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**

REPLY 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

Page

TABLE OF AUTHORITIES

Other Authorities

REPLY TO STATEMENT OF THE CASE AND FACTS

At page 1, the State asserts that Mr. Johnston "raises two grounds on appeal – first, that his death sentence violated *Caldwell v. Mississippi,* 472 U.S. 320 (1985)." That is not an accurate characterization of the first issue. The first claim primarily asserts that the errors that occurred at Mr. Johnston's penalty phase were harmful rather than harmless. Mr. Johnston attempted to utilize Dr. Moore as an expert witness to illustrate this point through a content based analysis of the trial transcripts and the *Caldwell* case. Indeed, *Caldwell* was violated at trial. Because *Caldwell* was violated, the errors that occurred can never be deemed harmless.

> 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).

Rather than focusing on mere advisory panels' unanimous recommendations to deem *Hurst* errors harmless, Florida courts should utilize the above reasoning from *Caldwell* to determine that

all *Hurst* errors are presumptively harmful, even in unanimous cases. *Caldwell* reasons that these type of errors can ***never*** be deemed harmless. The unanimous death recommendation here came from an advisory panel that was informed approximately 65 times that they were not really responsible for imposing the death sentence in this case. *Caldwell*, *Ring* and *Hurst* have essentially clarified three times since 1985 that juries, not judges, must be responsible for making the decision between life and death. Through the lens of *Hurst*, it should be apparent that the errors that occurred in the Appellant's trial were harmful because of unconstitutional manner in which the jury was instructed in violation of *Caldwell*.

Regarding Dr. Moore's qualifications, at page 1 the State asserts that a "proffer revealed that the proposed expert's expertise amounted to being able to read English." If this is all the State was genuinely able to glean from a review of the 64 pages of hearing transcript located at 2017 ROA Vol. IV T1-T64, the State failed to comprehend or retain most of the information conveyed by Dr. Moore at the qualifications hearing. Indeed at 2017 ROA Vol. IV T40, Dr. Moore testified that his fellow coders were in part qualified to conduct the content analysis in this case because they could read and comprehend the English language. That was in response to the State's suggestion on cross examination that Dr. Moore's fellow coders were somehow unqualified to participate in the content analysis in this case. The State focuses on this

portion of the transcripts in an attempt to demean and belittle the defense and Dr. Moore's qualifications.

Dr. Moore's 10 page Curriculum Vitae outlining some of his education, training, and experience making him uniquely qualified to testify in this matter was introduced at the hearing. *See* 2017 ROA Vol. II 243-52. His expert qualifications aside, indeed there is an element of simple common sense in this content analysis. To deny that the 65 jury instructions and related comments made at Mr. Johnston's trial violated *Caldwell* is to deny common sense. In addition, Dr. Moore is uniquely qualified to describe the effect that the 65 comments would have had on the jury's deliberations.

The State also asserts that "[Dr. Moore's] 'analysis' consisted of doing little more than marking whatever passages of the trial transcript that, in his view, offended the requirements of *Caldwell*." Dr. Moore's analysis went quite deeper than that. *See* the revised report at 2017 ROA Vol. IV 624-659. Dr. Moore was prohibited from fully explaining the analysis that he conducted in this case because the State prevailed on its Motion to Strike. Dr. Moore's testimony in the lower court focused on his qualifications rather than his analysis. The hearing below was a hearing on the State's Motion to Strike, not an evidentiary hearing.

The State ignores that Dr. Moore's scientific analysis in this case also included a determination of the percentage of agreement or disagreement of the decisions of the coders. Had Dr.

Moore been permitted to testify at an evidentiary hearing, Dr. Moore would have explained that he conducted a sociological and scientific analysis that included an evaluation of the error rates amongst the coders who were comparing the trial transcripts to the principles of the *Caldwell* case.

REPLY TO SUMMARY OF THE ARGUMENT

At page 2 the State asserts, without citing the authority, that "This Court has previously held that no *Caldwell* violation occurs where the trial court, as it did here, employed the standard jury instructions." Though this may have been findings of this Court pre-*Hurst*, such errors were analyzed with a flawed understanding of what an actual constitutional trial required.

The "standard jury instructions" in this state have now changed. Following *Hurst*, *Caldwell*-violative language has been removed from the instructions. The entire Florida capital sentencing scheme has changed since *Hurst*. The jury instructions utilized at this trial obviously violated *Caldwell.* These errors are presumptively harmful under the clear language, reasoning, and mandates of *Caldwell*. This Court should address the *Caldwell* issues here and grant relief. *Caldwell* is the reason for this Court to reverse prior findings of harmless error in cases with unanimous advisory recommendations.

Though certiorari was denied in *Truehill v. Florida,* -- S. Ct. --, 2017 WL 2463876 (October 16, 2017), 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 (2017).

Contrary to the State's continuing assertions, Dr. Moore and his report should not have been stricken. Dr. Moore was essential to the Appellant's case in helping the lower court understand that the errors that occurred in this case were presumptively harmful rather than harmless, notwithstanding the unanimous recommendation of the mere advisory panel. By placing quotation marks around "proposed 'expert'" in this section at page 2, the State appears to be suggesting that Dr. Moore is somehow not an expert. Dr. Moore is an expert, and he was fully qualified to testify at an evidentiary hearing. The lower court effectively closed the courthouse doors on Mr. Johnston. At the very least, this Court should reverse the lower court's order on the State's Motion to Strike and remand this case for an evidentiary hearing.

REPLY TO 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*, OR AT THE VERY LEAST, 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 State addresses this argument at pages 3-5 of their brief. At page 3, the State again callowly places quotation marks around "expertise" and "analysis" when referring to Dr. Harvey Moore's qualifications and his report. The State asserts that "Dr. Moore's 'expertise' consisted of an ability to read the English language, and his report was merely a compilation of whatever portions of the trial transcript that the expert felt violated *Caldwell v. Mississippi*." Dr. Moore's education, training, and experience extended well beyond the ability to read and comprehend the English language. The State's placement of quotation marks around "expert," "expertise," and "analysis" does little to advance their argument that the material should have been *Frye*-barred.

The State erroneously claims here that "his report was merely a compilation of whatever portions of the trial transcript that the expert felt violated *Caldwell.*" This is not true. The body of Dr. Moore's report was 8 pages long and actually included no specific references to portions of the trial transcripts at all. 2017 ROA Vol. IV 624-31. If one carefully reads and comprehends

Dr. Moore's report, it should be readily apparent that the report is much more than a mere compilation of the statements that violated *Caldwell*. "Tab A" of Dr. Moore's report was the "mere" compilation of portions of the trial transcript that violated *Caldwell*. 2017 ROA Vol. IV 632-361. What the State characterizes as "merely a compilation of [] portions of the trial transcript that the expert felt violated *Caldwell,*" is in fact a solid illustration of approximately 65 *Caldwell* errors from Mr. Johnston's trial. The report goes much farther than compiling and listing the *Caldwell* errors. The report actually explains why these errors were in fact harmful.

Remarkably, the State fails in their answer to identify and challenge even one of the approximate 65 statements listed in "Tab A" that violate *Caldwell*. Starting with "the jury will be asked to give a recommendation to the court on penalty," and concluding with "Do you Mr. Pateracki, agree and confirm that a majority of the jury join in the advisory sentence that you have just heard read by the clerk?" 2017 ROA Vol. IV 633, 636, the advisory panel's role was repeatedly diminished. The State cannot dispute that these statements violate the holdings of *Caldwell*, so the State does not even attempt in their Answer Brief to dispute that these statements violate the holdings of *Caldwell*. The *Caldwell*, *Ring*, and *Hurst* errors leading to the imposition of this death sentence are clearly unconstitutional. These errors were far from harmless per

Caldwell, *Id.* at 341. On remand from the United States Supreme Court following *Hurst v. Florida*, this Court should follow *Caldwell* and reverse all Florida death sentences, even in unanimous cases.

At page 3 the State asserts that "the defense failed to establish that the type of analysis he sought to advance was 'sufficiently established to have gained general acceptance in the particular field in which it belongs.' *Ramirez v. State* [citation omitted]." This assertion ignores law review articles submitted in the lower court from 1948, 1989, and 2008 that document general acceptance in this field of sociology and the law (nearly 70 years of general acceptance). One article described this type of analysis as a "new technique" gaining acceptance in 1948 (*see* 2017 ROA Vol. IV 626-627); another article submitted even specifically analyzed continuing *Caldwell* errors in the State of Florida four years after the *Caldwell* opinion (Michael Mello, TAKING CALDWELL V. MISSISSIPPI SERIOUSLY: THE UNCONSTITUTIONALITY OF CAPITAL STATUTES THAT DIVIDE SENTENCING BETWEEN JUDGE AND JURY, 30 Boston College Law Review 283 (1989))(*see* 2017 ROA Vol. II 308-345).

The lower court erred in *Frye*-barring this material. Mr. Johnston submitted materials in the lower court documenting at approximately seventy years of general acceptance of content analysis of court opinions and trial transcripts in the field of sociology and the law. 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)(this 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.")(*see* 2017 ROA Vol. II 346-357). At the very least, this Court should remand this case back to the lower court for an evidentiary hearing on this issue.

REPLY TO 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

Mr. Johnston stands by the arguments made in his Initial Brief in Argument II. In reply to the State's arguments here, this Court should recede from *Truehill v. State* 211 So. 3d 930 (Fla. 2017) and reverse the findings of the lower court.

CONCLUSION

Florida's death penalty system has been unconstitutional since the death penalty was reenacted after *Furman v. Georgia*. In light of *Caldwell* and considering equal protection, this Court should not mechanically hold errors harmless where mere advisory panels unanimously recommended death. This Court should grant relief from this unconstitutionally imposed death sentence.

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 21, 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 Reply 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