came from an advisory panel who did not hear from witness Diane Busch. Diane Busch was a witness who could have been called to trial to inform the advisory panel that Mr. Johnston helped her when she was in the intensive care unit of a hospital, and that she credits Mr. Johnston for saving her life. Though this Court affirmed the denial of this claim at *Johnston v. State*, 63 So. 3d 730, 740-41 (Fla. 2011), Mr. Johnston was granted a Certificate of Appealability from the Eleventh Circuit Court of Appeals on this issue (*Johnston v. Sec'y, Fla. Dept. of Corrections*, Appeal Number 14-14054). Before deciding the appeal, the Eleventh Circuit is awaiting finality of the *Hurst* issues in state court that are being litigated in the current procedural posture of this case.

Respectfully, contrary to this Court's opinion, the failure to call Ms. Busch was a witness was not a matter of strategy. Her name did not appear on the witness list due to neglect and inattention of trial counsel. Ms. Busch could have cast doubt on the alleged financial motive in this case, and she could have provided very powerful mitigation for Mr. Johnston. According to Ms. Busch, not only did Mr. Johnston help her in an extremely difficult time of need, but she actually credits him with saving her life. This is the some of the most powerful mitigation that could be available to a criminal defendant facing the death penalty. Had this testimony been presented at the penalty phase,

and had just one of the jurors who heard this testimony been persuaded to vote for life over death, Mr. Johnston most likely would have already received *Hurst* relief based on an 11-1 recommendation. The failure to call Ms. Busch was not strategy, rather, it was a Sixth Amendment violation of the right to counsel. And this was not the only available mitigation trial counsel failed to present to the advisory panel. This resulting undisturbed death sentence is arbitrary and capricious, and violates the Eighth Amendment prohibition against cruel and unusual sentences.

Florida juries are specifically instructed that the decision between life or death in a capital case is "not a mechanical or mathematical process.[][Y]ou should not merely total the number of aggravating factors and compare that number to the total number of mitigating circumstances.[][T]he law neither compels nor requires you to determine that the defendant should be sentenced to death." 2017 ROA Vol. II 301.

This Court should use the same degree of caution and care when a human life is at stake in this appeal. Just because a mere advisory recommendation made under an unconstitutional system is 12-0, this Court should not automatically/mathematically use that number to permit the State to overcome the extremely high harmless error hurdle (beyond a reasonable doubt). This is especially true in a capital case where trial counsel failed to call a vital witness who would have presented extremely powerful mitigation and

residual doubt. This is also a case where trial counsel failed to inform the jury that the defendant was taking prescribed psychotropic medications, provided bad advice concerning the need to testify at the penalty phase, and failed to inform the jury of the nexus between his mental health problems and his criminal behavior. This is an extremely highly mitigated case involving PET scans and brain damage. It is a single murder strangulation. It is not the worst of the worst. With an effective presentation and constitutional instructions that abide by the dictates of *Caldwell* and *Hurst*, it is reasonable to conclude that at least one juror would vote for life. If provided a mercy instruction in a constitutional trial, at least one juror reasonably could have voted for life over death.

CONCLUSION

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. The *Hurst* cases have corrected some of the unconstitutionality but, based on the fracturing of retroactivity, as well as this Court mechanically holding errors harmless in 12-0 cases, death sentences that remain are even further removed from rights guaranteed by the United States and Florida Constitutions, including equal protection. This Court should grant relief.

CERTIFICATE OF SERVICE

We certify that a copy hereof will be furnished to opposing counsel by filing with the e-portal, which will serve a copy of this Initial Brief on Timothy Freeland, Assistant Attorney General, on December 4, 2017.

S/ DAVID DIXON HENDRY
DAVID D. HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us

S/ JAMES L. DRISCOLL JR.
JAMES L. DRISCOLL JR.
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us

S/ GREGORY W. BROWN
GREGORY W. BROWN
ASSISTANT CCRC
FLORIDA BAR NO. 86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600

COUNSEL FOR APPELLANT

CERTIFICATE OF COMPLIANCE

We hereby certify that a true copy of the foregoing Initial Brief of the Appellant, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

S/DAVID DIXON HENDRY
DAVID DIXON HENDRY
FLORIDA BAR NO. 0160016
ASSISTANT CCRC
hendry@ccmr.state.fl.us

S/ JAMES L. DRISCOLL JR.
JAMES L. DRISCOLL JR.
FLORIDA BAR NO. 0078840
ASSISTANT CCRC
driscoll@ccmr.state.fl.us

S/ GREGORY W. BROWN
GREGORY W. BROWN
ASSISTANT CCRC
FLORIDA BAR NO. 86437
brown@ccmr.state.fl.us

CAPITAL COLLATERAL REGIONAL COUNSEL - MIDDLE
12973 N. Telecom Parkway Temple Terrace, Florida 33637
(813) 558-1600

COUNSEL FOR APPELLANT