CAPITAL CASE

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES MICHAEL HALL

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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<u>QUESTIONS PRESENTED FOR REVIEW</u>

<u>CAPITAL CASE</u>

<u>QUESTION ONE</u>

UNDER THE FEDERAL DEATH ACT, “MUST” JURORS RETURN A DEATH SENTENCE IF PROVEN AGGRAVATING FACTORS SUFFICIENTLY OUTWEIGH PROVEN MITIGATING FACTORS, AS MANDATED BY THE EIGHTH CIRCUIT, AND AS INSTRUCTED IN THIS CASE, OR IS THE OPPOSITE TRUE, THAT JURORS ARE NEVER REQUIRED TO RECOMMEND A DEATH SENTENCE REGARDLESS OF FINDINGS WITH RESPECT TO AGGRAVATING AND MITIGATING FACTORS, AS PERSISTENTLY INSTRUCTED BY WELL OVER ONE HUNDRED DISTRICT COURTS OUTSIDE THE EIGHTH CIRCUIT, IN LANGUAGE CITED WITH APPROVAL BY THIS COURT?

<u>QUESTION TWO</u>

IN LIGHT OF THIS COURT’S HOLDING IN ***STRINGER v. BLACK***, COUPLED WITH THE DICTATES OF THE FEDERAL DEATH PENALTY ACT AND THE PENALTY PHASE JURY CHARGE GIVEN IN THIS CASE, DID THE JURY’S REPORT OF “100% CERTAINTY” ABOUT INABILITY TO MAKE A UNANIMOUS DECISION ABOUT PUNISHMENT FOR MR. HALL AMOUNT TO A DETERMINATION THAT THE DEATH PENALTY WAS NOT JUSTIFIED, AND DID THE DISTRICT COURT’S SUPPLEMENTAL INSTRUCTION AFTER THAT JURY REPORT UNLAWFULLY COERCE THE JURY INTO RETURNING A DEATH SENTENCE?

LIST OF PARTIES, PROCEEDINGS AND OFFICIAL REPORTS

Court: The United States District Court for the Western District of Missouri,
Case Caption: ***United States v. Coonce and Hall***
Case Number 10-3029
Parties: United States of America, Wesley Coonce and Charles Michael Hall
Date of entry of judgment: Both Hall and Coonce were sentenced on July 18, 2014
Date of Filing of Notice of Appeal by Hall: July 21, 2014

Court: The United States Court of Appeals, Eighth Circuit
Case Caption: ***United States v. Hall***
Case Number 14-2742
Parties: United States of America, Charles Michael Hall
Date of Opinion: December 19, 2019
Date Motion for Rehearing Denied: March 17, 2020
Reporting: ***United States v. Hall***, 945 F.3d 1035 (8th Cir. 2019) (Appendix 1)

Court: The United States Court of Appeals, Eighth Circuit
Case Caption: ***United States v. Coonce***
Case Number 14-2800
Parties: United States of America, Wesley Coonce
Date of Opinion: July 25, 2019
Date Motion for Rehearing Denied: October 4, 2019
Reporting: ***United States v. Coonce***, 932 F.3d 623 (8th Cir. 2019)

Court: The United States Supreme Court
Case Caption: Wesley Coonce v. United States
Case Number: 19-7862
Parties: United States of America, Wesley Coonce
Case Status: Petition for Writ of Certiorari Pending

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CITATION TO REPORTS OF OPINIONS

The Magistrate's denial of objections to instructions and denial of proffer of alternative instructions is reported at Doc.[1] 495 of the District Court's file. A copy is provided at Appendix 4. The District Court's adoption of the Report and Recommendation is reported at Doc. 695 of the District Court's file, and a copy is appended at Appendix 5.

The District Court's Judgment and Sentence is reported at Doc. 898 of the District Court's file. A copy is provided at Appendix 6.

The Eighth Circuit's opinion is reported at ***United States v. Hall***, 945 F.3d 1035 (8th Cir. 2019). A copy is provided at Appendix 1.

STATEMENT OF JURISDICTION

The opinion of a Panel of the United States Court of Appeals for the Eighth Circuit affirming Mr. Hall's conviction and sentence of death for first degree murder was handed down on December 19, 2019 (Appendix 1). On March 17, 2020, Mr. Hall's requests for rehearing by the Panel and by the Eighth Circuit *en banc* were overruled (Appendix 2). Per Order of this Court dated March 19, 2020, entered in response to the COVID-19 pandemic, 150 days were granted for filing petitions for certiorari to this Court, like that for Mr. Hall (Appendix 3). This Petition for Writ of Certiorari is being filed within that 150-day time limit. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

Amendment V

[1] The term "Doc." refers to a document filed in the District Court, and reported in that Court's CM/ECF docketing system.

Amendment VI

Amendment VIII

United States Code

18 U.S.C. 3591(a)

18 U.S.C. 3593(c), (d) and (e)

STATEMENT OF THE CASE

1. Details regarding the offense, jurisdiction and the first phase of trial

While confined in the mental health ward at the Medical Center for Federal Prisoners in Springfield, Missouri, Mr. Hall and fellow inmate, Wesley Coonce, killed another inmate, Victor Castro-Rodriguez. ***United States v. Hall***, 1038-1039. When the three were alone in Mr. Castro-Rodriguez's cell, Mr. Hall and Mr. Coonce bound Mr. Castro-Rodriguez hands and feet, gagged and blindfolded Mr. Castro-Rodriguez, and laid Mr. Castro-Rodriguez on the floor; then Mr. Hall stood on Mr. Castro-Rodriguez's neck, compressing his larynx, and thereby suffocating him. ***United States v. Hall***, 1039. As parts of the process, Mr. Coonce stomped on and kicked Mr. Castro-Rodriguez. ***United States v. Hall***, 1039. Pathologists estimated that it would have taken three to five minutes for Mr. Castro-Rodriguez to die, but that Mr. Castro-Rodriguez would likely have lost consciousness much sooner (Tr. 1340-1341, 1616-1617). ***United States v. Hall***, 1039.

Within minutes after mental health ward personnel discovered Mr. Castro-Rodriguez's body, both Mr. Hall and Mr. Coonce had confessed to the murder, providing details of the incident, and specifically admitting that they had discussed the crime in the days in advance (Tr. 854-855, 859, 953-954). ***United States v. Hall***, 1039.

A murder charge under 18 U.S.C. 1111 was brought against Mr. Hall before the United States District Court for the Western District of Missouri, and jurisdiction there was proper in that, as alleged by the government and as stipulated by the parties, the mental treatment facility where the crime took place is itself a place within the maritime and territorial jurisdiction of the United States, and is located in Springfield, Missouri, within the Western District of Missouri (Appendix 13; Tr. 944). 18 U.S.C. 7(3).

Both Mr. Hall and Mr. Coonce sought severance for the first phase of trial, but those requests were denied; at the joint trial both were found guilty by the jury. ***United States v. Hall***, 1039.

2. Statutory aggravating factors and challenges raised about them

At the penalty phase of trial, the government advanced and the jury found two statutory aggravating factors against Mr. Hall, that the offense was especially heinous, cruel or depraved and that the offense was committed after substantial planning or premeditation (Appendix 9, p. 30-33; Appendix 12, p. 3-4).

At trial and upon appeal, Mr. Hall challenged that the evidence adduced about the killing did not meet the standard of heinousness, especially the requisite elements regarding torture or serious physical abuse, because the killing, while shocking in the same ways that murders generally are, employed only the amount of violence necessary to cause the death of Mr. Castro-Rodriguez (Appellant's Brief, p. 210-216). ***Maynard v. Cartwright***, 486 U.S. 356, 363-364 (1988). The Eighth Circuit deemed the evidence sufficient, but conceded as "true" that the facts in this case did not come close to the "greater cruelty and more extreme violence" generally seen in other cases in which the heinousness aggravating factor was pled and proven. ***United States v. Hall***, 1041; ***United States v. Montgomery***, 635 F.3d 1074, 1095-1096 (8th Cir. 2011); ***United***

States v. Agofsky, 458 F.3d 369, 374 (5th Cir. 2006); ***United States v. Ebron***, 683 F.3d 105, 150-151 (5th Cir. 2012); ***United States v. Snarr***, 704 F.3d 368, 393-94 (5th Cir. 2013); ***United States v. Taveras***, 488 F.Supp.2d 246, 252-253 (E.D.N.Y. 2007).

3. Non-Statutory Aggravating Factors and challenges raised about them

As well, the government put forth, and the jury found, four non-statutory aggravating factors, that Mr. Hall presents a future danger to commit acts of violence, that Mr. Hall demonstrated a grave indifference to human life, that Mr. Hall demonstrated lack of remorse for the killing, and that the killing was done to retaliate for Mr. Castro-Rodriguez reporting inmate misconduct in the mental health ward (Appendix 9, p. 34-35; Appendix 12, p. 3-5).

Mr. Hall countered that the government's future danger presentation, consisting of detailed accountings of Hall's prior convictions and prison rules violations, while grossly prejudicial *per se*, had no probative value upon the relevant question of whether Mr. Hall constitutes a future danger to commit acts of violence (Appellant's Brief, p. 179-180). Mr. Hall's prior Federal convictions were not for acts of violence, but instead for grandiose threats, to kill a Federal Judge, to bomb the Portland, Maine airport and the vacation home of Former President George H.W. Bush, and to cause a mass poisoning; all were based strictly and solely upon threatening talk in phone calls and letters while Mr. Hall was securely incarcerated, without a single overt act identified as taken in connection with any of the charges (Tr. 1958-2001, 2066-2067). Mr. Hall's state felony convictions were all for burglary and receiving stolen property, with one misdemeanor assault matter (Tr. 2063-64, 2068, 74, 2696-97). And, the ten prison rules violations, which were spread out over ten years of prison service, were each and all insignificant, to wit

- for assaulting another inmate by putting that inmate into a headlock and causing a scratch on that inmate's face, all with the reported intent to choke the inmate to death (Tr. 2231-32),
- for expressing homicidal thoughts in communications to staff (Tr. 2234-35, 2240-41),
- for expression of anger and upset over removal of legal paperwork from his cell (Tr. 2243),
- for fighting back when struck and injured by another inmate (Tr. 2226),
- for attempting to kill himself by hanging himself with an ostomy bag belt and by overdosing with aspirin and Tylenol (Tr. 2227, 2231, 2237-38),
- for possessing a razor and shaving when on suicide watch (Tr. 2339),
- for plying his skills as a tattoo artist (Tr. 2229, 2235-36, 2241-42),
- for smoking a hand-rolled cigarette (Tr. 2236-37), and
- for expression of his desire to enter a guilty plea, but only if he could be assured he would receive the death penalty (Tr. 2244-46).

The Eighth Circuit allowed that the information "was of mixed value", but ultimately decided that "…collectively, the evidence tended to show that Hall wanted to hurt others and might do so if given an opportunity, regardless of where he was or what constraints were placed on him." ***United States v. Hall***, 1044.

Mr. Hall also objected that the government puffed up the number of its claims in aggravation by employing multiple terms, including a newly-concocted "grave indifference to human life", for the purpose of double and triple counting the same basic intent (Appellant's Brief, p. 215-235). The Eighth Circuit conceded the obvious overlap of the various aggravators,

but concluded that the law allows such double and triple counting upon the matter of intent. ***United States v. Hall***, 1040-1041.

In upholding the jury's finding of lack of remorse, the Eighth Circuit rightly noted the statements made by Mr. Hall which supported that finding. ***United States v. Hall***, 1044. However, there was also evidence to the contrary from Olga Castro, the sister of Victor Castro-Rodriguez; Ms. Castro described a letter she received from Mr. Hall in which Hall expressed his sorrow about the emotional pain that his actions had caused to her and her family; Ms. Castro went on to say that the letter had brought to her "a lot of peace" (Tr. 3709-3713).

4. Mitigating Factors and the Jury's Erroneous Consideration upon them

On the other side of things, Mr. Hall brought days of testimony upon the existence of mitigating factors, including

- long-term afflictions with mental illness and with Crohn's disease,
- close, loving relationships with parents and sister,
- talents in sketch art, poetry and music, and
- good conduct in prison during the four-and-a-half years from the time of the crime until the time of trial (Tr. 3062-3065, 3294-3297, 4069-4295, 4311-4405, 4719-4878; Appendix 9, p. 37-38).

The Eighth Circuit acknowledged what the form of verdict submitted by the jury evinced, the unfortunate fact that some jurors refused to find the existence of any mitigating factors, even ones which had been proven beyond doubt, like universal agreement of experts about Mr. Hall's affliction with Crohn's disease and stipulation about Mr. Hall's good conduct while in prison (Appendix 12, p. 6-9). ***United States v. Hall***, 1041-1042. However, the Eighth Circuit expressed belief that the error was harmless. ***United States v. Hall***, 1042.

5. Instruction to the jury that they "must" return a sentence of death if aggravating factors sufficiently outweigh mitigating factors

At the beginning of the penalty phase of trial, and then again prior to closing arguments, the jury was instructed that they "must" return a sentence of death if they unanimously determined that aggravating factors "sufficiently outweigh" mitigating factors "to justify a sentence of death" (Appendix 9, p. 5, 41). Such instructions followed patterns promulgated by the Eighth Circuit in keeping with precedent on the matter. *Eighth Circuit Model Instructions 12.01 and 12.12*; ***United States v. Allen***, 247 F.3d 741, 779-782 (8th Cir. 2001), *vacated on other grounds* 536 U.S. 953 (2002).

At trial, and upon appeal, Mr. Hall objected that such instructions ran afoul of applicable law, that the jury instead should be instructed that they were never required to sentence to death, and that Hall's interpretation of the law, contrary to Eighth Circuit precedent, has been endorsed by the vast majority of Federal Courts outside of the Eighth Circuit, well over one hundred in number (Appellant's Brief, p. 79-99; Reply Brief, p. 9-21; Appendix 8; Appendix 10; Appendix 11). The District Court, and then the Eighth Circuit Panel, decided that the argument was foreclosed by "controlling" Circuit precedent (Appendix 4, Appendix 5). ***United States v. Hall***, 1035, 1048.

6, The Jury's Report of "100% Certainty" about inability to reach a unanimous decision about punishment, the District Court's supplemental instructions, and consequent coercion of a death sentence

After deliberating for about eight total hours over parts of two days on the issue of punishment, the jury announced through their foreperson's note that they had reached a penalty phase verdict for Co-Defendant Coonce, but that there was "100% certainty that we are unable to reach a unanimous decision in regards to Defendant Hall" (Appendix 12, p. 3; Tr. 5342-5358). ***United States v. Hall***, 1047. Over Mr. Hall's objections that the note expressed a jury

determination against the death penalty and should be accepted as such, the District Court responded to the note, instead, with a written instruction that jurors "should continue your deliberations and try to reach unanimous verdicts" (Appendix 12, p. 3; Tr. 5359-60). ***United States v. Hall***, 1047. About an hour later, the jury reported having reached verdicts, and thereafter a death recommendation was announced against Mr. Hall (Tr. 5361; Appendix 11).

In his Brief to the Eighth Circuit, Mr. Hall explained that, under the law and the District Court's instructions, the jury's announcement about "100% certainty" had to be interpreted as a report about the jury's determinations that there was not unanimity that a death sentence was justified, and that there was not unanimity on imposition of a life sentence, with the combined effect of those determinations mandating a life sentence imposed by the Court (Appellant's Brief, p. 101-104). The Eighth Circuit ventured instead that guidance was provided by this Court's holding in ***Lowenfield v. Phelps***, 484 U.S. 231, 238 (1988), and on that basis concluded that the law permitted the jury "moving back and forth" between the "binary choice" of a life sentence or a death sentence, and consequently further concluded that the jury note should not be read to say that "death was off the table". ***United States v. Hall***, 1048. In his Motion for Rehearing, Mr. Hall reminded about his briefing arguments, that the logic in ***Lowenfield***, while dispositive in the context of the Louisiana state non-weighing death penalty scheme, could not be applied to the "weighing" approach in a Federal Death Penalty Act case like this one, particularly in light of the instructions given to the jury by the District Court (Motion for Rehearing, p. 25-34; Reply Brief, p. 23-31). The Eighth Circuit refused rehearing upon the matter. ***United States v. Hall***, 1035.

ARGUMENT

DEATH PENALTY CASE

SUMMARY OF THE REASONS IN SUPPORT OF GRANTING THE WRIT

Petitioner Charles Michael Hall was sentenced to death for the killing of a fellow Federal inmate. Mr. Hall respectfully requests from this Court a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit for two compelling reasons, each involving a grave sentencing phase error.

The first error is the by-product of a twenty-year-long split between the Circuits over polar opposite opinions about the sentencing discretion afforded jurors under the Federal Death Penalty Act (FDPA). Per the terms of the Eighth Circuit's side of the split, the jury in this case was instructed that they "must" return a sentence of death if proven aggravating factors sufficiently outweighed proven mitigating factors. Such instruction is opposite to, and splits against, the instructions given over the last twenty years by well over one hundred other District Courts outside the Eighth Circuit, telling jurors that they are never required to sentence to death. The better of the arguments are on the side of Mr. Hall and the well over one hundred District Courts who have read the terms of the FDPA to give jurors the discretion to "never" return a death sentence. Those arguments are fundamentally supported by the fact that this Court and two other Circuits have had occasions to cite with approval the very sorts of instructions which told FDPA juries that they "never" were required to return a death sentence. This difference is as profoundly important as it is completely intractable. That this split has gone on for twenty years proves positive that the only way that this critical controversy will be settled is for this Court to intervene.

The other error involved the District Court issuing a supplemental instruction to the jury to continue deliberations after the jury had informed the Court about their "100% certainty" that that they could not reach a penalty phase determination regarding Mr. Hall. Under the circumstances which presented at trial, this supplemental instruction violated the terms of this Court's decision in ***Stringer v. Black***, 503 U.S. 222, 231-232 (1992), as well as the dictates of the FDPA, and the District Court's own instructions, and coerced a death sentence from a jury who had already lawfully made a determination that a death sentence was not justified.

Moreover, both errors occurred in the context of a case which was a close one on the issue of punishment.

QUESTION ONE

UNDER THE FEDERAL DEATH ACT, "MUST" JURORS RETURN A DEATH SENTENCE IF PROVEN AGGRAVATING FACTORS SUFFICIENTLY OUTWEIGH PROVEN MITIGATING FACTORS, AS MANDATED BY THE EIGHTH CIRCUIT, AND AS INSTRUCTED IN THIS CASE, OR IS THE OPPOSITE TRUE, THAT JURORS ARE NEVER REQUIRED TO RECOMMEND A DEATH SENTENCE REGARDLESS OF FINDINGS WITH RESPECT TO AGGRAVATING AND MITIGATING FACTORS, AS PERSISTENTLY INSTRUCTED BY WELL OVER ONE HUNDRED DISTRICT COURTS OUTSIDE THE EIGHTH CIRCUIT, IN LANGUAGE CITED WITH APPROVAL BY THIS COURT?

A. Summary of the issue and reasons for Certiorari Review

In this case, tried in the Western District of Missouri in 2014, the jury was twice commanded, in the fashion set forth in Eighth Circuit Model Instructions 12.01 and 12.11, that they "must" return a sentence of death if they unanimously determined that proven aggravating factors "sufficiently outweigh" proven mitigating factors "to justify a sentence of death" (Appendix 9, p. 5, 41). Particularly, just before the penalty phase of trial began, as part of a general explanation of law applicable to that phase of the proceedings, the District Court told the jury as follows:

> If you unanimously find that the aggravating factor or factors, which you all found to exist, sufficiently outweigh any mitigating factor or factors, which any one (1) of you found to exist, to justify imposition of a sentence of death, or if in the absence of a mitigating factor or factors, you find that the aggravating factor or factors alone are sufficient to justify imposition of a sentence of death, and that death is therefore the appropriate sentence in this case for that Defendant for each count for which he is charged, the law provides that that Defendant must be sentenced to death (Appendix 9, p. 5).

Later, after the close of penalty phase evidence, and prior to the arguments of counsel, the District Court, as part of its final charge, reiterated as follows:

> Under Count I as to Defendant Hall, if you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors that any of you found to exist to justify a sentence of death, and that therefore death is an appropriate sentence in this case, you must record your determination that a sentence of death shall be imposed on the appropriate page in Section VI(A) of the Special Verdict Form for Defendant Hall (Appendix 9, p. 41).

Meantime, in cases tried at or near the same time, across this country but outside the Eighth Circuit, jurors were instructed just the opposite, that they were NEVER required by law to return a sentence of death. See ***United States v. Tsarnaev***, D.Mass. Case # 13-10200, PACER Doc. 1418, p. 56 ("…no juror is ever required to impose a sentence of death"); ***United States v. Wilson***, E.D.N.Y. Case # 04-1016, PACER Doc. 304, p. 18 ("…no jury is ever required to impose the death penalty. Indeed, you may decline to impose the death penalty without giving a reason for that decision"); ***United States v. Savage***, E.D.Pa. Case # 07-550, PACER Doc. 1478, p. 7, 49 ("The law never requires imposition of a sentence of death" and "…no juror is ever required by law to impose the death sentence"); ***United States v. Briseno***, N.D.In. Case # 11-077, PACER Doc. 2784-1, p. 3 ("You are never required to impose a death sentence"); ***United States v. Williams***, D.Hawaii Case # 06-79, PACER Doc. 1528, p. 29 ("You are never required to return a verdict of death"); ***United States v. Richardson***, N.D.Ga. Case # 08-139, PACER Doc. 980, p. 39 ("…you are never required to vote for a death sentence"). Especially when a

life is on the line, it is difficult to conceive a more fundamental unfairness than what this dramatic difference in instruction about juror discretion brought to bear, with the degree of discretion given to the jury about life and death depending on nothing more than the venue of the case.

Prior to and during Mr. Hall's trial, undersigned counsel challenged as erroneous the mandatory language of the Eighth Circuit pattern instructions, and offered alternative instructions (Appendix 10, Appendix 11). The District Court overruled Mr. Hall's objections, upheld the pattern instructions, and rejected alternative instructions, all in keeping with a prior panel decision by the Eighth Circuit in ***United States v. Allen***, 247 F.3d 741, 779-782 (8th Cir. 2001), *vacated on other grounds* 536 U.S. 953 (2002) (Doc. 495, 695). In the years after the decision in ***Allen***, other Panels of the Eighth Circuit, including the Panel in this case, have deemed themselves bound by the holding in ***Allen***. ***United States v. Ortiz***, 315 F.3d 873, 900-901 (8th Cir. 2002); ***United States v. Nelson***, 347 F.3d 701, 712 (8th Cir. 2003); ***United States v. Purkey***, 428 F.3d 738, 762-763 (8th Cir. 2005); ***United States v. Montgomery***, 635 F.3d 1074, 1098-1099 (8th Cir. 2011); ***United States v. Hall***, 945 F.3d 1035, 1048 (8th Cir. 2019).

There are compelling reasons why the Eighth Circuit's interpretation of the law applied in this case warrants Certiorari review by this Court. While there has not been a direct, conflicting decision upon the matter by another United States Court of Appeals, there have been conflicting decisions aplenty from well over one hundred District Courts outside the Eighth Circuit, all the way from the time that the ***Allen*** case was decided to the present. Those hundred-plus District Courts have read the very same applicable statutes and have interpreted those statutes opposite to the Eighth Circuit's pronouncement, and have instructed capital case juries that they are never required to sentence to death, period. This conflict was never mentioned,

much less discussed, by the ***Allen*** Panel, or by any of the Eighth Circuit Panels since. Because the ***Allen*** Panel and their successors failed to address this conflict in interpretation of the statute, the Eighth Circuit has consequently failed to consider and apply the rule of lenity, which would dictate that the ***Allen*** Panel's interpretation, more harsh against defendants, be rejected in favor of the more lenient interpretation embraced by more than one hundred District Courts outside the Eighth Circuit.

B. Standard of Review

Arguments regarding submission of a particular instruction are ordinarily reviewed for abuse of District Court discretion; however, if the argument also raises the point that an issue of law has not been properly instructed upon, the appellate court is to review the matter *de novo*, assessing the jury charge as a whole to determine whether the issue of law has been adequately addressed. ***United States v. Park***, 421 U.S. 658, 675-676 (1975); ***United States v. Allen***, 247 F.3d 741, 780 (8th Cir. 2001), *vacated on other grounds* 536 U.S. 953 (2002); ***United States v. Long Crow***, 37 F.3d 1319, 1323 (8th Cir. 1994); ***United States v. de Francisco-Lopez***, 939 F.2d 1405, 1409 (10th Cir. 1991).

C. The applicable statutes

Two provisions of the Federal Death Penalty Act (FDPA) address the process for a jury's ultimate decision regarding the death penalty. The first is

> A defendant...shall be sentenced to death if, after consideration of the factors set forth in section 3592 in the course of a hearing held pursuant to section 3593, it is determined that imposition of a sentence of death is justified, except that no person may be sentenced to death who was less than 18 years of age at the time of the offense. 18 U.S.C.A. 3591(a)(2)

The second is

> ...the jury...shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a

> sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote...shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence. 18 U.S.C.A. 3593(e)

D. The Eighth Circuit's interpretation, that FDPA jurors "must" return a death sentence if aggravating factors sufficiently outweigh mitigating factors

In ***United States v. Allen***, 780, the District Court instructed the jury, in mandatory fashion, that they "shall" return a death sentence if they unanimously found that aggravating factors sufficiently outweighed mitigating factors to justify a sentence of death. ***United States v. Allen***, supra. The District Court rejected an alternative instruction, proffered by the defense, "…which would have informed the jury that they never are required to impose a sentence of death." ***United States v. Allen***, supra.

The ***Allen*** panel allowed that the language of 18 U.S.C. 3593(e) could be seen to create a two-stage process whereby, at the first stage, a jury might determine that aggravating factors sufficiently outweigh mitigating factors so as to justify a sentence of death, but at the second stage that jury would still be free to determine that a death sentence would not be imposed. ***United States v. Allen***, 780-781. However, as the ***Allen*** Panel saw things, such a two-stage process was not consistent with what it believed to be a command, in 18 U.S.C. 3591(a), "…that a defendant *shall* (emphasis in context) be sentenced to death if the fact finder determines that a sentence of death is justified after weighing the aggravating and mitigating circumstances." ***United States v. Allen***, 781. In other words, the ***Allen*** Panel believed that whatever jury discretion the jury possessed regarding whether "imposition of a sentence of death is justified", such discretion could only be exercised within the limited context of the weighing of aggravating and mitigating factors. ***United States v. Allen***, 781-782. Consequently, the ***Allen*** Panel found

that the District Court "committed no error" in instructing the jury as it did, and in rejecting the "never" language proffered by the defense. ***United States v. Allen***, 780-782.

The ***Allen*** Panel went one step further, claiming that support for their position could be gleaned from the failure by Congress to include in the FDPA specific language that the jury was never required to sentence to death. ***United States v. Allen***, 781.

As noted above, in the years since 2001, other panels of the Eighth Circuit followed the ***Allen*** Panel's lead. ***United States v. Ortiz***, 315 F.3d 873, 900-901 (8th Cir. 2002); ***United States v. Nelson***, 347 F.3d 701, 712 (8th Cir. 2003); ***United States v. Purkey***, 428 F.3d 738, 762-763 (8th Cir. 2005); ***United States v. Montgomery***, 635 F.3d 1074, 1098-1099 (8th Cir. 2011).

E. The argument to the contrary, as detailed in United States v. Haynes, that jurors in an FDPA case are "never" required to sentence to death

In ***United States v. Haynes***, 265 F.Supp.2d 914 (W.D.Tn. 2003), then District Judge Bernice Donald became the spokesperson for an overwhelming majority of District Courts outside the Eighth Circuit who saw things very differently. It should be noted that Judge Donald is now a Circuit Judge on the United States Court of Appeals for the Sixth Circuit.

Judge Donald decided that, under the terms of the FDPA, jurors would retain discretion to reject a sentence of death even if they found that aggravating factors outweighed mitigating factors; consequently, Judge Donald deemed that it would be appropriate to articulate that discretion by informing jurors that they are never required to impose the death penalty. ***United States v. Haynes***, 915. Judge Donald noted the contrary ***Allen*** holding, and made clear that she "respectfully disagrees" with the ***Allen*** Panel. ***United States v. Haynes***, 923.

As would be expected, Judge Donald's analysis started at the same place as did that of the ***Allen*** Panel, that is with the applicable statutes, 18 U.S.C. 3591(a)(2) and 3593(e). ***United States v. Haynes***, 915-916. Like the ***Allen*** Panel, Judge Donald saw as the "plain meaning" of

Section 3593(e) that "…the jury must not only weigh the aggravating versus mitigation factors but also determine whether the result, no matter how imbalanced the scale might be, is sufficient to justify a sentence of death." ***United States v. Haynes***, 916; ***United States v Allen***, 780-781. Unlike the ***Allen*** Panel, who initially saw a two step-process described by 3593(e), but eschewed that in light of their interpretation of 18 U.S.C. 3591(a), Judge Donald read 3591(a) and found its "plain meaning" to require two steps for the penalty determination; the first step involved consideration of aggravating and mitigating factors; the second step, which in the very words of the section was to come "after consideration" of the aggravating and mitigating factors, is a determination whether a death sentence was "justified". ***United States v. Haynes***, 916. Thus, when Judge Donald put the two provisions together, she found it "evident" that the intent of Congress in passing the FDPA was to permit jury discretion "…even after deciding whether any mitigating factors exist and after balancing these mitigating factors against the aggravating factors." ***United States v. Haynes***, 916. Judge Donald even provided dictionary definitions for the words of the statute in order to support her interpretations. ***United States v. Haynes***, 916-917.

Judge Donald continued, engaging in a thorough accounting of the legislative history of the FDPA in order to address the notion, as raised by the ***Allen*** Panel, that some significance should be found in the failure by Congress to include in the FDPA a specific provision commanding that jurors be instructed that they were never required to sentence to death. ***United States v. Haynes***, 918-920. Judge Donald highlighted the Congressional Record portions showing that, at the time of debate in Congress over the FDPA, there were two competing versions vying for passage; one, proposed by Senators Hatch and Dole, was a mandatory act, requiring imposition of a death sentence if aggravating factors were found to outweigh

mitigating factors; another, proposed by Senator Biden, though also calling for a weighing process, worded the process in a distinctly non-mandatory fashion, and counter-sunk the non-mandatory point with an explicit provision that a jury is never required to impose a death sentence, coupled with a requirement that the jury be instructed to that effect. ***United States v. Haynes***, 918. Judge Donald further noted in the Congressional Record that the Dole/Hatch version requiring death if aggravators outweighed mitigators was rejected, both when it was brought up in the Senate, and also in conference. ***United States v. Haynes***, 919. It was the Biden version which passed, though amended by removal of the explicit provision regarding juror discretion and instruction upon that discretion; no explanation is present in the record about the purpose behind the amendment which removed that provision. ***United States v. Haynes***, 919.

From this history, Judge Donald reached the obvious conclusion that "…both branches of Congress expressly considered and ultimately rejected, statutory language which mandates imposition of the death penalty once the jury found that aggravating factors outweigh any mitigating factors." ***United States v. Haynes***, 919. Judge Donald further noted that, even after the removal of the Biden version's explicit provisions regarding juror discretion and instruction, the remaining portions of the Biden version which passed still contained drastically different language from the mandatory version which failed. ***United States v. Haynes***, 919. Judge Donald allowed that, because there was no explanation for removal of the explicit juror discretion and instruction language, it could be argued that Congress intended that jurors not be so instructed; however, Judge Donald also observed that it was just as possible that the language was removed because it was deemed redundant and also an encroachment on the powers of Federal District Courts to properly instruct juries. ***United States v. Haynes***, 919. Based upon her review of the Congressional Record, Judge Donald reached the modest conclusion that, in

light of her interpretation of the law as passed, there was nothing in that legislative history precluding instruction that a Federal capital case jury is never required to impose a death sentence. ***United States v. Haynes***, 920.

To top things off, Judge Donald noted that, in ***Jones v. United States***, 527 U.S. 373, 385 (1999), this Court, in an opinion by Justice Thomas, had already weighed in, in the affirmative, regarding the propriety, in an FDPA case, to instruct the jury that they are never required to sentence to death. In the process of addressing another issue, there came citation with approval for the "never" language, to wit:

> Based upon this consideration, you the jury, by unanimous vote, shall recommend whether the defendant should be sentenced to death, sentenced to life imprisonment without the possibility of release, or sentenced to some other lesser sentence. If you unanimously conclude that the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of any mitigating factors, that the aggravating factors are themselves sufficient to justify a sentence of death, you may recommend a sentence of death. Keep in mind, however, that regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence. ***Jones v. United States***, supra.

Accordingly, Judge Donald adopted the same instructions cited with approval by Justice Thomas' opinion in ***Jones***. ***United States v. Haynes***, 921.

It is worth noting that, in the ***Allen*** Panel Opinion, though the ***Jones*** decision is mentioned in a host of other respects, the citation with approval to the "never" language from the capital case instructions in ***Jones*** was overlooked, and therefore not addressed. ***United States v. Allen***, 762, 778, 787, 789, 798.

It is worth further noting that, in 2006, five years after the decision by the Eighth Circuit in ***Allen***, the Eleventh Circuit cited verbatim, and therefore with tacit approval, the giving of the very same sorts of instructions telling an FDPA jury that they were "never required to return a death sentence". ***United States v. Brown***, 441 F.3d 1330, 1355-1356 (11th Cir. 2006). And, just

two weeks ago, the First Circuit acknowledged, and took no issue against, instruction to an FDPA jury that "no juror is ever required to impose a sentence of death." ***United States v. Tsarnaev***, 2020 WL 4381578, *48 (9th Cir 2020).

F. A study was undertaken by undersigned counsel to determine how FDPA juries have been instructed across the country and over the years

In preparing briefings and arguments for this case, undersigned counsel completed a never-before-done, nationwide study for the one hundred ninety-seven FDPA defendants whose capital cases, up until that time, had been tried through penalty phase. Starting with the basic case-style information available from the Federal Capital Punishment Resource Project of the Administrative Office of the United States Courts, undersigned counsel set about the monumental task of scouring for copies of the penalty phase instructions used in all of the FDPA cases tried over the years, nationwide. Using PACER, court records, government archives, etc., copies of instructions were found for all but a handful of the cases. Undersigned counsel then reviewed each set of instructions to determine how this issue was addressed in each case. Ultimately, a listing was prepared, with an accounting for each case consisting of the case citation to the case style, the District, the case number, and the source from which instruction materials for the case were obtained. Then cases were grouped according to the manner in which juries were instructed, and whether the cases were tried before 2010 or in 2010 and thereafter. In addition, Eighth Circuit cases were singled out in bold type. That compendium was provided to the Eighth Circuit, and is set forth in Appendix 8.

G. The study showed that the interpretation of the applicable statutes, rejected by the Eighth Circuit, has been adopted by the overwhelming majority of the Federal Courts throughout the rest of the United States, creating a Circuit split

As would be expected, for 25 defendants whose cases were tried in Eighth Circuit District Courts while the ***Allen*** decision was in force, ***Allen***-type mandatory instruction language was used (Appendix 8, p. 6-7, 11-12).[2] On the other hand, for the defendants whose cases were tried outside the Eighth Circuit, things were very, very different. The numbers show

- In 117[3] cases, ***Allen***-type mandatory language was NOT used, and jurors were instructed, instead, that they are never required to sentence to death (Appendix 8, p. 1-5, 8-10),
- In 14 cases, ***Allen***-type mandatory language was used (Supplemental Appendix 8, p. 6-7, 11-12),
- In 10 cases, ***Allen***-type mandatory language was used, AND jurors were also instructed that they are never required to sentence to death (Appendix 8, p. 6, 10-11),
- In 10 cases, ***Allen***-type mandatory language was NOT used, and "never" language was also NOT used (Appendix 8, p. 6, 10), and
- In 10 cases, Tenth Circuit Pattern Instructions were used (Appendix 8, p. 8, 12).

Thus, nearly all of the District Courts outside of the Eighth Circuit have rejected the mandatory instruction language advanced in ***Allen***. Moreover, in more recent cases, the trend has been against the ***Allen*** way of doing things. Since the beginning of 2010, only seven Courts have used the "must" language in their instructions; three of those were District Courts in the 8th Circuit; of

[2] To clarify, there have been a total of 29 defendants tried in Eighth Circuit Courts under the FDPA. Three defendants, Street in Missouri, and co-defendants Honken and Johnson in Iowa, were tried while the ***Allen*** decision was under reconsideration, and in those cases, the District Courts instructed their juries that they never were required to sentence to death (Appendix 8, p. 4, 8). In Honken's case, there was an additional reason for the "never" instruction used, the fact that some capital charges were brought against Honken under the FDPA and some were brought under 21 U.S.C. 848 (since repealed). One other defendant, Paul, was tried before ***Allen*** was decided (Appendix 8, p. 11).

[3] For the five cases for which documentation has not been found, there is anecdotal information that jurors were instructed that they were never required to sentence to death. Therefore, this total more than likely will turn out to be 123.

the remaining four courts, only one instructed in the ***Allen*** fashion (Appendix 8, p. 7-8, 12), while the other three compromised, using the ***Allen*** "must" language, but also informing their juries that they never were required to sentence to death (Appendix 8, p. 11). During the same time frame, twenty-four other District Courts followed the well-established trend, and instructed their juries that they never were required to sentence to death (Appendix 8, p. 4-5, 10).

It is certainly true that, in those Circuits where District Courts instruct juries that they never have to give death, there have not been Circuit rulings directly considering and approving such instructions, and so there has never developed a classic circuit split with the Eighth Circuit on the issue. However, that circumstance owes to the government choosing not to challenge, upon interlocutory appeal, even one of those well-over one hundred rulings approving such "never" instructions. As a consequence, persistent approvals of the "never" instructions by the District Courts constitute the precedent in those Circuits, and have created, in those ways, a Circuit split.

H. The Fourth Circuit's support for Allen, such as it is, still does not include support for the Eighth Circuit instruction regime

The Fourth Circuit has provided partial concurrence with the ***Allen*** Panel, at least insofar as rejecting defense requests for instruction to juries that they never have to return a sentence of death. ***United States v. Caro***, 597 F.3d 608, 631-633 (4th Cir. 2010). That having been said, in light of the statistics aforementioned, it is clear that even this support from the Fourth Circuit for the ***Allen*** way of doing things has not dissuaded the overwhelming number of District Courts outside the Fourth and Eighth Circuits, who continue to instruct juries that they never have to give death.

Furthermore, the Fourth Circuit has not supported the Eighth Circuit pattern instruction use of "must" language. Instead, Fourth Circuit FDPA case penalty phase instructions have

employed neutral language, certainly not including the "never" language proposed by defendants, but also not including the Eighth Circuit "must" language. ***United States v. Umana***, W.D.N.C. Case # 3:08-Cr-134, Doc. 1261, p. 117; ***United States v. Roof***, D.S.C. Case # 15-472, Doc. 948, p. 88-89.

I. Considering all pertinent factors, including the rule of lenity, the instructions used in Hall's case were erroneous

To remind about what was detailed above, Judge Donald in the ***Haynes*** case set forth the compelling arguments why the FDPA is not the sort of mandatory statute envisioned by the ***Allen*** Panel, and described in Eighth Circuit Pattern Instructions. And, Judge Donald is joined in that opinion by the vast majority of District Judges nationwide, and outside the Eighth Circuit.

But even if all that could be said is that there are two reasonable interpretations of the statute, the one offered by the ***Allen*** Panel and the other offered by the well over one hundred other Federal Courts, including Judge Donald, that conflict would trigger a principle of law which would favor Judge Donald's reasoning. That is the Rule of Lenity.

As this Court has well-taught, when there are two possible, reasonable interpretations of a criminal statute, there arises an ambiguity in the meaning of the statute. ***United States v. Bass***, 404 U.S. 336, 347-348 (1971). When ambiguity is found, that ambiguity is to be resolved "in favor of the defendant" and ultimately "in favor of lenity." ***United States v. Bass***, supra; ***United States v. Santos***, 553 U.S. 507, 513-514 (2008); ***United States v. R.L.C.***, 915 F.2d 320, 325 (8th Cir. 1990). In this case, the Rule of Lenity requires the rejection of the more harsh interpretation espoused by the ***Allen*** Panel, and consequently the rejection of the instructions given in Mr. Hall's case. The Rule of Lenity would dictate embracing of the more defendant-favoring alternative, instruction to the jury that that they are never required to return a sentence

of death, in the form embraced by well over one hundred District Courts, and as proffered by Mr. Hall prior to trial (Appendix 10, Appendix 11).

J. Prejudice from this mis-instruction should be inferred but also is proven

In light of the foregoing, it is clear that this is an important question of Federal law upon which there is a conflict, that the Eighth Circuit is on the wrong side of that conflict, and that, as a consequence, the instructions given in this case erroneously failed to inform jurors how to determine whether a death sentence should be returned; consequently, Mr. Hall is entitled to reversal and remand without proving anything more per the reasoning by this Court in ***Sullivan v. Louisiana***, 508 U.S. 275, 282 (1993).

In ***Sullivan***, this Court decided that a failure to properly instruct the jury about a tenet of the law critical to their decision-making (the meaning of proof beyond a reasonable doubt) denied the defendant his Sixth Amendment right to trial by jury in such a fundamental way that the consequences would be "necessarily unquantifiable and indeterminate" thus making the error structural, not amenable to harmless error analysis. ***Sullivan v. Louisiana***, supra. This Court also found another reason why that such mis-instruction upon standards for jury determinations cannot be subjected to harmless error analysis; that is that when a jury is so mis-instructed, it fails to actually reach a proper verdict which can then be the subject of a harmless error analysis. ***Sullivan v. Louisiana***, 279-281.

The mis-instruction in this case is the very sort found by this Court in ***Sullivan*** to be structural. The difference between the unlawful command that jurors "must" return a death sentence, versus the proper directive that jurors were "never" required to return a death sentence, is stark. There is no way to say what jurors would have done had they been given the statutorily

requisite level of sentencing discretion. Thus, the error here is structural, and there needs be no further inquiry.

Even if this Court found that errors such as the ones here should be subjected to harmless error analysis, it must be remembered that upon such a proposition, the burden is on the government to prove the error harmless beyond a reasonable doubt. 18 U.S.C. 3595(c)(2); ***Jones v. United States***, 397-398. And, when a case is deemed to be a close one, it is nigh on impossible to prove that error is harmless beyond a reasonable doubt. ***United States v. Street***, 548 F.3d 618, 633-634 (8th Cir. 2008); ***United States v. Rodriguez-Marrero***, 390 F.3d 1, 17 (1st Cir. 2004). The conclusion that a case is close is inescapable when a trial court finds it necessary to supplementally instruct to break a jury deliberation impasse. ***United States v. Woodard***, 699 F.3d 1188, 1199 (10th Cir. 2012); ***Smith v. United States***, 980 F. Supp. 2d 854, 869 (N.D. Ohio 2013).

There can be no doubt that this was a close case, since the jury reported "100% certainty" of an inability to reach a unanimous verdict about punishment, and the District Court supplementally instructed in an effort to bring about a unanimous verdict (Appendix 13, p. 3). Thus, there is no way to say that the erroneous instructions here were harmless beyond a reasonable doubt.

Moreover, a finding of harmlessness cannot be made when the error misdirects the jury into a finding which it may well not have made had the error not been present. ***United States v. Huntley***, 523 F.3d 874, 875 (8th Cir. 2008). That this sort of misdirection occurred in this case is confirmed by what actually happened during deliberations. Even under the mis-instructions given by the District Court, the jury's foreperson advised the District Court of "100% certainty that we are unable to reach a unanimous decision in regards to Defendant Hall" (Appendix 8, p.

3). It was later learned that, at that point, the foreperson had filled out part of the verdict form, reporting that the jury had not reached a unanimous vote in favor of a death sentence for Mr. Hall; that entry was later changed, after the Court refused to accept this result from the jury, and gave instructions commanding further deliberations (Appendix 12, p. 10). Since the jury got this far toward rejecting the death penalty even with the erroneous "must" instruction, there is a reasonable probability that, had the jury been properly instructed that they never had to return a death sentence, the jury would not have returned a sentence of death.

Finally, as explained in the factual recitation above at pages 3-6, the evidence in aggravation was far from overwhelming.

K. Conclusion

For these compelling reasons, Mr. Hall urges that this Court issue its Writ of Certiorari, order further briefing and argument, review and reverse the previous holdings along these lines, reverse Mr. Hall's death sentence, and remand this case for a new penalty phase proceeding in which proper instruction to the jury, along the lines proposed by Mr. Hall, is given.

Question Two

IN LIGHT OF THIS COURT'S HOLDING IN ***STRINGER v. BLACK***, COUPLED WITH THE DICTATES OF THE FEDERAL DEATH PENALTY ACT AND THE PENALTY PHASE JURY CHARGE GIVEN IN THIS CASE, DID THE JURY'S REPORT OF "100% CERTAINTY" ABOUT INABILITY TO MAKE A UNANIMOUS DECISION ABOUT PUNISHMENT FOR MR. HALL AMOUNT TO A DETERMINATION THAT THE DEATH PENALTY WAS NOT JUSTIFIED, AND DID THE DISTRICT COURT'S SUPPLEMENTAL INSTRUCTION AFTER THAT JURY REPORT UNLAWFULLY COERCE THE JURY INTO RETURNING A DEATH SENTENCE?

A. Summary of Hall's challenge against the District Court's failure to accept the jury's determination against the death penalty

In his Appellant's Brief, Mr. Hall challenged that the District Court, in violation of the FDPA and the Sixth and Eighth Amendments, squeezed a death sentence out of the jury who

heard the case (Appellant's Brief, p. 17-18, 99-117). The circumstance which presented was that the jury, after deliberating for about eight total hours on the issue of punishment, announced through their foreperson's note that, though they had reached a penalty phase verdict for Co-Defendant Coonce, there was "100% certainty that we are unable to reach a unanimous decision in regards to Defendant Hall" (Appellant's Brief, p. 100; Brief Appendix 11, p 10). Over Hall's objections that the note expressed a jury determination and should be accepted as such, the District Court instead responded to the note with a written instruction that jurors "should continue your deliberations and try to reach unanimous verdicts" (Appellant's Brief, p. 100; Tr. 5359-60; Brief Appendix 11, p. 10). About an hour later, the jury reported having reached a verdict, and thereafter a death recommendation was announced against Mr. Hall (Appellant's Brief, p. 100; Tr. 5361; Appendix 11, p. 3).

In his Appellant's Brief to the Eighth Circuit, Mr. Hall reminded that the jury was unequivocally instructed that they "must" return a sentence of death if they unanimously found that proven aggravating factors sufficiently outweighed proven mitigating factors so as to justify a sentence of death (Appellant's Brief, p. 102-103; Appendix 9, p. 5, 41). Mr. Hall then urged that, in this context, while the jury note was obviously not a unanimous choice of a particular sentence as sought in the form of verdict, it was a clear report about two jury determinations; the first determination, precisely proper under the District Court's penalty phase charge, was that there was not unanimity that a death sentence was justified, and that therefore a death sentence could not be imposed under the law; the second determination, also proper under the District Court's penalty phase charge, was that there was not unanimity on imposition of a life sentence; since the form of verdict did not provide a space for reporting this state of affairs, the jury followed other instructions of the District Court, and reported these results via the note from their

foreperson (Appellant's Brief, p. 101-104; Appendix 13, p. 3). Mr. Hall went on that this reading of the jury's note was confirmed by the fact that the jury originally recorded their anti-death-penalty determination on their form of verdict, only to scratch that out, and enter a unanimous death sentence under the cudgel of the objected-to supplemental instruction (Appellant's Brief, p. 100, 104-106; Appendix 12, p. 10). Mr. Hall continued that, though a Louisiana state court's use of a penalty phase deadlock instruction was approved by this Court in ***Lowenfield v. Phelps***, 484 U.S. 231, 238 (1988), the facts of that case were so completely different that there was absolutely no support to be found therein for the supplemental instruction by the District Court in Mr. Hall's case (Appellant's Brief, p. 105-106). Mr. Hall then identified the factors which should be considered in determining whether a penalty phase supplemental instruction was coercive, and explained how the facts in this case, each and all, confirmed the occurrence of coercion through means of the supplemental instruction (Appellant's Brief, p. 106-117). Mr. Hall concluded that, since the District Court surely pushed the jury out of the original anti-death-penalty determination, and into a death sentence, Mr. Hall is entitled to reversal of that death sentence (Appellant's Brief, p. 117).

B. Summary of the Eighth Circuit Panel Opinion

Critical to the Eighth Circuit Panel's approach to the matter was the notion that the law allowed the jury, in their penalty phase deliberations, to "move back and forth" between the "binary" alternatives of death and life. ***United States v. Hall***, 1048. This view of the law led the Panel to the conclusion that the jury note should be seen only as a report that the jury was "not unanimous", and "not that death was off the table". ***United States v. Hall***, 1048. The Panel acknowledged the fact which would seem inconsistent with their conclusions, that in the form of verdict, the word "no" was originally marked "in the space for recommending a death sentence";

however, the Panel brushed this off, contending that there was "no way of knowing when it happened or why". ***United States v. Hall***, 1048, fn. 6. Then, relying upon this Court's approval for use of an anti-deadlock instruction in ***Lowenfield v. Phelps***, supra, the Panel concluded that the District Court's response to the jury's note, which was simply directing further deliberations, "…did not coerce them into picking one alternative over the other." ***United States v. Hall***, 1047. The Panel conceded there were earmarks of coercion, particularly that the jury had already deliberated half of one day and a goodly part of another day, and that the jury returned a death sentence only "about an hour" after the District Court directed further deliberations; however, the Panel felt these circumstances, though consistent with coercion, were tempered by an additional jury note asking for exhibits, and ventured that this request for exhibits showed that the jury as a whole did not feel pressured to impose a death sentence. ***United States v. Hall***, 1047-1048.

C. The Panel's view of the law is contrary to holdings by this Court about the operation of the weighing process for determination of a capital case sentence

1. Unquestionably, the FDPA sets forth a "weighing" process for determination of a Federal capital case sentence, and Hall's jury was instructed upon that process

This Court has held what the statutory language clearly shows, that the FDPA employs a "weighing" scheme for determination of a capital case sentence. ***Jones v. United States***, 527 U.S. 373, 398 (1999); 18 U.S.C. 3593(e). As noted under Question One of this Petition, all Circuits instruct jurors about their duties to weigh aggravating factors versus mitigating factors; where there is divergence is over whether a jury should be instructed as well that they retain the power to reject a death sentence regardless of the outcome of the weighing process, with well over one hundred District Courts saying they do (Appendix 8), but the Eighth Circuit saying they do not. ***United States v. Allen***, 247 F.3d 741, 779-782 (8th Cir. 2001), *vacated on other grounds* 536 U.S. 953 (2002); ***United States v. Haynes***, 265 F.Supp.2d 914, 915-923 (W.D.Tn. 2003).

In keeping with the Eighth Circuit's interpretation of 18 U.S.C. 3591(a) and 3593(e), the jury in this case was instructed that

> Under Count I as to Defendant Hall, if you unanimously conclude that the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors that any of you found to exist to justify a sentence of death, and that therefore death is an appropriate sentence in this case, you must record your determination that a sentence of death shall be imposed on the appropriate page in Section VI(A) of the Special Verdict Form for Defendant Hall. (Appendix 9, p. 41)

The very next paragraph of that Instruction endeavored to explain, in part, what should be done if such unanimity to impose a death sentence could not be reached.

> If you determine that death is not justified for Defendant Hall, you must complete Section VI(A) on the appropriate page of the Special Verdict Form for Defendant Hall, and you must then record your determination that Defendant Hall be sentenced to life imprisonment without the possibility of release on the appropriate page in Section VI(B) of the Special Verdict Form for Defendant Hall. (Appendix 9, p. 41)

In the very next Instruction, per the dictates of 18 U.S.C. 3594 and ***Jones v. United States***, 380-381, it was further explained to the jury that

> (u)nder Counts I and II as to Defendant Coonce, and under Count I as to Defendant Hall, if you cannot unanimously agree whether the Defendants should be sentenced to death or life imprisonment without the possibility of release, the court will sentence the Defendants to life imprisonment without the possibility of release. There is no parole in the federal system. (Appendix 9, p. 42)[4]

2. This Court has determined and explained the stark differences between weighing and non-weighing capital sentencing processes

Almost thirty years ago, this Court granted certiorari to judge the moment of submission to a Mississippi capital case jury of what was agreed by the parties to be an invalid aggravating factor. ***Stringer v. Black***, 503 U.S. 222, 231-232 (1992). To lay the groundwork for answering that narrow question, this Court much more broadly observed and meticulously explained that

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[4] This Court has left it to the discretion of the lower Federal Courts whether an instruction like this is given. ***Jones v. United States***, supra. The Eighth Circuit has chosen to so instruct. *Eighth Circuit Pattern Instruction 12.12*, note on use 1.

capital punishment processes throughout the country are of two types, weighing and non-weighing; the "weighing" type calls upon jurors to do as the title implies, weigh proven aggravating factors against proven mitigating factors to determine whether a death sentence should be imposed; the "non-weighing" type does not call for jurors to weigh the factors against each other or against some particular standard, but requires only that the jury consider proven factors of both types in deciding upon punishment, and in that context allows for the jury to move back and forth between life and death as they see fit. ***Stringer v. Black***, 229-230. This Court added that the difference between the two types is not merely one of "semantics", but rather of "critical importance". ***Stringer v. Black***, 231-232.

This Court then drew upon this distinction to decide the narrow question presented, that whereas under a non-weighing process, the impact of an invalid aggravating factor was doubtful, inclusion of such an invalid factor in a weighing process, like that in Mississippi, could well influence the choice of punishment, and thus relief was warranted. ***Stringer v. Black***, 233-236. This Court also directly addressed citation by the State of Mississippi to the prior decision in ***Lowenfield v. Phelps***, supra, calling that reliance "misplaced", and observing that, since that case involved the very different non-weighing scheme in place in the State of Louisiana, the notions expressed in that case could provide no useful guidance to explain and decide about processes in a weighing scheme. ***Stringer v. Black***, 233-234.

In the decades since, this Court and the lower Federal Courts have followed and reinforced these explanations about the distinctions between weighing and non-weighing sentencing schemes. ***Brown v. Sanders***, 546 U.S. 212, 216-220 (2006); ***Rousan v. Roper***, 436 F.3d 951, (8th Cir. 2006); ***Rhines v. Young***, 899 F.3d 482, 498-499 (8th Cir. 2018).

3. The Eighth Circuit's foundational premise was faulty, applicable in a non-weighing penalty selection process, but inapplicable in the FDPA weighing scheme

Essential to the Panel Opinion is the premise that the law and instructions supposedly allowed the jury to "move back and forth" between the "binary" life and death alternatives for punishment. ***United States v. Hall***, 1048. This is a spot-on description about the workings of a non-weighing sentencing scheme, which in turn operates the very same way as the "binary" guilt/not guilt determination process in any criminal case jury trial. ***Stringer v. Black***, supra; ***Lowenfield v. Phelps***, supra.

However, the complex, step-by-step weighing system set up under the FDPA is completely different. 18 U.S.C. 3593; ***Stringer v. Black***, supra; ***Jones v. United States***, supra. What is more, if one harkens back to Question One of this Petition, and the arguments of the two sides detailed there, the very sort of "back and forth" discretion about punishment contemplated by the Panel's premise under this Question Two was actually rejected by the Eighth Circuit in ***United States v. Allen***, at 781-782. Plus, the Instructions actually given to the jury in this case, which will be described in detail below, did not offer them the freedom to "move back and forth" between life and death, instead commanding that they "must" return a death sentence if they unanimously determined that aggravating factors sufficiently outweighed mitigating factors to justify that sentence (Appendix 9, p. 41). Of course, jurors are presumed to follow their instructions. ***Kansas v. Marsh***, 548 U.S. 163, 179-180 (2006).

4. The Panel's faulty premise also led them to misread the jury's note

Had the Panel been considering a non-weighing capital punishment scheme, they might have been able to read the jury note in this case and rightly find that death was not off the table. However, under the teachings of ***Stringer v. Black***, and the instructions in this case, there is no room for such allowance.

First, the jury was tasked to determine whether they could unanimously find that the proven aggravating factors sufficiently outweighed proven mitigating factors so as to justify a sentence of death (Appendix 9, p. 41).

Second, the jury was further commanded that if they could so unanimously find, they "must" record a death sentence determination in Section VI(A) of the Verdict Form (Appendix 9, p. 41). If the jury made such a unanimous finding for death and therefore against life, the form of verdict provided space for the foreperson to make the requisite reports, by marking "yes" in Section VI(A), and by marking "no" in Section VI(B) (Appendix 9, p. 41; Appendix 12, p. 9-10).

Third, the jury was told that, if and only if they could not unanimously find that a death sentence was justified, they could then and only then consider whether a unanimous choice of a life sentence could be made (Appendix 9, p. 41). If the jury made such a determination against death, and then unanimously decided in favor of a life sentence, the form of verdict also allowed reporting of that result, and the foreperson would mark "no" in Section VI(A), and mark "yes" in Section VI(B) (Appendix 9, p. 41; Appendix 12, p. 9-10).

Fourth, the jury was instructed that, if they did not unanimously determine that death was justified, and also could not unanimously agree upon a life sentence, "the Court will sentence the Defendant to life imprisonment without the possibility of release" (Appendix 9, p. 42).

In some jurisdictions, for instance the Northern District of Georgia, a third sentencing choice, besides unanimous death or unanimous life, has been provided in the form of verdict.

> We, the jury, having considered and evaluated the evidence presented in light of the instructions of the Court, are not unanimously persuaded on the appropriate sentence. ***United States v. Richardson***, NDGA Case # 1:08-CR-00139, Doc. 948, p. 17.

Since that is exactly what the Hall case jury note reported, there can be no doubt that, had the Northern District of Georgia third option also been afforded to Hall's jury, that third option

would have been completed and returned. However, the Eighth Circuit Model form of verdict used in Mr. Hall's case did not provide such a third option to report such a result. Therefore, under the instructions and form of verdict used in Mr. Hall's case, the only logical way for a jury to report such a result would be through a jury note just like that which came to the District Court.

Fifth, the objected-to use of the "must" language in this case, though controversial in connection with the Question One issue raised in this Petition, removes all doubt about what the jury's note meant. To repeat, the jury note reported "100% certainty that we are unable to reach a unanimous decision in regards to Defendant Hall", language virtually the same as that in the Northern District of Georgia third option cited above. Under the instructions and form of verdict in this case, the jury could have made the report in their note only if they first made the determination that death was not justified, or in the words of the Eighth Circuit Panel that "death was off the table", and thereafter made the further determination that they could not unanimously agree upon a life sentence.

And, it bears repeating, jurors are presumed to follow their instructions. ***Kansas v. Marsh***, supra.

<u>6. The Panel's faulty premise is the only excuse for confusion over the timing of jury's original choice of the word "no" in the death portion of the verdict form</u>

The Panel also footnoted about the jury foreperson entering the word "no" in answer to the form of verdict question as to whether the death sentence would be imposed, but went on that there was supposedly "no way of knowing when it happened or why." ***United States v. Hall***, 1048, fn. 6. What seems to be a clear expression of the jury's anti-death-penalty determination was confusing to the Panel only because the Panel misjudged this as a non-weighing process

case. As already explained above, under the weighing law applicable to this case and under the instructions given, the sequence of events could have been none other than

- that, under the weighing case law and instructions, jurors considered whether they could unanimously find that aggravating factors sufficiently outweighed mitigating factors to justify a death sentence,
- that, the jury could not unanimously agree about justification for a death sentence, and so, as reflected on the form of verdict, "no" was then entered into the form of verdict,
- that, per the directions in the instructions, the jury turned their attention to trying to reach unanimous agreement upon a life sentence, and
- that, when the jury could not unanimously agree to a life sentence, they penned their note to the District Court.

7. The Panel's reliance upon ***Lowenfield v. Phelps*** is consistent with their faulty premise, but violative of this Court's holding in ***Stringer v. Black***

The Panel, relying upon their same faulty base premise, felt support for the District Court's instruction of Hall's jury was supplied by ***Lowenfield v. Phelps***, 234-241, wherein this Court approved the use of an instruction, similar to the one used in Hall's case, to deal with a Louisiana jury's penalty phase report of deadlock. As discussed above, in ***Lowenfield v. Phelps***, supra, this Court dealt with the non-weighing sentencing scheme's "binary choice" between life and death, and thus could readily extrapolate to that circumstance the teachings from cases dealing with the "binary choice" in the normal criminal case between guilt and not guilt. See also ***Allen v. United States***, 164 U.S. 492, 501-502 (1896). Trouble is that this Court has also held that teachings in the non-weighing context cannot be applied to the very different issues which a weighing scheme presents. ***Stinger v. Black***, supra. Thus, in ***Lowenfield v. Phelps***, instruction to continue deliberations was appropriate to confront the simple circumstance of a

jury who, when they reported deadlock under the non-weighing Louisiana penalty phase scheme, could only be describing difficulty choosing between life and death sentences. On the other hand, in Mr. Hall's case, under the completely different weighing construct of the FDPA, as described in the District Court's Instructions, the direction to continue deliberations invaded upon a jury who had already made a determination against a death sentence, misleading them into believing they had done something wrong, and cajoling them to a different determination.

8. The circumstances in this case were rife with coercion

No matter the peculiar facts of the case, the ground rules for determining whether coercion is wrought by a supplemental charge require consideration of the supplemental charge "in its context and under all the circumstances…." ***Lowenfield v. Phelps***, 237; ***Jenkins v. United States***, 380 U.S. 445, 446 (1965). Circumstances of moment are the length and depth of deliberations before the giving of the supplemental instruction, the brevity of deliberations after the giving of the supplemental instruction, and any other facts bespeaking coercion or pressure. ***Lowenfield v. Phelps***, 240; ***United States v. United States Gypsum Company***, 438 U.S. 422, 462 (1978); ***United States v. Thomas***, 791 F.3d 889, 898 (8th Cir. 2015); ***Hooks v. Workman***, 606 F.3d 715, 739, 741 (10th Cir. 2010).

To their credit, the Panel acknowledged the obvious signs of coercion here: the eight hours of deliberations before the supplemental instruction, which was plenty of time to yield a unanimous decision against co-defendant Coonce, and only "about an hour" from the time of the supplemental instruction to the time of return of the death verdict against Hall. ***United States v. Hall***, 1047-1048. The Panel sought refuge from these concerns in a further jury note asking for exhibits, inferring that this request showed that the jury did not feel pressured to impose a death sentence. ***United States v. Hall***, 1047-1048. Standing in the way of such inference-drawing is

the lack of ability to know whether the exhibits were desired by those jurors who had found the death penalty not justified, or by those on the other side, seeking to add further impetus to the momentum of the District Court's supplemental instruction shove.

But it was the instruction itself, coming at the particular point of deliberations which it did, which provided the proof-positive of the coercion.

Out of context, the mere eleven words of the supplemental instruction might well appear benign to the casual reader. Yet, the truth is that even the briefest of supplemental instructions can be coercive depending upon the other relevant circumstances present in the case. ***United States v. LaVallee***, 439 F.3d 670, 689 (10th Cir. 2006).

In the context of this case, less was more. The eleven words of the District Court's instruction, coming in direct response to the jury's effort to return an anti-death result, conveyed the unmistakable message that the result returned by the jury was unacceptable, and that the jury needed to "try" to get things right through "unanimous verdicts" (Appendix 13, p. 3).

In ***State v. Thompson***, 85 S.W.3d 635, 641 (Mo.banc 2002), the Missouri Supreme Court confronted a strikingly similar set of facts, and found that, upon those similar facts, there was "too great a risk" that the jury would "mistakenly assume" that the Judge was telling them that their understanding of the instructions they had previously been given was wrong and that their determination needed to be changed to one allowing for a sentence of death.

In this case, Mr. Hall's jury already had plenty enough time to sort through, decide completely, and report about their unanimous sentencing verdict for codefendant Coonce (Appendix 13, p. 3). After all of that, commanding that the jury spend even more time deliberating only communicated the coercive message that the jury had done something wrong, and needed to "try" to get things right (Appendix 13, p. 3).

All tolled, the record bespeaks coercion from the supplemental instruction.

8. This error cannot be deemed harmless in this close case on the issue of punishment

To remind what was said in connection with Question One, the burden is on the government to prove an error is harmless beyond a reasonable doubt. 18 U.S.C. 3595(c)(2); ***Jones v. United States***, 397-398. And, again, when a case is a close one, there is little if any way to prove that error is harmless beyond a reasonable doubt. ***United States v. Street***, 548 F.3d 618, 633-634 (8th Cir. 2008); ***United States v. Rodriguez-Marrero***, 390 F.3d 1, 17 (1st Cir. 2004).

Let us not forget the factual accounting at pages 3-6 above demonstrating that the case in aggravation of punishment was not overwhelming. The nail of that point is countersunk by the very jury impasse which is being addressed in this Question. And, the very basis for this Question, a trial court finding it necessary to supplementally instruct to break a jury deliberation impasse, bespeaks closeness of a case. ***United States v. Woodard***, 699 F.3d 1188, 1199 (10th Cir. 2012); ***Smith v. United States***, 980 F. Supp. 2d 854, 869 (N.D. Ohio 2013).

E. Conclusion

Because the Panel Opinion was wrongly decided, and conflicts with decisions by this Court, a Writ of Certiorari should issue. Ultimately, Mr. Hall requests that his sentence of death be set aside and a sentence of life imprisonment without release be entered by this Court in keeping with the original jury determination upon the matter.

CONCLUSION

WHEREFORE, based upon each and all of the aforementioned grounds, Mr. Hall prays that this Honorable Court enter its Order in this case granting to Mr. Hall its Writ of Certiorari to the Eighth Circuit Court of Appeals, and granting any further relief which this Court deems just and proper under the circumstances.

Respectfully submitted

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CERTIFICATE OF SERVICE AND COMPLIANCE

It is hereby certified

- that required privacy act redactions have been made to the foregoing,
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- that, the portions of this document countable under Supreme Court Rule 33.2(b) contains less than 40 pages, and therefore this Petition complies with the dictates of Rule 33.2(b),
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