DOCKET NO. 18- 6901

IN THE SUPREME COURT OF THE UNITED STATES

ENOCH D. HALL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

[Capital Case]

Whether this Court should grant review of the Florida Supreme Court's determination that Hall's jury was not misled nor was its responsibility minimized, as discussed in this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by an instruction that accurately reflected Florida law at the time of sentencing in a case that presents no conflict among state appellate courts and that does not present an important or unsettled question of constitutional law?

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The decision of the Florida Supreme Court is reported at *Hall v. State*, 246 So.3d 210 (Fla. 2018).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on April 12, 2018. This Court's jurisdiction to review the final judgment of the Florida Supreme Court is authorized by 28 U.S.C. § 1257. However, because the Florida Supreme Court's decision in this case is based on adequate and independent state grounds, this Court should decline to exercise jurisdiction as no federal question is raised. Sup. Ct. R. 14(g)(i).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT OF CASE AND FACTS

This capital case is before this Court upon the Florida Supreme Court's affirmance of the denial of Hall's successive postconviction relief motion addressed to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*,202 So.3d 40 (Fla. 2016) upon finding that any *Hurst* error and claims of due process and Eighth Amendment violations were harmless beyond a reasonable doubt. *Hall v. State*, 246 So.3d 210 (Fla. 2018).

Petitioner, Enoch Hall, was convicted in the 2008 first-degree murder of Officer Donna Fitzgerald, whose body was found in

the paint room at Tomoka Correctional Institute (TCI). *Hall v. State*, 107 So. 3d 262, 267 (Fla. 2012). The facts are as follows:

> Hall was an inmate at TCI, who worked as a welder in the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) compound, where inmates work refurbishing vehicles. Sergeant Suzanne Webster was working as the TCI control room supervisor, where she was responsible for getting a count from all areas of the prison as to the number of inmates in each area. When Webster had not heard from Fitzgerald, who was working in the PRIDE compound that night, Webster radioed Officer Chad Weber, who went to the PRIDE facility with Sergeant Bruce MacNeil to search for Fitzgerald. Weber saw Hall run through an open door on the other end of one of the PRIDE buildings and Weber and MacNeil pursued Hall. Weber caught up to Hall, who repeatedly stated "I freaked out. I snapped. I killed her." Hall responded to Weber's commands and placed his hands on the wall and was handcuffed. Weber took possession of the PRIDE keys that Hall had in his hands. Officer Chad Birch shouted from inside the building, "Officer down!" and Hall remained outside with other officers while Captain Shannon Wiggins and Officers Weber and MacNeil entered the building and located Fitzgerald's body. Fitzgerald's body was found lying face down on top of a cart in the paint room. The upper part of her body was wrapped in gray wool blankets, and the bottom half of her body came over the back of the cart, with her pants and underwear pulled down to her knees. Inside a bucket of water that was on the floor next to Fitzgerald's legs was Hall's bloody T-shirt. Hall was escorted to the medical facility (MTC) of the prison by Officers Brian Dickerson and Gary Schweit. Several officers took turns watching Hall while he sat in the MTC. Hall was later escorted to a conference room to talk with investigators from the Florida Department of Law Enforcement (FDLE) and then to a cell. Hall gave three statements to FDLE agents throughout the night regarding the events of the murder.

Id. at 267-9 (footnotes omitted). The jury returned a recommendation of death by a unanimous vote. *Id.*

The trial court found five aggravators: (1) previously convicted of a felony and under sentence of imprisonment; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;(3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; (4) especially heinous, atrocious or cruel; (5) cold, calculated, and premeditated; (6) the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties, which was merged with aggravator number 3 as listed above. *Id.* at 270. In mitigation, the sentencing court found no statutory mitigators and eight non-statutory mitigating circumstances. *Id.* at 271. The trial court concluded that the aggravating circumstances far outweighed the mitigation and gave great weight to the jury's unanimous recommendation of death before sentencing Hall to death. *Id.*

The Florida Supreme Court upheld the conviction and sentence on direct appeal, but did not find the evidence sufficient to support the cold, calculated and premeditated (CCP) aggravator. *Hall*, 107 So. 3d at 278. However, in light of the substantial remaining aggravators and the relatively weak mitigation, the court found any such error harmless. The Florida Supreme Court provided the following analysis:

> When an aggravating factor is stricken 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). Despite striking CCP, four valid aggravating factors, including HAC and prior violent felony, two of the weightiest factors, remain. In addition to the weakness of the non-statutory mitigators, and the unanimous recommendation *279 of death by the jury, any error in finding the CCP aggravator is harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986).

Hall, 107 So. 3d at 278

Petitioner's case became final on October 7, 2013, when the United States Supreme Court denied his petition for writ of certiorari. *Hall v. Florida,* 134 S. Ct. 203 (2013).

Petitioner's initial motion for postconviction relief, which raised eleven claims, was denied on July 8, 2015. The Florida Supreme Court affirmed the denial of Petitioner's initial motion for postconviction relief and denied his petition for writ of habeas corpus. *Hall v. State*, 212 So. 3d at 1036 (Fla. 2017).

On January 5, 2017, Hall filed a Successive Motion to Vacate Death Sentence, citing the rulings in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So.3d 630 (Fla. 2016), which was denied by the postconviction court. On April 12, 2018, the Florida Supreme Court issued an opinion affirming the denial of *Hurst* relief.

Hall now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

THERE IS NO BASIS FOR CERTIORARI REVIEW OF THE FLORIDA SUPREME COURT'S HARMLESS ERROR DECISION BECAUSE THERE IS NO CONFLICT BETWEEN STATE COURTS OF LAST RESORT OR UNITED STATES COURTS OF APPEAL NOR DOES THE CASE PRESENT AN IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW.

As stated in Rule 10 of the Rules of the Supreme Court of the United States certiorari review will be granted only for "compelling reasons." Additionally, consideration of a decision by a state court of last resort should involve an important question of federal law that has not been, but should be, resolved by this Court" or should involve cases that decide a federal question in a way that conflicts with other state high courts or federal courts of appeal. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue,* 482 U.S. 182, 184, n. 3 (1987); *Braxton v. United States,* 500 U.S. 344, 348 (1991).

In *Reynolds*, the Florida Supreme Court addressed for the first time a *Caldwell* challenge to its jury instructions in capital cases in light of *Hurst*. *See Reynolds v. State*, 251 So.3d 811 (Fla. 2018). In addressing what it termed Reynolds's "*Hurst-based Caldwell* claim", the Florida Supreme Court concluded that neither *Ring v. Arizona,* 536 U.S. 584 (2002) nor *Hurst* "provides a basis for *Caldwell* challenges to the standard jury instruction given ... between 2002 and 2016" because any such challenge could not

withstand this Court's holding in *Romano v. Oklahoma,* 512 U.S. 1 (1994). *Reynolds,* 251 So.3d at 823. The court recognized that "*Caldwell,* as interpreted by *Romano,* ensures that jurors understand their actual sentencing responsibility; it does not indicate that jurors must also be informed of how their responsibilities might hypothetically be different in the future, should the law change." *Id.* A contrary holding would produce an absurd result, according to the court, because invalidating a conviction based on what was at the time an accurate jury instruction would allow *Caldwell* claims to swallow whole *Hurst* partial retroactivity. Accepting Reynolds's argument would, in effect, add a fourth prong to the state's retroactivity standard in *Witt v. State,* 387 So. 2d 922 (Fla. 1980). That is, it would require a consideration of whether a jury instruction accurately predicted a change in the law. *Id.* at 827.

The Florida Supreme Court also stated that Reynolds misinterpreted its Eighth Amendment holding in *Hurst v. State.* Reynolds's argument, as condensed by the court, was that because the Florida Supreme Court held that the Eighth Amendment required unanimous jury penalty recommendations, which Reynolds's jury was not told, his jury did not appreciate the significance of its responsibility. The court held that Reynolds misapplied it Eighth Amendment discussion in *Hurst v. State* noting that although *Caldwell* claims are related to the Eighth Amendment issue discussed

in *Hurst,* they are not the same. The court summed up Reynolds's argument and its rejection of it this way: "as the argument goes, even *pre-Ring* juries were being misled as to their responsibility in sentencing notwithstanding the fact that such a responsibility did not exist then and does not exist retroactively. This is the exact unwieldiness of *Caldwell* that *Romano* averts. Either juries were being misled or they were not. We conclude that they were not." *Id.* at 827. The Florida Supreme Court cited its analysis in *Reynolds* as the rationale for denying Hall's *Caldwell* claim.

Nevertheless, Hall points to *Hurst v. Florida*, and *Caldwell* to assert he is entitled to resentencing as his jury was instructed its role was advisory in violation of the Eighth Amendment and the Florida Supreme Court did not address his *Caldwell* claim sufficiently once it determined the jury had unanimously recommended death. Hall asserts that because *Hurst v. State* pointed to the Eighth Amendment in deciding that penalty-phase jury unanimity was required, his jury, which was not told their recommendation must be unanimous, did not appreciate the significance of its decision.

While it is true that the Florida Supreme Court's *Hurst* decision discussed the Eighth Amendment, it did so to buttress its already stated conclusion that its reading of *Hurst v. Florida* along with "Florida's state constitutional right to trial by jury, and our Florida jurisprudence" required a unanimous sentencing

recommendation. *Hurst,* 202 So. 3d at 50. The plurality decision in Reynolds countered that *Hurst v. State* was not compelled by the Eighth Amendment; rather, the Eighth Amendment was merely part of what the *Hurst v. State* court discussed. *Reynolds,* 251 So.3d at 826. Addressing its own precedent, the Florida Supreme Court stated that Reynolds's argument "misapplies our decision in *Hurst.*" The Florida Supreme Court noted that *Caldwell* had no bearing on its discussion of jury unanimity in *Hurst v. State* and that the Eighth Amendment issue discussed in *Hurst v. State* is significantly different from the Eighth Amendment issue addressed in *Caldwell.* Hall is attempting to build a *Caldwell* claim on a foundation of misinterpreted state law. Consequently, this Court lacks jurisdiction to review the decision of the Florida Supreme Court. *Michigan v. Long,* 463 U.S. 1032, 1038 (1983).

Furthermore, this Court has never held that *Hurst v. Florida,* which is based nearly entirely on the Sixth Amendment, is retroactive. Indeed, this Court has already stated that neither *Ring* nor *Apprendi v. New Jersey,* 530 U.S. 466 (2000), which are precursors of *Hurst,* are retroactive. *Schriro v. Summerlin,* 542 U.S. 348 (2004); *See also Blakely v. Washington,* 542 U.S. 296, 323 (2004) (stating "*Ring* (and *a fortiori Apprendi)* does not apply retroactively . .").

Hall's case is presented to this Court in a postconviction posture. *Hurst* is applicable to Hall through an expansive state

law test for retroactivity, providing retroactive application to the date this Court decided *Ring* in 2002. As *Ring*, and by extension *Hurst*, is not retroactive under federal law, Florida has implemented a test that provides relief to a broader class of individuals applying *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980).[1] This case is a poor vehicle to reach the question presented because this Court would first have to address the question of retroactivity of *Hurst* before even reaching the underlying claim.

Aside from the question of retroactivity, another significant obstacle to review of the harmless error claim Petitioner presents to this Court is that under this Court's established precedent, there was no underlying Sixth Amendment error. Petitioner became eligible for a sentence of death due to his previous violent felony convictions, and since a judge is permitted to enhance a sentence based on prior convictions without a jury finding, there was no constitutional error in sentencing Hall to death based on this aggravator.[2] *See Apprendi; Ring. See also James v. United States*,

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[1] Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague v. Lane*, 489 U.S. 288 (1989). See *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, 138 S. Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

[2] The State presented testimony relating to Hall's prior violent felony convictions, "introducing testimonies from two women whom

550 U.S. 192, 214 n.8 (2007) (noting that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.); *Cunningham v. California*, 549 U.S. 270 (2007) (noting *Apprendi's* recidivism exception); *Jones v. United States*, 526 U.S. 227, 249 (1999) (explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). The prior violent felony aggravator is well-established Florida law, and was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy."). Therefore, there was no underlying Sixth Amendment violation in this case.

Hall had raped." *Hall*, 107 So. 3d at 273. Hall was serving two life sentences when he sexually assaulted and murdered the victim in this case.

Hall v. State, 107 So. 3d 262, 275 (Fla. 2012)

Pursuant to this Court's jurisprudence, there can be no federally based *"Hurst-induced Caldwell* claims." The fact that a state court has held, as a matter of state law, that a decision of this Court and a later related state supreme court decision are partially retroactive,[3] does not provide a basis for this Court to address tangentially related constitutional claims. This Court has repeatedly recognized that where a state court judgment rests on adequate and independent state law grounds, the Court's jurisdiction fails. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *Florida v. Powell*, 559 U.S. 50, 57 (2010) (stating that if a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision.")

PETITIONER'S DEATH SENTENCE COMPORTS WITH *CALDWELL v. MISSISSIPPI*.

Hall maintains that the jury in his case was instructed that its role was advisory in violation of *Caldwell v. Mississippi,* 472 U.S. 320 (1985) and the Eighth Amendment. Nothing about the process employed by the Florida Supreme Court rejecting Hall's *Hurst* and *Caldwell* claims was inconsistent with the Constitution. This Court has never held that the Eighth Amendment requires jury unanimity

[3] This Court has held that, generally, a state court's retroactivity determinations are matters of state law, not federal constitutional law. *Danforth v. Minnesota,* 552 U.S. 264 (2008).

as to its ultimate sentencing recommendation. Other than broadly requiring states to have standards that prevent arbitrary and capricious imposition of a death sentence and that account for the relevant character and record of the offender, this Court has never imposed a specific procedure that all death penalty states must use to satisfy the Eighth Amendment. *See Gregg v. Georgia,* 428 U.S. 153, 195 (1976) ("We do not intend to suggest that only the above-described procedures would be permissible under *[Furman v. Georgia,* 408 U.S. 238 (1972)) or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman,* for each distinct system must be examined on an individual basis.") Consequently, the decision of the Florida Supreme Court does not present this Court with an important question of unsettled federal law.

This Court's decision in *Caldwell* is straightforward. Nothing in the *Caldwell* decision or its progeny stands for the proposition that the Eighth Amendment is violated when a jury is properly instructed at the time of trial, but the law subsequently changes. In fact, that is the opposite of what *Caldwell* stands for. This Court has made clear that *Caldwell* violations occur only when remarks to the jury improperly describe the role assigned to the jury by local law and does so in a way that undermines the jury's sense of responsibility. *See Romano v. Oklahoma,* 512 U.S. 1, 9 (1994). Therefore, the Florida Supreme Court's decision is not in

conflict with this Court's *Caldwell* decision; rather, it is in conformity with it.

A capital penalty-phase jury should not be ***misled*** regarding the role it plays in the sentencing process; and the jury's responsibility in determining an appropriate sentence should not be diminished. A *Caldwell* error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminished their role in the process. Contrary to Hall's suggestion, the jury's sense of responsibility was not diminished nor was it led to believe the responsibility for determining Hall's sentence lay elsewhere.

Hall concedes his jury was properly instructed regarding its role in the sentencing process according to state law as it existed at the time of his penalty phase. Rather, he insists that there is a *Caldwell* violation because the Florida Supreme Court treats this unconstitutional recommendation as binding. Hall fails to recognize that *Caldwell* focuses on what the jury was told, and the effect any **erroneous** information may have had on its sense of responsibility. *Caldwell* is not concerned with what an appellate court may or may not rely on in reviewing procedural errors to determine if they are harmless. *Caldwell* errors do not arise and cannot exist in an appellate opinion. A yet to be written appellate

opinion can have no effect on the jury's role or sense of responsibility.

The jury recommendation in his case is not unconstitutional under either *Caldwell* or *Hurst*. As such there is no important, unsettled question of federal law for this Court to address. A Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation.[4] Still, Florida juries are hardly led to believe that their role in the proceedings is insignificant- even post-*Ring,* pre-*Hurst* juries. *See Darden v. Wainwright,* 477 U.S. 168, 183 n. 15 (1986) *("Caldwell* is relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision."). Indeed, much of what the jury is told is meant to enhance, and even increase, the jury's sense of responsibility.

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[4] Even today, under Florida's new death penalty statute, the judge remains the final sentencer in Florida. A jury's recommendation of death in Florida is just that—a recommendation. Florida's new death penalty statute refers to the jury's vote as a "recommendation." § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death") (emphasis added). See also In re Standard Jury Instructions in Capital Cases, 214 So. 3d 1236, 1238 n.4 (Fla. 2017) (Lawson, J., concurring) (stating that "the jury's verdict is only a recommendation"). A Florida trial court, while bound by the jury's findings of no aggravation and a recommendation of a life sentence, is not bound by a jury's recommendation of a death sentence. A judge is still free to reject the jury's death recommendation and impose a life sentence.

Florida penalty-phase juries are and were told that the judge will give their recommendation great weight. In fact, though, under Florida law if the sentencing court arbitrarily gives a death recommendation little or even no weight that decision is unreviewable regardless of how unjustified the court's reasoning may be. Under both the old death penalty statute, and the current death penalty statute, unanimous jury recommendations for death are not binding on the sentencing judge. Even so, from the jury's perspective, if they recommend death that will weigh heavily in favor of a death sentence. Therefore, their sense of responsibility is not diminished. It is enhanced.

Because Hall's jury was properly instructed, and nothing was said to diminish the gravity of the task they were undertaking, there is no *Caldwell* error. As such, there is no basis for this Court to exercise its certiorari jurisdiction because the Florida Supreme Court is not in conflict with any decision of this Court and the state court's decision does not present a question of important, unsettled federal law.

As for Hall's assertion that the Florida Supreme Court's harmless-error analysis relied only on the unanimous recommendation, that is simply not supported by the opinion of the court below. Hall criticizes the Florida Supreme Court's "total reliance" on the advisory jury recommendation. Hall ignores the state courts explicit statement that "a unanimous recommendation

is not sufficient" alone to find any penalty-phase error harmless.[5] *Reynolds,* 251 So.3d at 816. In fact, the Florida Supreme Court's harmless-error analysis turns on an individualized review of each case. In reviewing for harmless error, the state court looks to the record as a whole; including the jury instructions, a review of the aggravators and mitigators, and finally the facts of the case. *Id.*

Capital defendants, like Hall, are afforded an individualized sentencing proceeding in which aggravating and mitigating circumstances are presented to the jury. There is no evidence that Hall's jury arbitrarily and capriciously rendered its unanimous recommendation. Hall was already serving a life sentence for two violent rape cases when he ambushed and murdered Corrections Officer Fitzgerald with a prison-made metal shank before hiding her body and removing her uniform bottoms and underwear. In discussing proportionality on direct appeal, the Florida Supreme Court characterized the balance of aggravation and mitigation as follows:

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[5] In comparison, the Florida Supreme Court has found *Hurst* errors to be harmful in all *post-Ring* cases where the jury's recommendation was not unanimous, regardless of the type and nature of the aggravating factors. *See e.g. Johnson v. State,* 205 So. 3d 1285 (Fla. 2016); *Deviney v. State,* 213 So. 3d 794, 799 (Fla. 2017); *Banks v. State,* 219 So. 3d 32 (Fla. 2017); *Abdol v. State,* 220 So. 3d 1106 (Fla. 2017); *Kirkman v. State,* 233 So. 3d 456 (Fla. 2018); *Pagan v. State,* 235 So. 3d 317 (Fla. 2018); *Everett v. State,* 43 Fla. L. Weekly S250 (Fla. May 24, 2018).

> In the instant case, Hall was convicted of the stabbing murder of Fitzgerald. The trial 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—very great weight; (5) cold, calculated, and premeditated—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 gave "little weight" and "some weight" to 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.

Hall v. State, 107 So. 3d at 279-80. There is no *Hurst v. Florida* error, as defined by this Court, in Hall's case. Significantly, even after striking the CCP aggravator, Hall had four valid remaining aggravators, all of which were afforded either "great weight" or "very great weight."[6] Secondly, three of the remaining

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[6] "(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

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. Presuming that the jury did its job as instructed by the trial court, 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.[7] *Hall*, 212 So. 3d at 1035. Hall's argument that a properly instructed jury would have voted for life instead of unanimously returning a death recommendation has no support and no merit. In this case, the aggravation was significant and greatly outweighed the paltry mitigation. Any reasonable jury would have, and did in fact, find unanimously that death was the appropriate sentence.

Hall's case is certainly among the most aggravated and least mitigated, and why a death sentence was, and is, appropriate under these facts. Other than in cases were a defendant is within a class of people for whom the death penalty is not an option - juveniles,

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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.

[7] Contrary to Hall's assertion, there is no need "to ask if the jury's understanding of its role had an effect on its deliberation and non-binding recommendation". (Pet. P. 11).

intellectually disabled, those who commit crimes short of murder - the only limit the Eighth Amendment places on the imposition of the death penalty is that the penalty cannot be imposed in an arbitrary or capricious manner. It is reserved for the most aggravated and least mitigated of crimes. There is nothing in the record to support the proposition that the jury's responsibility in rendering an advisory verdict was assailed or diminished. The jury knew and understood their great responsibility in reviewing the evidence and determining whether to recommend death.

The Florida Supreme Court properly found that the error in Hall's case was harmless beyond a reasonable doubt. This finding neither contravenes this Court's precedent, nor violates federal law. The Florida Supreme Court's decision does not conflict with that of any federal appellate court or state supreme court. The Eleventh Circuit has consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano*. As the Eleventh Circuit has explained, the infirmity identified in *Caldwell* is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary,* 119 F.3d 1471, 1481-82 (11th Cir. 1997) *(quoting Romano,* 512 U.S. at 9); See *also Johnston v. Singletary,* 162 F.3d 630, 642-44 (11th Cir. 1998); *Belcher v. Sec'y, Fla. Dep't of Corr.,* 427 Fed. Appx. 692, 695 (11th Cir. 2011). While these cases were decided before *Hurst v. Florida*

nothing in *Hurst v. Florida* impacts any of the Eleventh Circuit's analysis in these cases. Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate *Caldwell* when it accurately reflects state law. *Lorraine v. Coyle,* 291 F.3d 416, 446 (6th Cir. 2002); *Bowling v. Parker,* 344 F.3d 487, 514-15 (6th Cir. 2003); *Fleenor v. Anderson,* 171 F.3d 1096, 1098-99 (7th Cir. 1999); *Wilson v. Sirmons,* 536 F.3d 1064, 1121(10th Cir. 2008).

This case presents no important, unsettled, or conflicting application of constitutional law. Hall cites to no federal circuit court case or state supreme court case holding to the contrary. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Thus, certiorari review should be denied.

CONCLUSION

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

Respectfully submitted,

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