CAPITAL CASE

No. _____

IN THE

Supreme Court of the United States

ENOCH D. HALL

Petitioner,

v.

STATE OF FLORIDA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

APPENDIX

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APPENDIX

A

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 2008-033412 CFAES

v.

ENOCH D. HALL,

Defendant.
_____/

ORDER DENYING DEFENDANT'S SUCCESSIVE MOTION TO VACATE DEATH SENTENCE

This matter came before the Court for consideration of the Defendant's "Successive Motion to Vacate Death Sentence," filed on January 5, 2017. The Court, having considered the motion, the State's response, and the case management conference held on February 6, 2017, having reviewed the court file, and being fully advised in the premises, hereby finds as follows:

PROCEDURAL HISTORY

On October 27, 2009, after a jury trial wherein Defendant was found guilty of first-degree murder, the jury returned a recommendation of death by a unanimous vote. *Hall v. State*, 107 So. 3d 262 (Fla. 2012). On January 15, 2010, the trial court sentenced Defendant to death upon the finding of five aggravating circumstances and eight non-statutory mitigating circumstances. *Id.* at 270. On direct appeal, Defendant's sentence of death was affirmed. *Id.* at 281. On October 7, 2013, the United States Supreme Court denied Defendant's petition for writ of certiorari. *Hall v. Florida*, 134 S. Ct. 203, 187 L. Ed. 2d 137 (2013).

On September 17, 2014, Defendant filed a motion for postconviction relief, which was denied by the trial court. Defendant appealed the denial of his postconviction motion and filed a petition for writ of habeas corpus. On January 5, 2017, while his appeal and habeas corpus petition was pending, Defendant filed the instant successive motion to vacate his death sentence

in light of *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). On February 2, 2017, Defendant filed a motion to stay and hold in abeyance his postconviction motion. On February 6, 2017, a case management conference was held. On February 7, 2017, the trial court granted Defendant's motion to stay and held his successive postconviction motion in abeyance until 30 days after the Florida Supreme Court has issued mandate on his pending appeal. On April 13, 2017, the Florida Supreme Court issued mandate affirming the denial of Defendant's postconviction motion and denying his habeas corpus petition. *Hall v. State*, 212 So. 3d 1001 (Fla. 2017), *reh'g denied,* SC15-1662, 2017 WL 1150799 (Fla. Mar. 28, 2017).

ANALYSIS & RULING

In the instant motion, Defendant raises the following five claims under *Hurst*: (1) that Defendant's death sentence violates the Fifth, Sixth, Eight, and Fourteenth Amendments of the United States Constitution and the Florida Constitution; (2) that Defendant's death sentence violates the Eight Amendment of the United States Constitution and the Florida Constitution; (3) that Defendant's death sentence should be vacated because the fact-finding that subjected him to death was not proven beyond a reasonable doubt; (4) that Defendant's death sentence violates the Florida Constitution requiring unanimous jury verdict; and (5) that the decisions under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), are new law that would govern Defendant's resentencing, and require the trial court to revisit Defendant's claims in his initial postconviction motion.

In its opinion affirming the trial court's denial of Defendant's initial postconviction motion, the Florida Supreme Court denied Defendant's claims relating to the unconstitutionality of the death penalty, and held that any *Hurst* error with regard to Defendant's sentence, which

was based upon a unanimous recommendation of death, is harmless beyond a reasonable doubt. *Hall*, 212 So. 3d at 1036.

Accordingly, Defendant's successive motion to vacate death sentence is denied.

Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant's motion is **DENIED**.

DONE AND ORDERED in DeLand, Volusia County, Florida, this _____ day of May, 2017.

5/16/2017

RAUL A. ZAMBRANO
CIRCUIT JUDGE

Note: Defendant is advised that he has the right to appeal within 30 days of the rendition of this final order.

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Hon. Laura E. Roth, Clerk of the Circuit Court

APPENDIX

B

246 So.3d 210
Supreme Court of Florida.

Enoch D. HALL, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–1355
|
[April 12, 2018]

Synopsis
Background: Defendant's murder conviction and death sentence were affirmed on appeal, 107 So.3d 262, the denial of defendant's initial postconviction motion was affirmed on appeal, and defendant's petition for a writ of habeas corpus was denied, 212 So.3d 1001. Defendant filed a successive motion to vacate his death sentence while his initial postconviction motion was pending. The Circuit Court, Volusia County, No. 642008CF033412XXXAES, Raul A. Zambrano, J., denied the motion. Defendant appealed.

Holdings: The Supreme Court held that:

[1] error in having judge instead of jury determine presence of cold, calculated, and premeditated aggravating circumstance was harmless;

[2] death sentence did not violate due process or the Eighth Amendment; and

[3] grand jury indictment was not required to list aggravators.

Affirmed.

Canady and Polston, JJ., concurred in result.

Pariente, J., filed dissenting opinion in which Quince, J., joined.

West Headnotes (6)

[1] **Jury**
Death penalty
Sentencing and Punishment
Harmless and reversible error

Trial court's error in having judge instead of jury determine presence of cold, calculated, and premeditated aggravating circumstance was harmless in capital defendant's murder trial; even after striking aggravator, defendant had four valid remaining aggravators, all of which were afforded either great or very great weight, three remaining aggravators were without dispute, and aggravating circumstances far outweighed mitigating circumstances. (Per curiam, with three justices joining and two justices concurring separately.)

Cases that cite this headnote

[2] **Criminal Law**
Particular issues and cases

Capital defendant's claim that trial counsel was ineffective for not presenting mental health mitigation to jury was procedurally barred on successive postconviction motion, where claim was raised and denied on previous postconviction motion. (Per curiam, with three justices joining and two justices concurring separately.) U.S. Const. Amend. 6.

Cases that cite this headnote

[3] **Criminal Law**
Particular Cases and Issues

Under *Strickland*, claims of ineffective assistance of counsel are assessed under the law in effect at the time of the trial. (Per curiam, with three justices joining and two justices concurring separately.) U.S. Const. Amend. 6.

Cases that cite this headnote

[4] **Constitutional Law**
Proceedings
Sentencing and Punishment
Degree of proof
Sentencing and Punishment
Harmless and reversible error

Defendant's death sentence for his murder conviction did not violate due process; even though all aggravators and mitigators were required to be proven beyond a reasonable doubt, error in this regard in defendant's trial was harmless based on unanimous death sentence. (Per curiam, with three justices joining and two justices concurring separately.) U.S. Const. Amend. 14.

1 Cases that cite this headnote

[5] **Sentencing and Punishment**
Unanimity
Sentencing and Punishment
Harmless and reversible error

Defendant's death sentence for murder conviction did not violate Eighth Amendment, where defendant's jury returned unanimous recommendation of death, and trial court's error in not requiring unanimity was harmless. (Per curiam, with three justices joining and two justices concurring separately.) U.S. Const. Amend. 8.

1 Cases that cite this headnote

[6] **Indictment and Information**
Matter of aggravation in general

Grand jury indictment was not required to list aggravators in capital defendant's murder case, and therefore defendant was not denied right to proper indictment. (Per curiam, with three justices joining and two justices concurring separately.)

Cases that cite this headnote

***212** An Appeal from the Circuit Court in and for Volusia County, Raul A. Zambrano, Judge—Case No. 642008CF033412XXXAES

Attorneys and Law Firms

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Opinion

PER CURIAM.

This case is before the Court on appeal from an order denying a Successive Motion to Vacate Death Sentence pursuant to *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017), under Florida Rule of Criminal Procedure 3.851. Because the order concerns postconviction relief from a sentence of death, we have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

FACTS AND BACKGROUND

This Court has previously detailed the underlying facts of this case. *Hall v. State* (*Hall I*), 107 So.3d 262, 267–71 (Fla. 2012). Relevant to the instant proceeding, Hall, an inmate at Tomoka Correctional Institution (TCI), was convicted and sentenced to death for the first-degree murder of Correctional Officer (CO) Donna Fitzgerald. *Hall v. State* (*Hall II*), 212 So.3d 1001, 1009 (Fla. 2017). After a penalty phase, the jury returned a unanimous death sentence. *Id.* at 1012.[1] Hall appealed, and this Court ultimately affirmed his conviction and sentence. *See generally Hall I*, 107 So.3d 262.[2] On October 7, 2013, the United States Supreme Court denied certiorari, *Hall v.*

Florida, 571 U.S. 878, 134 S.Ct. 203, 187 L.Ed.2d 137 (2013); thus Hall's case became final on that date.

This Court affirmed the denial of Hall's initial motion for postconviction relief and ***213** denied his petition for writ of habeas corpus. *Hall II*, 212 So.3d at 1036. During the pendency of his initial postconviction motion, Hall filed a Successive Motion to Vacate Death Sentence pursuant to *Hurst*, which was denied by the postconviction court. This appeal from the first successive motion for postconviction relief follows.

ANALYSIS

Hall's Claims for Relief under *Hurst v. State*

We affirm the postconviction court's denial of relief on this claim for the reasons discussed below. Most importantly, our opinion in *Hall II*, and our corresponding *Hurst* harmless error analysis denying relief within that opinion, already addressed the issues that Hall now attempts to present.

CCP Aggravator Stricken

[1]We conclude that this subclaim of Hall's successive postconviction motion fails on the merits. Notably, aside from *Wood v. State*, 209 So.3d 1217, 1234 (Fla. 2017), which is distinguished below, Hall presents *no binding precedent* that supports his assertion that the stricken CCP aggravator in his case is sufficient to receive *Hurst* relief. Moreover, as discussed below, our recent decisions in *Middleton v. State*, 220 So.3d 1152 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 829, 200 L.Ed.2d 326 (2018), and *Cozzie v. State*, 225 So.3d 717, 729 (Fla. 2017), *cert. denied*, —— U.S. ——, 138 S.Ct. 1131, 200 L.E.2d 729 (2018), support the contrary conclusion.

In *Wood*, we struck both the CCP and avoid arrest aggravating factors, which were two of the three aggravators found by the trial court and to which it assigned "great weight." *Id.* at 1233. In ultimately determining that the error in *Wood* was not harmless, we emphasized:

> In this case the jury was instructed on both aggravating factors that we have determined were not supported by competent, substantial evidence. This alone would require a finding that the error was not harmless beyond a reasonable doubt. We note that our conclusion in this regard is also consistent with our pre-*Hurst* precedent in *Kaczmar v. State*, 104 So.3d 990, 1008 (Fla. 2012), where we held that, upon striking the CCP and felony-murder aggravating factors *so that only one valid aggravating factor remained*, such error was not harmless beyond a reasonable doubt. Post–*Hurst*, this conclusion is even more compelling.
>
> ... [T]he jury would have had to make these factual determinations that *the sole valid aggravating factor*—that the capital felony was committed while Wood was engaged, or was an accomplice in the commission of a burglary and or robbery—outweighed the mitigating circumstances established. "[W]e are not so sanguine as to conclude that [Wood's] jury ... would have found [*this sole aggravating factor*] sufficient to impose death and that [*this sole aggravating factor*] outweighed the mitigation."

Id. at 1234 (alterations in original) (emphasis added) (quoting *Hurst*, 202 So.3d at 68). In determining that the error was harmful, we repeatedly emphasized that our conclusion was influenced by the fact that *two of the three aggravators* presented were stricken, leaving only *one* valid aggravating factor for the jury to properly consider. Thus the harmless error analysis in *Wood* was based on the Court's determination that the remaining *sole valid aggravating factor* was not sufficient to support the sentence of death.[3]

***214** *Wood* is distinguishable from Hall's case for numerous reasons. Firstly, even after striking the CCP aggravator, Hall had *four* valid remaining aggravators, all of which were afforded either "great weight" or "very great weight,"[4] as opposed to the *one* remaining aggravator found in *Wood*. Secondly, three of the remaining aggravators found in Hall's case (i.e., under sentence of imprisonment, previously convicted of another violent felony, and the victim was a law enforcement officer) were without dispute. Thus as we stated in our harmless error analysis in *Hall II*,

> Presuming that the jury did its job as instructed by the trial court, we are convinced that it would have still found the aggravators greatly outweighed the mitigators in this case. Indeed, it is inconceivable

> that a jury would not have found the aggravation in Hall's case unanimously, especially given the fact that three of the aggravators found were automatic ....

212 So.3d at 1035. It is also worth noting that this Court, in conducting its harmless error analysis in *Hall II*, did not include the invalidated CCP aggravator in its analysis. *Id.* Instead, we found that the *Hurst* error, as it related to Hall's case, was harmless, even without the stricken CCP aggravator. *Id.* Thus we conclude that *Wood* is distinguishable from Hall's case.

Two other cases recently decided by our Court, *Middleton* and *Cozzie*, also lend support to the postconviction court's denial of this subclaim of Hall's successive postconviction motion.

Middleton involved a unanimous jury recommendation of death, where this Court ultimately struck the avoid arrest and CCP aggravators. 220 So.3d at 1172. There, we explained:

> "When this Court strikes an aggravating factor on appeal, 'the harmless error test is applied to determine whether there is no reasonable possibility that the error affected the sentence.' " *Williams v. State*, 967 So.2d 735, 765 (Fla. 2007) (quoting *Jennings v. State*, 782 So.2d 853, 863 n.9 (Fla. 2001)); *see also Diaz v. State*, 860 So.2d 960, 968 (Fla. 2003) ("We find this error harmless, however, after consideration of the two remaining aggravating circumstances and the five mitigating circumstances in this case."). Despite striking the avoid arrest and CCP aggravators, two valid aggravators remain in this unanimous death-recommendation case. The two aggravators which remain are that the murder was especially heinous, atrocious, or cruel (HAC) and that is was committed during the commission of a burglary and for pecuniary gain, which were each given "great weight" by the trial court.

Id. In finding that the error in *Middleton* was harmless, we noted that there was no statutory mitigation and that "the trial court expressly stated that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient ***215** to outweigh the mitigation in total presented." *Id.*[5] Thus because there was no reasonable possibility that the erroneous aggravators contributed to Middleton's sentence, we ultimately concluded that any errors there were harmless. *Id.*

Hall's case is similar to *Middleton* because significant aggravation remained, even without the stricken CCP aggravator, that "far outweighed the mitigation." *Hall I*, 107 So.3d at 271. Furthermore, three of the remaining aggravators present in *Hall* are without and beyond dispute. The fourth aggravator that remains, HAC, is one of the weightiest in Florida, *see Jackson v. State*, 18 So.3d 1016, 1035 (Fla. 2009), and was afforded "very great weight" by the trial court. Thus we conclude, as we have previously in Hall's initial postconviction case, that any error in Hall's case, like the errors in *Middleton*, was harmless. *See Hall II*, 212 So.3d at 1035–36 (finding any *Hurst* error harmless).

Similarly, in *Cozzie*, we determined that "[e]ven if the avoid arrest aggravator were stricken ... the unanimous death recommendation would still remain, along with the aggravators of CCP, HAC, and in the course of a felony, which are among the weightiest aggravators in our capital sentencing scheme." 225 So.3d at 729. Furthermore, the remaining aggravators in *Cozzie* were afforded "great weight" by the trial court. *Id.*[6] Thus we ultimately determined that "any possible error was harmless because there was not a reasonable possibility that [Cozzie] would have received a life sentence without the trial court finding of the [avoid arrest] aggravator." *Id.* (alterations in original) (quoting *Aguirre–Jarquin v. State*, 9 So.3d 593, 608 (Fla. 2009)).

Hall has significant and weighty aggravation beyond the invalidated CCP aggravator. Further, the trial court in both *Cozzie* and here concluded that the aggravating circumstances "far outweigh[ed]" the mitigating circumstances. *Id.* at 725; *see Hall I*, 107 So.3d at 271. Thus we conclude that *Cozzie* is factually similar to Hall's case.

Both Hall and the dissent attempt to conflate *nonbinding, dissenting opinions* with our *binding* post-*Hurst* death penalty precedent. However, as discussed above, our binding precedent dictates our conclusion that Hall's stricken CCP aggravator is harmless beyond a reasonable doubt.

We deny this subclaim of Hall's successive postconviction motion.

Mental Health Mitigation Presentation

[2]We deny this subclaim in the successive postconviction motion because this Court has already heard and addressed the mental health mitigation in Hall's initial

postconviction motion. Thus this claim is procedurally barred. In addition, even when considered on the merits, we conclude that this subclaim fails.

In his initial postconviction motion, Hall extensively asserted the claim that trial counsel was ineffective for not presenting mental health mitigation to the jury. Similarly, in our opinion on Hall's initial postconviction motion, we addressed the issue and determined that the trial court's ruling on counsel's strategy was supported by ***216** competent, substantial evidence. *Hall II*, 212 So.3d at 1027–29. Thus we conclude that this subclaim is procedurally barred, as it was raised and denied on Hall's previous postconviction motion. *See Hunter v. State*, 29 So.3d 256, 267 (Fla. 2008).

[3]Nevertheless, we also conclude that the subclaim should be denied on the merits. Primarily, under *Hurst* harmless error, this Court must look to the potential effect on the trier-of-fact, not on the potential effect on trial counsel's trial strategy. *Hurst*, 202 So.3d at 68–69. Additionally, we have previously held that trial counsel is not required to anticipate changes in the law to provide effective legal representation. *See Lebron v. State*, 135 So.3d 1040, 1054 (Fla. 2014) ("This Court has 'consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law.' " (quoting *Cherry v. State*, 781 So.2d 1040, 1053 (Fla. 2000))). Furthermore, under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), claims of ineffective assistance of counsel are assessed under the law in effect at the time of the trial. *Id.* at 689, 104 S.Ct. 2052. Thus we conclude that Hall's subclaim also fails on the merits.

Caldwell v. Mississippi, *472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)*.

We deny this subclaim of Hall's successive postconviction motion because it fails on the merits. We have repeatedly rejected *Caldwell* challenges to the advisory standard jury instructions in the past. *See, e.g.*, *Rigterink v. State*, 66 So.3d 866, 897 (Fla. 2011); *Globe v. State*, 877 So.2d 663, 673–74 (Fla. 2004); *Card v. State*, 803 So.2d 613, 628 (Fla. 2001); *Sireci v. State*, 773 So.2d 34, 40 nn.9 & 11 (Fla. 2000); *Teffeteller v. Dugger*, 734 So.2d 1009, 1026 (Fla. 1999); *Brown v. State*, 721 So.2d 274, 283 (Fla. 1998); *Burns v. State*, 699 So.2d 646, 655 (Fla. 1997); *Johnson v. State*, 660 So.2d 637, 647 (Fla. 1995). Additionally, as discussed in detail in our recent opinion in *Reynolds v. State*, No. SC17–793, —— So.3d ——, 2018 WL 1633075 (Fla. Apr. 5, 2018) (plurality opinion), we have now expressly rejected these post-*Hurst Caldwell* claims. *See also Franklin v. State*, 43 Fla. L. Weekly S86, 236 So.3d 989 (Feb. 15, 2018). Thus we deny relief on this subclaim of Hall's successive postconviction motion.

Hall's Sentence Violates Due Process

We deny this subclaim of Hall's successive postconviction motion because we have already addressed a *Hurst* harmless error analysis as it pertains to Hall's case in *Hall II*, 212 So.3d at 1033–36. Thus this subclaim is duplicative.

[4]Furthermore, the authority upon which Hall relies in support of his argument, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), is not determinative. The United States Supreme Court, in *In re Winship*, held that the State must prove all elements of a crime in a juvenile delinquency proceeding beyond a reasonable doubt, just as it would in an adult criminal proceeding, and that the failure to do so would result in a due process violation. 397 U.S. at 367–68, 90 S.Ct. 1068. We conclude that *In re Winship* is distinguishable from Hall's case, however, because Hall's case does not concern a juvenile delinquency proceeding. Moreover, although *Hurst* did result in the requirement that all aggravators and mitigators be proven beyond a reasonable doubt, as we previously stated in *Hall II*, the error in Hall's case was harmless. *See* 212 So.3d at 1033–36 (discussing how the error was harmless due to Hall's unanimous death sentence). Thus we conclude that Hall's death sentence does not violate due process and thus hold that this subclaim is meritless.

***217** Hall's Death Sentence Violates the Eighth Amendment

[5]We deny this claim of Hall's successive postconviction motion because there was no harmful error in this case. *Hall II*, 212 So.3d at 1036. In *Hurst*, we held that unanimity is required under the Eighth Amendment. Similarly, we have determined that defendants whose sentences became final post-*Ring* and who received unanimous jury recommendations are not entitled to

Hurst relief if the error is deemed to be harmless pursuant to *Davis v. State*, 207 So.3d 142, 173–75 (Fla. 2016). Hall's jury returned a unanimous recommendation, *Hall I*, 107 So.3d at 270, his sentence became final after *Ring*, *see Hall v. Florida*, 571 U.S. 878, 134 S.Ct. 203, 187 L.Ed.2d 137, and the *Hurst* error was harmless. Therefore, we deny this claim of Hall's successive postconviction motion.

Hall's Indictment

[6]Finally, Hall's argument with regard to his indictment also fails. Hall argues that he was denied his right to a proper indictment because the grand jury indictment in his case did not list the aggravators. However, "this Court has repeatedly rejected the argument that aggravating circumstances must be alleged in the indictment." *Pham v. State*, 70 So.3d 485, 496 (Fla. 2011) (citing *Rogers v. State*, 957 So.2d 538, 554 (Fla. 2007); *Coday v. State*, 946 So.2d 988, 1006 (Fla. 2006); *Ibar v. State*, 938 So.2d 451, 473 (Fla. 2006); *Blackwelder v. State*, 851 So.2d 650, 654 (Fla. 2003); *Kormondy v. State*, 845 So.2d 41, 54 (Fla. 2003)). Nothing in *Hurst* indicates that our holding impacted this settled point of law; and we have also held prior to *Hurst* that "neither *Apprendi* nor *Ring* requires that aggravating circumstances be charged in the indictment." *Rogers*, 957 So.2d at 554. Therefore, Hall's indictment claim fails.

CONCLUSION

For the reasons set forth above, we affirm the postconviction court's order denying Hall relief on his successive motion for postconviction relief.

It is so ordered.

LABARGA, C.J., and LEWIS and LAWSON, JJ., concur.

CANADY and POLSTON, JJ., concur in result.

PARIENTE, J., dissents with an opinion, in which QUINCE, J., concurs.

PARIENTE, J., dissenting.

In *Hall v. State* (*Hall II*), 212 So.3d 1001 (Fla. 2017), this Court denied Hall relief under *Hurst*[7] based on the jury's unanimous recommendation for death. 212 So.3d at 1035.[8] That opinion, which focused solely on the jury's unanimous recommendation for death, did not discuss the effect of the stricken cold, calculated, and premeditated (CCP) aggravator on the *Hurst* harmless error analysis.

In *Hall II*, I concurred in result without an opinion, and Justice Quince dissented as to the majority's denial of *Hurst* relief, explaining that some of the aggravating ***218** factors required a factual determination that this Court could not assume the jury made unanimously despite the jury's unanimous recommendation for death. 212 So.3d at 1036–37 (Quince, J., concurring in part and dissenting in part). Concurring in result in *Hall II*, I did not consider the effect of the stricken CCP aggravator on this Court's *Hurst* harmless error analysis.

In this case, the per curiam opinion addresses the stricken CCP aggravating factor and finds our opinion in *Wood v. State*, 209 So.3d 1217 (Fla. 2017), distinguishable. Per curiam op. at 213–14. Although Wood's death sentence was reversed on proportionality grounds, *Wood*, 209 So.3d at 1221, as I explained on rehearing in *Middleton v. State*, 42 Fla. L. Weekly S637, 2017 WL 2374697 (Fla. June 1, 2017), this Court's opinion in *Wood* supports the conclusion that a stricken aggravating factor affects the *Hurst* harmless error analysis. *Id.* at S637–38, *1 (Pariente, J., dissenting).

In *Wood*, this Court stated: "Our inquiry post-*Hurst* must necessarily be the effect of any error on the jury's findings, rather than whether beyond a reasonable doubt the trial judge would have still imposed death." 209 So.3d at 1233. Applying this statement on rehearing in *Middleton*, I explained the "serious[ ] flaw[ ]" in the majority's harmless error analysis:

> Instead of focusing on the effect of the error on the jury, the majority opinion conducted an erroneous and contradictory harmless error analysis that did not consider the effect of striking two of the four aggravating factors—avoid arrest and CCP—on the jury and instead focused on the effect the improper aggravators had on the trial court.... When the correct harmless error analysis, pursuant to our precedent, is conducted, I conclude that Middleton is entitled to a new penalty phase.

> Without even referencing, much less considering, the two stricken aggravators, the majority relied only on the jury's unanimous verdict to determine that the *Hurst* error in Middleton's case was harmless beyond a reasonable doubt. *Regardless of whether the failure to consider the effect of the two stricken aggravators on the jury was an oversight, it is clear that the analysis is incomplete*.

Middleton, 42 Fla. L. Weekly at S638, 2017 WL 2374697, at *1 (Pariente, J., dissenting) (citations omitted) (emphasis added). Like in *Middleton*, in denying Hall *Hurst* relief in *Hall II*, this Court did not consider the effect of the stricken CCP aggravating factor. Per curiam op. at 214.

As I also explained in *Middleton*, a stricken aggravating factor significantly affects the *Hurst* harmless error analysis:

> Indeed, the essence of the United States Supreme Court's decision in *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), was refocusing Florida's capital sentencing scheme on the jury .... *Id.* at 624. As this Court stated in *[State v. DiGuilio] DiGuilio v. State*, 491 So.2d 1129 (Fla. 1986), "Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact." *Id.* at 1139. Therefore, in determining whether the *Hurst* error ... was harmless beyond a reasonable doubt, we must focus on how the stricken aggravating factors could have affected the jury's recommendation for death....
>
> Because the jury ... was instructed on the ... aggravating factors that this Court determined were not supported by competent, substantial evidence, this Court must consider the impact that the inappropriate aggravating factors had ***219** on the jury's ultimate verdict in determining whether the *Hurst* error was harmless beyond a reasonable doubt. *Despite the jury's unanimous recommendation for death, this Court has no way of knowing that the jury would have reached the same verdict if it had been instructed on only the ... valid aggravators* .... Nor can we assume that the jury would have unanimously found the remaining aggravators sufficient to impose death or unanimously found that the aggravation (without the two stricken aggravating factors) outweighed the mitigation.
>
> In short, it is sheer speculation to assume that even without [the stricken] aggravators, the jury would have still unanimously recommended death. Thus, the Court is in no position to conclude that the unanimous jury recommendation renders the *Hurst* error harmless beyond a reasonable doubt.

Middleton, 42 Fla. L. Weekly at S638, 2017 WL (Pariente, J., dissenting) (emphasis added) (citations omitted).

Likewise, in Hall's case, this Court has no way of knowing whether the unsupported CCP aggravating factor contributed to the jury's unanimous recommendation for death, or whether it affected the jury's conclusion that the aggravating factors were sufficient to impose death and that the aggravation outweighed the mitigation. *See Hurst*, 202 So.3d at 44. In fact, the stricken aggravating factor in Hall's case "is among the most serious aggravators set out in the statutory sentencing scheme." *Wood*, 209 So.3d at 1228 (quoting *Deparvine v. State*, 995 So.2d 351, 381 (Fla. 2008)). Thus, I would conclude that because of the stricken CCP aggravating factor in Hall's case, the State cannot establish that the *Hurst* error is harmless beyond a reasonable doubt and would grant Hall a new penalty phase.

Accordingly, I dissent.

QUINCE, J., concurs.

All Citations

246 So.3d 210, 43 Fla. L. Weekly S178

Footnotes

1 As we stated in *Hall I*,

> In the trial court's Sentencing Order, the court found five aggravators: (1) previously convicted of a felony and under sentence of imprisonment—great weight; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person—great weight; (3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws—great weight; (4) especially heinous, atrocious or cruel [(HAC)]—very great weight; (5) cold, calculated, and premeditated [(CCP)]—very great weight; (6) the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties—no weight—merged with aggravator number 3 as listed above. In mitigation, the sentencing court found no statutory

mitigators and eight non-statutory mitigating circumstances: (1) Hall was a good son and brother—some weight; (2) Hall's family loves him—little weight; (3) Hall was a good athlete who won awards and medals—little weight; (4) Hall was a victim of sexual abuse—some weight; (5) Hall was productively employed while in prison—some weight; (6) Hall cooperated with law enforcement—some weight; (7) Hall showed remorse—little weight; and (8) Hall displayed appropriate courtroom behavior—little weight. The trial court concluded that the aggravating circumstances far outweighed the mitigation and gave great weight to the jury's unanimous recommendation of death. Thus, the trial court imposed the sentence of death.

Hall I, 107 So.3d at 270–71.

2 We did, however, find that the trial court's finding of the CCP aggravator was not supported by competent, substantial evidence, and thus it was stricken. *Hall I*, 107 So.3d at 278–79.

3 Ultimately, in *Wood*, we did not order a new penalty phase because we determined that Wood's death sentence was a disproportionate punishment when the aggravators were stricken. 209 So.3d at 1234.

4 "(1) [P]reviously convicted of a felony and under sentence of imprisonment—great weight; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person—great weight; (3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws—great weight; (4) especially heinous, atrocious or cruel—very great weight; [and] (5) ... the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties—no weight—merged with aggravator number 3 as listed above." *Hall I*, 107 So.3d at 270–71.

5 The trial court in *Middleton* found eleven nonstatutory mitigators, all of which were afforded "some weight" or "little weight." 220 So.3d at 1173.

6 The trial court found one statutory mitigator and twenty-five nonstatutory mitigators in *Cozzie*. Ultimately, the trial court, in weighing the aggravation and mitigation in *Cozzie*, concluded that the aggravators "far outweighed" the mitigators in sentencing Cozzie to death. 225 So.3d at 726.

7 *Hurst v. State* (*Hurst*), 202 So.3d 40 (Fla. 2016), *cert. denied*, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017); *see Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016).

8 Despite having already denied Hall *Hurst* relief, this Court has addressed more than one request for *Hurst* relief from multiple defendants based on alternative arguments under the Sixth and Eighth Amendments. *See Hitchcock v. State*, 226 So.3d 216, 217 n.2 (Fla.), *cert. denied*, —— U.S. ——, 138 S.Ct. 513, 199 L.Ed.2d 396 (2017).

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APPENDIX

C

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

vs.

CASE NO.: 2008-33412CFAES

ENOCH HALL /
Defendant

PENALTY PHASE ADVISORY SENTENCE

(CHECK ONLY ONE)

X A majority of the jury, by a vote of 12 to 0 advise and recommend to the court that it impose the death penalty upon Enoch Hall.

_____ The jury advises and recommends to the court that it impose a sentence of life imprisonment upon Enoch Hall without the possibility of parole.

Dated at DAYTONA BEACH, VOLUSIA County, Florida, this 29 day of October, 2009.

Paul B Murphy
FOREPERSON

PAUL B. Murphy

FILED
IN OPEN COURT
OCT 29 2009
1725
Clerk Circuit & County
Court Volusia County, FL

APPENDIX

D

Filing # 61310324 E-Filed 09/05/2017 11:40:38 AM

IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1355

ENOCH D. HALL
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FL
Lower Tribunal No. 2008-33412 CFAES

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Enoch D. Hall will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying a successive motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated "R" followed by the page number. References to the postconviction record are designated "PCR" followed by the page number. References to the successive postconviction record are designated "SPCR" followed by the page number. All references to volumes are designated as "V" followed by the volume number.

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STATEMENT OF PROCEDURAL HISTORY AND FACTS

On July 10, 2008, Enoch Hall was indicted by Grand Jury for the First-Degree Murder of Florida Department of Corrections Officer Donna Fitzgerald. The indictment did not include aggravators the State intended to prove at sentencing in seeking the death penalty. Hall was tried in the Seventh Judicial Circuit in Volusia County, Case Number 2008-33412 CFAES before J. David Walsh, Circuit Court Judge. On October 23, 2009, Hall was found guilty of First-Degree Murder. The advisory panel recommended a death sentence by a vote of twelve to zero. The panel's recommendation contained no verdict or fact-finding.

The judge imposed a death sentence on January 15, 2010. As the sole fact-finder, the Court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury. The judgment and sentence in this case was affirmed on appeal by this Court on August 30, 2012. *Hall v. State*, 107 So. 3d 262 (Fla. 2012). However, this Court found that the aggravator, CCP, was not supported by competent, substantial evidence. *Id.* at 277-278. Hall filed a petition for writ of certiorari to the U.S. Supreme Court that was denied on October 7, 2013. *Hall v. Florida*, 134 S.Ct. 203 (2013).

Hall filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 17, 2014. Hall raised nine claims. The postconviction court denied all nine claims on July 8, 2015. Hall's Motion for

Rehearing was denied on August 7, 2015. Hall appealed the denial of his post-conviction motion to this Court raising Claims 1-9 of the 3.851 Motion for Postconviction Relief and two additional grounds in a State Habeas.

On January 5, 2017, during the pendency of his appeal from the denial of his original Rule 3.851 postconviction motion, Hall filed a successive Rule 3.851 motion seeking relief pursuant to *Hurst v. Florida* [1]*(Hurst I), Hurst v. State* [2]*(Hurst II),* and their progeny. Pursuant to *Tompkins v. State*, 894 So.2d 584, 879-60 (Fla. 2005), Hall simultaneously filed a motion asking this Court to relinquish jurisdiction to the trial court to litigate the issues raised in the successive motion. This Court denied that request on January 23, 2017. Therefore, Hall filed a Motion to Stay and Hold in Abeyance his successive postconviction motion, which the trial court granted on February 7, 2017.

This Court proceeded to address *Hurst I* and *II* in its opinion, despite the fact that no supplemental briefing was requested by this Court on an issue that had not been specifically pled in Hall's postconviction appeal. The trial court's order denying relief on the original Rule 3.851 motion was then affirmed on appeal by this Court on February 9, 2017. *Hall v. State*, 212 So. 3d 1001 (Fla. 2017). After the Mandate was issued by this Court, the trial court lifted the stay. On May 17,

[1] *Hurst v. Florida*, 136 S. Ct. 616 (2016).
[2] *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

2017, relying on the 2017 opinion of this Court, the trial court denied the successive 3.851 motion without allowing for oral argument at a case management conference. Hall filed a Motion for Rehearing on May 30, 2017, which explained how this Court, in addressing *Hurst I* and *II* in Hall's original postconviction appeal, overlooked facts critical to the resolution of the claims presented in Hall's successive 3.851 Motion. *See*, *Hall v. State*, at 1034-1036. The Motion for Rehearing also explains why Hall filed a successive 3.851 motion, where these facts could be argued in accordance with case law that developed after his original postconviction appeal had been filed. The motion for rehearing was also denied on June 26, 2017. This timely appeal follows.

SUMMARY OF THE ARGUMENT

Mr. Hall was sentenced to die under an unconstitutional death penalty scheme. The United States Supreme Court, in *Hurst v. Florida*, declared Florida's death penalty system unconstitutional. Based on *Hurst I* and *II*, and its progeny, and the implications arising therefrom, Mr. Hall's death sentence violates the United States Constitution and the Florida Constitution. Because Mr. Hall was sentenced without a jury determining beyond a reasonable doubt the essential elements that purportedly justify his death sentence, both the United States and Florida Constitutions mandate that his sentence be vacated. Specifically, Mr. Hall's sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of both the

U. S. Constitution and the corresponding provisions of the Florida Constitutions. The error is not harmless. Mr. Hall must be resentenced by a properly instructed jury that unanimously finds the aggravating circumstances of Mr. Hall's crime, and finds that they outweigh his mitigating circumstances beyond a reasonable doubt. If their unanimous verdict is to sentence him to death, they must do so with a full understanding of the weight of their responsibility. Any other outcome constitutes an arbitrary application of the law and is unconstitutional.

STANDARD OF REVIEW

This is an appeal from a successive motion under Fla. R. Crim. P. 3.851 Collateral Relief after Death Sentence Has Been Imposed and Affirmed on Direct Appeal. This Court found that Mr. Hall is entitled to retroactive application of *Hurst* in accordance with *Mosely v. State*, 209 So.3d 1248, 1275 (Fla. 2016). See, *Hall v. State*, 212 So.3d at 1033. The standard of review is *de novo*. *Stephens v. State*, 748 So.2d 1028, 1032 (Fla. 2000). This Court employs a mixed standard of review, deferring to the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. *See, Sochor v. State*, 883 So. 2d 766, 771-72 (Fla. 2004).

ARGUMENT 1

IN LIGHT OF *HURST I* AND *II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES

CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida,* and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a sentence of death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial**.** *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "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." *Hurst v. State,* at 57.

In *Hurst v. Florida,* the United States Supreme Court did not rule that harmless error review actually applies to *Hurst* claims, observing that it "normally leaves it to the state courts to consider whether an error is harmless." 136 S. Ct. at 624 (citing *Neder v. United States*, 527 U.S 1, 25 (1999)). This Court should have concluded that *Hurst* errors are not capable of harmless error review. That is

because the Sixth Amendment error identified in *Hurst* – divesting the capital jury of its constitutional fact-finding role at the penalty phase- represents a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). *Hurst* errors are structural because they "infect the entire trial process." *Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993). In other words, *Hurst* errors "deprive defendants of basic protections without which a [capital] trial cannot reliably serve its function as a vehicle for determination" of whether the elements necessary for a death sentence exist. *Neder*, 527 U.S. at 1.

Even if the *Hurst* error in Mr. Hall's is case capable of harmless error review, the Sixth Amendment error under *Hurst v. Florida* cannot be proven by the State to be harmless beyond a reasonable doubt in Mr. Hall's case. Although Mr. Hall's death recommendation was unanimous, even a unanimous death recommendation would not mandate a finding of harmless error, as that is only one of several inquiries that juries must make under *Hurst v. Florida*. The only document returned by the jury was an advisory recommendation that a death sentence should be imposed. Mr. Hall's penalty phase advisory panel did not return a verdict making any findings of fact, so we have no way of knowing what aggravators, if any, the jurors unanimously found were proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the

jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. In *Hurst I*, the Supreme Court found:

> Florida concedes that *Ring*[3] required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance."… The State fails to appreciate the central and singular role the judge plays under Florida law….The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires. *Id*. at 622. (Emphasis added).

In *Hurst II*, this Court quoted the Supreme Court, "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact-finding. Florida's sentencing scheme … is therefore unconstitutional." This Court went on to find, "In reaching these conclusions, the Supreme Court flatly rejected the State's contention that although '*Ring* required a jury to find every fact necessary to render Hurst eligible for a death penalty,' the jury's recommended sentence in Hurst's case necessarily included such findings. *Id.* at 622." *Hurst II*, at 53. (Emphasis added.) Nevertheless, this Court's subsequent opinions contradict its opinion in *Hurst II* and the Supreme Court's holding in *Hurst I*, which this Court quoted, by finding in *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016), "Here, the

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

jury unanimously found all of the necessary facts for the imposition of death sentences by virtue of its unanimous recommendations."

It is established law that a harmless error analysis must be performed on a case-by-case basis, and there is no one-size fits all analysis; rather there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990). *Accord Sochor v. Florida*, 504 U.S. 527, 540 (1992). As to *Hurst I* error, "the burden is on the State, as beneficiary of the error, to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to [the defendant]'s death sentence in this case." *Hurst II*, at 68. In *King v. State*, this Court emphasized that a unanimous recommendation was not dispositive, but rather "*begins a foundation* for us to conclude beyond a reasonable doubt" that the *Hurst* error was harmless.[4] (Emphasis added) On appeal from Hall's original postconviction motion, this Court reiterated the standard by which the unconstitutional sentencing error found in *Hurst* should be evaluated to determine if the error was harmless. This Court stated in part:[5]

> … the [sentencing] error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See,* e.g., *Zack v. State*, 753 So. 2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously

[4] *King v. State*, 211 So. 3d 866, 890 (Fla. 2017).
[5] *Hall v. State*, 212 So.3d 1001, 1033-1034 (Fla. 2017).

> applied," [State v.] *DiGuilio*, 491 So. 2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. (Emphasis added)

Under this Court's jurisprudence since *Hurst II*, this Court has repeatedly inferred from the jury's unanimous recommendation that the jury must have conducted unanimous fact-finding - within the meaning of the Sixth Amendment - as to each of the requirements for death sentence under Florida law. This inference has led this Court to engage in speculation as to what the jury actually found.

A. CCP Aggravator Stricken

On direct appeal, this Court disagreed with the trial court's finding that the aggravator, CCP (a cold, calculated and premeditated killing) was proven.[6] The trial court had given this aggravator "very great weight," yet it was inappropriate to weigh this aggravator against Hall's mitigators. V11/R1798 Furthermore, without the benefit of briefing on *Hurst* and its progeny, this Court ruled against Hall on his postconviction appeal without explicitly addressing the effect of the stricken aggravator, CCP, on a harmless error analysis pursuant to *Hurst*.

The issue of a stricken aggravator of "very great weight" distinguishes Mr. Hall's case from other cases involving a unanimous death recommendation, where

[6] *Hall v. State*, 107 So.3d 262, 276-278 (Fla. 2012).

this Court found the *Hurst* error was harmless. In both *Truehill*[7] and *King*[8], the Court noted that these defendants did not challenge the finding on any of the aggravators. In *Wood*[9], the Court indicated that a *Hurst* error in a unanimous-recommendation case would—if the case were not already being remanded for imposition a life sentence on proportionality grounds—require a remand for a new penalty phase because the jury had been instructed to consider inappropriate aggravators:

> In this case, the jury was instructed on both aggravating factors that we have determined were not supported by competent, substantial evidence. This alone would require a finding that the error was not harmless beyond a reasonable doubt. We note that our conclusion in this regard is also consistent with our pre-*Hurst* precedent in *Kaczmar v. State*, 104 So.3d 990, 1008 (Fla. 2012), where we held that, upon striking the CCP and felony-murder aggravating factors so that only one valid aggravating factor remained, such error was not harmless beyond a reasonable doubt. Post–*Hurst*, this conclusion is even more compelling. (Emphasis added.)

Justice Pariente commented on this concept further in her dissent in *Middleton*,[10] "I now realize, as pointed out by Middleton in his motion for rehearing, that *reversal is compelled* because this Court struck two of the four

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[7] *Truehill v. State*, 211 So.3d 930, 956 (Fla. 2017), "Further supporting that any *Hurst* error was harmless here, Truehill has not contested any of the aggravating factors as improper in the case at hand—Truehill's direct appeal."
[8] *King v. State*, 211 So.3d 866 (Fla. 2017), "…we further note that when King first appealed his sentence to this Court, he did not challenge the finding of any aggravating circumstances found below."
[9] *Wood v. State*, 209 So.3d 1217, 1234 (Fla. 2017).
[10] *Middleton v. State*, -- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017).

aggravating factors on appeal and, therefore, the error, post-*Hurst*, cannot be considered harmless beyond a reasonable doubt." (Emphasis added) This point was made again in Justice Pariente's concurring opinion in *Cole*,[11] "Also, this Court struck the HAC aggravating factor on direct appeal, which must be considered in determining 'the effect of any error on the jury's findings' after *Hurst*. *Wood v. State*, 209 So.3d 1217, 1233 (Fla. 2017); *see* majority op. at ---."

Viewing this concept conversely, in *Bevel*'s majority opinion from June 15, 2017[12], this Court held, "In this case, where no aggravating factors have been struck, "we can conclude that the jury unanimously made the requisite factual findings" before it unanimously recommended that Bevel be sentenced to death for the murder of Sims, and we therefore deny relief under *Hurst* for that sentence; (citing *Davis v. State*, 207 So. 3d 142, 175 (Fla. 2016)." Mr. Hall's CCP aggravator was struck, so the same conclusion cannot be drawn.

Mr. Hall's direct appeal pre-dated *Hurst*, therefore this Court did not perform a harmless error analysis based on how the inclusion of this stricken aggravator affected the jury. The Court in *Wood*, at 1233, was mindful that in determining harmless error, "Our inquiry post-*Hurst* must necessarily be the effect of any error on the jury's findings, rather than whether beyond a reasonable doubt

[11]*Cole v. State*, -- So.3d --, 2017 WL 2806992, at *10 (Fla. June 29, 2017).
[12]*Bevel v. State*, ---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017).

the trial judge would have still imposed death. *See Hurs*t, 202 So.3d at 68." Since the jury in Mr. Hall's case made no findings of fact, it is mere speculation what weight they gave the CCP aggravator. As this Court cautioned in *Hurst v. State*, engaging in speculation about the jury's fact-finding "would be contrary to our clear precedent governing harmless error review." 202 So. 3d at 69; S*ee also*, *Mosley v. State*, 209 So.3d 1248, 1284 (Fla. 2016). The precedent this Court established in declining to speculate about the jury's fact-finding in *Hurst v. State*, even though that case involved a non-unanimous jury recommendation, applies equally to Mr. Hall where we must guess whether the loss of an aggravator of "very great weight" would have tipped the scales in Mr. Hall's favor. This Court has repeatedly cautioned the trial courts against engaging in speculation in several non-unanimous cases.[13] In *McGirth*, only 1 juror voted for life, but it was inappropriate to speculate why.[14]

In Mr. Hall's case, the State argued that Mr. Hall was lying in wait for Ms. Fitzgerald and implied that he intended to rape, then murder her. V30/R2805, 2807, 2826, 2862 The Defense argued that Mr. Hall snapped when he attacked the guard due to overwhelming stress and the effects of the drug, Tegretol. Whether or

[13] *Simmons v. State*, 207 So.3d 860, 867 (Fla. 2016); *Williams v. State*, 209 So.3d 543, 567 (Fla. 2017); *Calloway v. State*, 210 So.3d 1160, 1200 (Fla. 2017); *Ault v. State*, 213 So. 3d. 670, 680 (Fla. 2017); *McGirth v. State*, 209 So.3d 1146, 1164 (Fla. 2017).
[14] *Id*.

not the aggravator, CCP, was established with enough evidence to be considered by a jury goes directly to the theory of the State's case. It is purely speculative to say that the jury would have made the same recommendation had the trial court not presented them with CCP as an aggravator, which in essence supported the State's theory of the case. Since it is not possible to know how this aggravator figured into their weighing process when they made their advisory recommendation, it is not possible for the State to meet their burden of proof that the error was harmless.

B. Mental Health Mitigation Presented to Judge, Not the Jury

Consideration must also be given to how trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. As an example, Dr. Krop was called by the defense to testify that Mr. Hall suffered from a serious emotional disturbance at the time of the offense, however his testimony was not presented to the jury, but only to the judge at the *Spencer*[15] hearing. V5/R627-705 The jury never heard that Mr. Hall had low average intelligence and an asymmetrical, atrophied brain, which could affect impulse control, memory and cause inflexibility in decision making. The jury never knew that an MRI supported Dr. Krop's neurological testing results. V5/R652-656, 686, V5/PCR708-716 Trial counsel never presented to the jury evidence of Mr. Hall's stressful working

[15] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

conditions or that he appeared affected by this stress just before the murder.[16] The jury never knew about family issues concerning Mr. Hall's mother that could have led to CO Fitzgerald's laughing at him being the final trigger that caused Mr. Hall to snap.[17] If this evidence had been presented to the jury, in addition to the testimony about his drug use and him being a victim of sexual battery while in jail, it would have given the jury a better understanding of why Mr. Hall lost control and killed CO Fitzgerald. Moreover, the several non-statutory mitigators that were presented, (Mr. Hall's remorse and cooperation with law enforcement, his history has a conscientious, hard worker at PRIDE and his good prison record for the previous fourteen years), would have made more sense to the jury if they were viewed in the context of Mr. Hall's mental health issues and the factors that caused him to snap. In light of his good prison record for the previous fourteen years in prison, Mr. Hall snapping is the only explanation for the murder that makes sense.

While the sentencing judge denied the validity of Dr. Krop's opinion concerning brain abnormalities and Mr. Hall's emotional disturbance as mitigating circumstances, giving them "no weight," the jurors under *Hurst* would have been free to conclude that the defense had established the existence of the statutory and non-statutory mitigating factors which the defense argued were present in Mr.

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[16] *Hall v. State*, Case No. SC15-1662, Appellant's Initial Brief, pgs. 17-25, (Feb. 4, 2016).
[17] *Id.*, at 59-66.

Hall's case and given them greater weight. Even the State's expert, Dr. Danziger, testifying about Dr. Krop during the evidentiary hearing said, "…I read his reports. He did appropriate testing. I thought it was a reasonable job." V6/PCR943 Significantly, neither Dr. Krop nor any of the State's experts found that Mr. Hall had an anti-social personality disorder. A jury may well have given Dr. Tanner's findings, that the MRI scan indicated brain abnormalities, and Dr. Krop's neurological testing results, that Mr. Hall had a cognitive disorder NOS, the greater consideration it deserved and it is likely that at least one juror would have recommended life.

Certainly the previous rejection of Mr. Hall's claim concerning the reasonableness of withholding important mitigation evidence from the jury and only presenting it to the trial court during a *Spencer* hearing, should be reviewed in light of the fact that the jury is the trier-of- fact, not the judge. *Hurst* requires jurors find and weigh aggravators against mitigators. However, the issue post-*Hurst* is not whether trial counsel was ineffective, but rather how the constitutional error necessarily affected their decisions, causing a prejudicial result. Surely if trial counsel realized that if one juror was influenced to vote for life, and the judge would be unable to sentence him to death, then counsel would never have considered withholding Dr. Krop's testimony from the jury. Evaluating this issue in light of *Hurst I* and *II*, renders a decision to withhold crucial mitigation evidence

from a jury, only presenting it to the judge, incompetent and ill-advised. Since counsel cannot be expected to anticipate changes in the law, the claim is not a condemnation of their legal strategy. Under a harmless error analysis, the question is whether there is a "reasonable possibility that the error contributed to the sentence." *Hurst II*, at 68. Where it likely affected counsels' decision making, the constitutional error caused trial counsel to be ineffective. While it may not be trial counsels' fault, nevertheless the *Hurst* error is not harmless.

In *Hurst v. State*[18], the first advisory panel that heard his case did so without the benefit of mental health mitigation and recommended death eleven to one. When the second advisory panel heard this mitigation, only seven to five recommended death for the stabbing of the clerk.[19] At Mr. Hall's penalty phase proceeding, no juror voted in favor a life sentence. In light of the important information that a jury was never able to consider and weigh in Mr. Hall's case, it is apparent that the outcome would probably be different and that Mr. Hall would likely receive a binding life recommendation from the jury. The State cannot meet its burden that there is no reasonable possibility that the *Hurst* error contributed to Mr. Hall's death sentence.

[18] *Hurst v. State*, 819 So.2d 689, 694 (Fla. 2002).
[19] *Hurst v. State*, 147 So. 3d 435, 440 (Fla. 2014); and *Hurst II* at 46.

C. *Caldwell v. Mississippi*

Additionally, in the wake of *Hurst v. Florida* and the resulting new Florida law, the jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), must be correctly instructed as to its sentencing responsibility. This means that post-*Hurst* the individual jurors must know that each will bear the responsibility for a death sentencing resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*[20]. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Otherwise, "a real danger exists that a resulting death sentence will be based at least in part on the determination of a decision maker that has been misled as to the nature of its responsibility." *Mann v. Dugger*, 844 F.2d 1446, 1454-55 (11th Cir. 1988).

In Mr. Hall's case, the jury was told the exact opposite–that he could be sentenced to death regardless of the jury's recommendation. The judge instructed the jury, "As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." V35/R3483 In penalty phase closing arguments, the State repeatedly referred to the advisory panel's decision as a

[20]*Perry v. State*, 210 So. 3d 630 (Fla. 2016).

recommendation, rather than a verdict. V35/R3553, 3564, 3656 The chances that at least one juror would not join a death recommendation if a resentencing were now conducted is highly likely given that proper *Caldwell* instructions would be required.

Mr. Hall has not litigated a *Caldwell* claim directly, since the *Hurst* rulings. Now, in light of *Hurst I* and *II* and *In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017), the issue of whether Mr. Hall's penalty phase jury instructions violated his constitutional rights warrants closer scrutiny and the precedent established in *Caldwell* should be re-considered. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("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.").

For all the reasons explained above, the *Hurst* error in Mr. Hall's case warrants relief. Mr. Hall's death sentence must be vacated and a new penalty phase proceeding ordered.

ARGUMENT 2

UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *Hurst II*, at 59-60, this Court held:

> In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended *verdict* resulting in a death sentence is required under the Eighth Amendment. ….The foundational precept is the principle that death is different. This means that the penalty may not be arbitrarily imposed, but must be reserved only for defendants convicted of the most aggravated and least mitigated of murders. Accordingly, any capital sentencing law must adequately perform a narrowing function in order to ensure that the death penalty is not being arbitrarily or capriciously imposed. (FNs omitted) … If death is to be imposed, unanimous jury sentencing recommendations, *when made in conjunction with the other critical findings unanimously found by the jury*, provide the highest degree of reliability in meeting these constitutional requirements in the capital sentencing process. (Emphasis added)

Mr. Hall's sentence was not the product of unanimous jury findings, nor did he receive the benefit of a penalty phase jury verdict. His case was only heard by an advisory panel and the verdict was rendered by a judge. His sentence was the product of an arbitrary and capricious system that did not afford him the rights that the Eighth Amendment guarantees. Under the Eighth Amendment, his execution would thus constitute cruel and unusual punishment. His death sentence should be vacated and a new penalty phase proceeding ordered.

ARGUMENT 3

THIS COURT SHOULD VACATE MR. HALL'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In *In re Winship* the United States Supreme Court held that the elements necessary to adjudicate a juvenile and subject him or her to sentencing under the juvenile system required each fact necessary be proved beyond a reasonable doubt. The Court made clear, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). [21] Under the Due Process Clause, it is the state, and the state alone, which must prove each element beyond a reasonable doubt and has the burden of persuasion.

The jury trial that *Hurst v. Florida* mandates requires that the State prove each element beyond a reasonable doubt. Mr. Hall was denied a jury trial on the

[21] *See also, Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *U.S. v. Booker*, 543 U.S. 220, 244 (2005); *Cunningham v. California*, 549 U.S. 270, 273 (2007).

elements that subjected him to the death penalty. It necessarily follows that he was denied his right to proof beyond a reasonable doubt. Therefore, Mr. Hall's sentence violates the Due Process Clause of the Fifth and Fourteenth Amendments of United States Constitution, and the corresponding provisions of the Florida Constitution. This Court should vacate his death sentence and a new penalty phase proceeding should be ordered.

ARGUMENT 4

IN LIGHT OF *HURST*, *PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT.

On remand this Court applied the Supreme Court's decision in *Hurst I* in light of the Florida Constitution and held:

> As we will explain, we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and on Florida's constitutional right to jury trial, considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal offense. In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances. We also hold, based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment to the United States Constitution, that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous.

Hurst II, at 44. In *Perry*, at 633, this Court found Florida's post-*Hurst* revision of the death penalty statute was unconstitutional after reviewing the statute in light of the its opinion in *Hurst II*. This Court held,

> that as a result of the longstanding adherence to unanimity in criminal jury trials in Florida, the right to a jury trial set forth in article I, section 22 of the Florida Constitution requires that in cases in which the penalty phase jury is not waived, the findings necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury. [FN omitted] Hurst, 202 So.3d at 44-45. Those findings specifically include unanimity as to all aggravating factors to be considered, unanimity that sufficient aggravating factors exist for the imposition of the death penalty, unanimity that the aggravating factors outweigh the mitigating circumstances, and unanimity in the final jury recommendation for death. *Id*. at 53-54, 59-60.

Thus, the new statute was found to be unconstitutional.

Mr. Hall has a number of rights under the Florida Constitution that are at least coterminous with the United States Constitution, and possibly more extensive. This Court should also vacate Mr. Hall's death sentence based on the Florida Constitution. Article I, Section 15(a) provides:

> (a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

Article I, Section 16(a) provides in relevant part:

> (a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges . . .

In *Hurst I*, the United States Supreme Court applied *Ring* to Florida's system and held that a jury must find any fact that subjects an individual to a greater penalty. Prior to *Apprendi*, *Ring*, and *Hurst I*, the United States Supreme Court addressed a similar question in a federal prosecution and held that: "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt" *Jones v. United States*, 526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999). Because the State proceeded against Mr. Hall under an unconstitutional system, the State never presented the aggravating factors of elements for the Grand Jury to consider in determining whether to indict Mr. Hall.

In addition to United States Constitution's requirement that Mr. Hall's death sentence be vacated, this Court should also vacate Mr. Hall's death sentence because his death sentence was obtained in violation of the Florida Constitution, and a new penalty phase proceeding should be ordered.

CONCLUSION

Based on the foregoing claims, viewed individually and cumulatively, Mr. Hall's death sentence is unconstitutional. He prays this Court vacate the trial court's Order denying relief for his Rule 3.851 motion, enter an Order vacating his

death sentence and order a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on September 5, 2017, I electronically filed the forgoing Brief with the Clerk of the Florida Supreme Court by using Florida Courts e-portal filing system which will send a notice of electronic filing to the following: Vivian Singleton, Assistant Attorney General, Vivian.Singleton@myfloridalegal.com and CapApp@myflordialegal.com; Rosemary Calhoun, Assistant State Attorney, CalhounR@sao7.org, and Cindy Bisland, BislandC@sao7.org. I further certify that I mailed the forgoing document to Enoch D. Hall, DOC#214353, Florida State Prison, P.O. Box 800, Raiford, FL 32083.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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APPENDIX

E

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IN THE SUPREME COURT OF FLORIDA
CASE NO. SC17-1355
Lower Tribunal No. 2008-33412 CFAES

ENOCH D. HALL,
Appellant,
v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
VOLUSIA COUNTY, FLORIDA

APPELLANT'S MOTION FOR REHEARING

COMES NOW the Appellant, ENOCH D. HALL, by and through undersigned counsel, pursuant to Fla. R. App. P. 9.330, and respectfully moves this Court to reconsider its opinion of April 12, 2018 affirming the circuit court's denial of his successive motion for post-conviction. By this motion, the Appellant submits that the Court has overlooked and/or misapprehended points of law and facts critical to the resolution of the claims presented in his appeal and discussed below.

All claims for relief previously presented to the Court are specifically argued again, no claim previously raised is hereby abandoned.

Relevant Procedural History

On October 23, 2009, Mr. Hall was found guilty of First-Degree Murder for the killing of Florida Department of Corrections Officer Donna Fitzgerald.

The advisory panel recommended a death sentence for by a vote of twelve to zero. The advisory panel's recommendation contained no verdict or fact-finding.

The judge imposed a death sentence on January 15, 2010. As the sole fact-finder, the trial court found aggravating and mitigating factors and weighed them without the benefit of individual factual determination by a jury.

Mr. Hall filed his Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.851 on September 17, 2014. The defendant raised 9 claims. The postconviction court denied all nine claims on July 8, 2015. Mr. Hall's Motion for Rehearing was denied on August 7, 2015.

On February 4, 2016, Mr. Hall filed his initial brief with this Court challenging the denial of his postconviction motion. He also raised two additional grounds in a State Habeas.

On January 5, 2017, Mr. Hall filed with the Circuit Court for the Seventh Judicial Circuit his Successive Motion to Vacate Death Sentence. This motion fully

developed his right to relief based on *Hurst v. Florida*[1], the enactment of Chapter 2016-13, the issuance of *Perry v. State*[2], and the issuance of *Hurst v. State*[3], all of which established new Florida law. On the same day, Mr. Hall filed a motion with this Court asking it to relinquish jurisdiction to the circuit court to litigate the issues raised in his successive motion. Mr. Hall's motion to relinquish jurisdiction was denied and this Court proceeded to issue an opinion affirming the denial of Mr. Hall's original motion for post-conviction relief. Subsequently, the circuit court denied Mr. Hall's successive 3.851 motion based on *Hurst* without allowing argument.

On April 12, 2018, this Court issued its opinion affirming the postconviction court's denial of Mr. Hall's successive 3.851 motion filed pursuant to *Hurst* and its progeny. This Motion for Rehearing follows:

GROUNDS FOR RELIEF

A. *Caldwell v. Mississippi,* 472 U.S. 320 (1985).

In rejecting Mr. Hall's *Caldwell* claim, this Court noted that it had repeatedly rejected *Caldwell* challenges in the past.[4] *Hall*, at *10-11. However, all those cases

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[1] *Hurst v. Florida*, 136 S.Ct. 616 (2016).
[2] *Perry v. State*, 210 So.3d 630 (Fla. 2016).
[3] *Hurst v. State*, 202 So.3d 40 (Fla. 2016).
[4] *See, e.g., Rigterink v. State*, 66 So. 3d 866, 897 (Fla. 2011); *Globe v. State*, 877 So. 2d 663, 673-74 (Fla. 2004); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001); *Sireci v. State*, 773 So. 2d 34, 40 nn.9 & 11 (Fla. 2000); *Teffeteller v. Dugger*, 734

were decided pre-*Hurst v. Florida.* They were based on the reasoning that if Florida's death penalty scheme is constitutional, then an instruction that follows that scheme is also constitutional. After the holding by the United States Supreme Court that Florida's death penalty sentencing scheme is not constitutional in accordance with the Supreme Court's 2000 holding in *Apprendi v. New Jersey* and its 2002 holding in *Ring v. Arizona*, then it follows that Florida's jury instructions are also unconstitutional.[5]

In denying Mr. Hall's *Caldwell* claim, this Court also cited to its February 2018 opinion in *Franklin v. State*, 43 Fla. L. Weekly S86 (Feb. 15, 2018). However, *Franklin* did not contain a post-*Hurst* analysis of the *Caldwell* issue, rather it relied upon pre-*Hurst* reasoning. The *Franklin* opinion did rely on two post-*Hurst* cases,

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So. 2d 1009, 1026 (Fla. 1999); *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998); *Burns v. State*, 699 So. 2d 646, 655 (Fla. 1997); *Johnson v. State*, 660 So. 2d 637, 647 (Fla. 1995).

[5] *See, Reynolds*, at *24-25. Similarly, before *Ring* there was no authoritative indication that there were any constitutional infirmities with Florida's capital sentencing scheme. *See Walton v. Arizona*, 497 U.S. 639, 647-48 (1990), *abrogated by Ring*, 536 U.S. at 609; *Hildwin v. Florida*, 490 U.S. 638, 639-41 (1989), *abrogated by Hurst v. Florida*, 136 S. Ct. at 623; *Spaziano v. Florida*, 468 U.S. 447, 462-65 (1984), *abrogated by Hurst v. Florida*, 136 S. Ct. at 623; *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976). Therefore, there cannot be a pre-*Ring*, *Hurst*-induced *Caldwell* challenge to Standard Jury Instruction 7.11 because the instruction clearly did not mislead jurors as to their responsibility under the law; therefore, there was no *Caldwell* violation. *See Romano,* 512 U.S. at 9. The Standard Jury Instruction cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts.

Truehill v. State, 211 So.3d 930 (Fla. 2017) and *Oliver v. State*, 214 So. 3d 606 (Fla. 2017). However, in *Truehill*, while the appellant raised the "non-binding nature of the [jury's] verdict," this Court only analyzed whether the advisory panel's recommendation could be considered findings of fact. *Caldwell* and the jury's diminished sense of responsibility were never discussed. *See, Truehill,* at 955-957. Similarly, the *Oliver* case does not analyze *Caldwell* and the jury's diminished sense of responsibility either. *See, Oliver*, at 617-618.

It remains, then, that the sole basis for this Court's denial of Mr. Hall's *Hurst*-induced *Caldwell* claim wherein he challenges the constitutionality of the jury's diminished sense of responsibility is this Court's plurality opinion in *Reynolds v. State*, No. SC17-793 (Fla. Apr. 5, 2018).

The majority's opinion in *Reynolds* focuses on whether jury instructions which existed pre-*Hurst* can be found to be in violation of *Caldwell*. *Reynolds*, at*28. This Court reasons that if the instructions were based on the law as it stood at the time they were given, then the instructions properly described the jury's role at that time.[6] However, the impact of *Caldwell* does not end there. While it may be true that the instructions accurately reflected Florida's death sentencing scheme as

[6] This Court focuses its analysis of the *Caldwell* issue in terms of whether the jury was **misled as to its role** in the sentencing process, citing *Romano v. Oklahoma*, 512 US 1 (1994) and *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). *Reynolds*, at 23.

it existed at that time, it must be considered that Florida's death sentencing scheme was unconstitutional at that time, because that scheme violated the precepts annunciated by the United States Supreme Court's opinion in *Ring*.[7] Accurately instructing the jury on an unconstitutional law is still unconstitutional. Therefore, it is not enough to ask did the instructions reflect the sentencing scheme at that time and the role described for the jury therein. In conducting a harmless error analysis of the *Hurst* error, where Florida had unconstitutionally shifted the responsibility of determining a defendant's death eligibility to a judge, this Court must also ask if the jury's understanding of its role had an effect on its deliberation and non-binding recommendation. This Court noted in *Reynolds*:

> We stated much of the same in *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *receded from on other grounds by Franqui v. State*, 699 So. 2d 1312, 1319-20 (Fla. 1997), and there specifically rejected the argument that *Tedder* created a rule where "the weight given to the jury's advisory recommendation [wa]s so heavy as to make it the de facto sentence." *Id*. at 840. (Emphasis added)

Id., at *21. The issue raised in *Tedder*[8] concerned a trial court's override of a jury's life recommendation. It then stands to reason, if the instruction telling the jury that their recommendation should be given "great weight" is still not enough to make it a verdict for life, we cannot now say that the jury being told that their

[7] *Ring v. Arizona*, 536 U.S. 584 (2002).
[8] *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

recommendation should be given great weight is enough to consider it a verdict for death.

Again, this is not an issue of whether the trial court should have or could have given a different instruction to the jury at the penalty phase. Naturally, the instruction would reflect the law at that time. However, in determining if the *Hurst* error was harmless, we must ask if we may rely on the panel's non-binding recommendation. We must look at that recommendation through the lens of *Caldwell,* and realize it is not reliable enough to treat it as a verdict.

This Court pointed out that *Caldwell* involved the jury believing that an appellate court could adjust an incorrect result, whereas *Reynolds* and others raising *Caldwell* in the wake of *Hurst* deal with the jury being told the trial court has the ultimate responsibility to determine if a defendant can be sentenced to death. This Court found, "Calling the recommendations "advisory" and the trial court as the final sentencer is certainly less problematic than the references to appellate review in *Caldwell*, *Blackwell*, and *Pait* because, unlike appellate courts, trial courts are positioned to make factual findings, which they do every day" *Reynold*, at *30. This is not a meaningful distinction and the rationale ignores the underlying issue the Supreme Court had with the prosecutor's comments in *Caldwell,* "[they] led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere." *Caldwell,* at 329. While the jury's role

may have been advisory under the law at the time that Mr. Hall was sentenced, after *Hurst*, the Supreme Court has ruled that such a sentencing scheme was unconstitutional under *Ring*. *See*, *Hurst v. Florida*, at 621. The advisory nature of the panel's role carries less weight than a binding verdict. This distinction must be part of a *Hurst* harmless error analysis, which test the State would fail under the precedent established in *Caldwell*.

This Court also raised the issue in *Reynolds* whether a *Caldwell* analysis would open the door to full retroactivity of *Hurst*, as opposed to retroactivity only going back to the holding in *Ring*. If the jury instruction alone were being considered, then this would likely be the result. However, the analysis begins with a case being qualified for *Hurst* relief (i.e. a post-*Ring* case) and then being analyzed for harmless error. If **in the context of a harmless error analysis,** we ask whether the *Hurst* error diminished the jury's role, as that role was described in *Ring*, then retroactivity preceding *Ring* would not be implicated. *See*, *Ring*, at 609.

This Court further pointed out in *Reynolds* that the Eighth Amendment findings it made in *Hurst v. State* concerned the requirement of unanimous jury verdicts and did not focus on the jury's understanding of its responsibility. *Reynolds*, at *32. Nevertheless, *Caldwell* has been found to also be a violation of the Eighth Amendment. *Caldwell*, at 329-330. One need not rely on the Eighth Amendment findings in *Hurst v. State* to argue that a jury's sense of responsibility being

diminished is unconstitutional. Accordingly, the *Hurst* error in Mr. Hall's case should not be considered a harmless error where the Supreme Court has ruled that only juries may make findings of fact and their sense of responsibility for that duty should not be diminished.

B. Mental Health Mitigation Presentation

This Court misapprehended the focus of Mr. Hall's claim that trial counsel's decision to withhold mitigation from the jury and present it only to the judge is an ineffective assistance of counsel claim. Appellant stated in his Reply Brief:

> **This claim is mischaracterized as a "prototype ineffectiveness claim.**" AB 10 Mr. Hall anticipated this mischaracterization in his initial brief and went to great lengths to explain the important distinction between his argument and a typical ineffective assistance of counsel ("IAC") claim. Naturally, trial counsel cannot be held accountable for failing to consider a law that did not exist. However, when considering whether the *Hurst* error was harmless, it is necessary to consider how it impacted counsel's decision making – in essence how the *Hurst* error prejudiced Mr. Hall case, because his attorneys were laboring under false assumptions. No competent attorney would fail to present evidence to the trier-of-fact and still expect that evidence to have any impact on their client's sentence. Had counsel known that it only took one juror to save Mr. Hall's life, important mental health evidence would not have been withheld from the jury. **Mr. Hall is seeking relief pursuant to a harmless error analysis of the *Hurst* violation, rather than an IAC claim**.

(Emphasis added.) Reply Brief, at pg. 4. Nevertheless, this Court overlooked this clarification and continued to address this claim as a previously pled IAC claim, considering it procedurally barred. Even when this Court additionally looked at this claim as a *Hurst* error, it was deemed harmless, because "under *Hurst* harmless error, this Court must look to the potential effect on the trier-of-fact, not on the potential

effect on trial counsel's trial strategy. *Hurst*, 202 So. 3d at 68-69." However, also within the *Hurst* opinion, this Court further quoted *DiGuilio,* 491 So.2d at 1139, "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Hurst*, at 68. If evidence is presented to the wrong trier-of-fact, then its absence may have an effect on the correct trier-of-fact's decision. Therefore, understanding who the trier-of-fact is would weigh heavily on a decision about to whom to present mitigation evidence. Accordingly, the *Hurst* error harmless analysis test should not be precluded from considering the likely effect that presenting mitigation evidence to the wrong trier-of-fact would have on the sentence.

C. CCP Aggravator Stricken

In the *Hurst* harmless error analysis, this Court considered the stricken CCP[9] aggravator only in terms of the number of aggravators, rather than the significance of this particular aggravator being stricken to this particular case. Appellant argued the importance of the stricken CCP aggravator cannot be underestimated, because it goes directly to the State's theory of the case against Mr. Hall.[10] This argument was

[9] "CCP" stands for Cold, Calculated and Premeditated.

[10] In Mr. Hall's case, the State argued that Mr. Hall was lying in wait for Ms. Fitzgerald and implied that he intended to rape, then murder her. V30/R2805, 2807, 2826, 2862 The Defense argued that Mr. Hall snapped when he attacked the guard due to overwhelming stress and the effects of the drug, Tegretol. Whether or not the aggravator, CCP, was established with enough evidence to be considered by a jury goes directly to the theory of the State's case. It is purely speculative to say that the jury would have made the same recommendation had the trial court not presented them with CCP as an aggravator, which in essence supported the State's theory of

not addressed. CCP was the foundation of the State's theory that Mr. Hall planned the murder. This aggravator is central to their case. If it was not established with substantial, competent evidence, the State cannot also meet its burden to prove that the absence of this aggravator had no effect on the weighing process.

Furthermore, in finding that striking the CCP aggravator was harmless, this Court also emphasized that the HAC[11] aggravator was proven. However, rather than discussing the role that this aggravator played in Mr. Hall's specific case, this Court relies on the generalization that this aggravator is considered especially egregious. In Mr. Hall's case, the trial court found HAC due to the multiple stabs wounds. This Court's harmless error analysis only looked at the fact that HAC is generally one of the weightiest aggravators. *Hall*, at *8. However, there is a difference between an action that is the consequence of a person snapping with uncontrolled rage, and an action that is purposefully torturous with an intention to be cruel.

Courts are forbidden from applying "harmless-error analysis in an automatic or mechanical fashion" in a capital case. *Clemons*, 494 U.S. at 753.). The Supreme Court has emphasized that proper harmless-error analysis should consider the error's

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the case. Since it is not possible to know how this aggravator figured into their weighing process when they made their advisory recommendation, it is not possible for the State to meet their burden of proof that the error was harmless. Initial Brief, at 12-13.

[11] "HAC" means heinous, atrocious and cruel.

probable impact on the minds of an average rational jury. *See Harrington v. California*, 395 U.S. 250, 254 (1969). And the Supreme Court has made clear that harmless-error rulings must be accompanied by sufficient reasoning based on the actual record. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752 (1990); *Sochor v. Florida*, 504 U.S. 527, 541 (1992) (O'Connor, J., concurring) (explaining that a state court "cannot fulfill its obligations of meaningful review by simply reciting the formula for harmless error"). There is a critical difference between concluding that a properly instructed jury *could* have reached a unanimous death recommendation, and that it would have done so beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons, Mr. Hall is asking this Court to reconsider its decision and overturn the trial court's order denying Mr. Hall's successive post-conviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing has been furnished by email to: Doris Meacham, Assistant Attorney General, Doris.Meacham@myfloridalegal.com, and CapApp@myfloridalegal.com; and by U. S. Mail to Enoch Hall, DOC# 214353, Florida State Prison, 7819 NW 228th St., Raiford, Florida 32026 on this 26th day of April, 2018.

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