No. 18-679

In The

Supreme Court of the United States

ERICK VIRGIL HALL,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Idaho

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Petitioner Erick Virgil Hall raises the following questions before this Court:

1. Whether certain of the "aggravating circumstances" used by Idaho to determine whether a defendant may be sentenced to death—those that ask whether the crime was especially "heinous, atrocious or cruel, manifesting exceptional depravity"; whether the defendant exhibited "utter disregard for human life"; and whether the defendant "has exhibited a propensity to commit murder"—fail to provide sentencing juries with constitutionally adequate guidance.

2. Whether Idaho's felony-murder aggravating circumstance, which substantially duplicates the State's felony-murder statute, violates the constitutional requirement that Idaho sufficiently narrow the class of persons subject to the death penalty.

(Pet., p.i.)

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STATEMENT OF THE CASE

In September 2000, Lynn Henneman, a flight attendant from New York, disappeared after going for a walk on the Greenbelt in Boise, Idaho. (Pet's App., p.2a.) Two weeks later, Lynn's body was found floating in the Boise River with her black sweater tied tightly around her neck and her shirt tied around one of her wrists. (Id.) An autopsy revealed she likely died from strangulation. (Id.) No suspects were identified until 2003, when police were investigating another murder in the Boise foothills. (Id.) During the investigation of the second murder, Petitioner Erick Virgil Hall was questioned and provided a DNA sample that matched the DNA on the vaginal swabs earlier collected from Lynn's body. (Id., pp.2a-3a.)

Hall was subsequently charged with first-degree murder under alternate theories that included premeditated murder and murder committed during a kidnapping and/or rape, first-degree kidnapping, and rape. (Id., pp.3a, 185a.) A jury convicted Hall of all three counts, including both theories of first-degree murder. (Id., pp.185a-187a.) After a special sentencing hearing, the same jury found four statutory aggravating factors, including: (1) "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity" ("HAC"); (2) "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life" ("utter disregard"); (3) "The murder was committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, kidnapping or mayhem and the defendant killed,

intended a killing, or acted with reckless indifference to human life" ("felony-murder"); and (4) "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society" ("propensity"). (Id., pp.188a-189a) (*see also* I.C. § 19-2515(9)(e)-(h) (2003)).[1] After the jury concluded that the collective mitigation weighed against the individual statutory aggravators did not make imposition of the death penalty unjust (id., pp.189a-191a), Hall was sentenced to death (id., pp.195a-197a).

As part of a consolidated appeal, Hall contended three of the statutory aggravators—HAC, utter disregard, and propensity—are unconstitutionally vague because they allegedly "fail to provide the sentencing authority with sufficient guidance to avoid the arbitrary and capricious application of capital punishment in violation of the Eighth Amendment. (Pet's App., p.48a.) Hall further contended the felony-murder aggravator "does not meaningfully narrow the class of persons eligible for the death penalty in cases where the defendant is convicted on a felony-murder theory" (id., pp.54a-55a) because the felony-murder aggravator duplicates an element of the crime of first-degree murder (id., pp.54a-57a). The Idaho Supreme Court

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[1] The propensity aggravator was amended in 2005 after Hall's trial, 2005 Idaho Sess. Laws, Ch.152, § 1, pp.468-71, and renumbered in 2006. 2006 Idaho Sess. Laws, Ch.129, § 1, pp.375-78. Therefore, the statutory provision Hall has provided is incorrect. (*See* Pet's App., pp.204a-205a.)

rejected Hall's arguments and affirmed his convictions and sentences. (Id., pp.48a-57a.)

REASONS FOR DENYING THE PETITION

Hall contends Idaho's HAC aggravator contravenes *Maynard v. Cartwright*, 486 U.S. 356 (1988), conflicts with the Eighth Circuit's decision in *Moore v. Clark (Moore I)*, 904 F.2d 1226 (8th Cir. 1990), and fails to account for the change to jury sentencing. (Pet., pp.11-18.) Hall relies extensively upon Justice Kidwell's dissent in *Hall*. (*See* Pet's App., pp.175a-181a.) However, Justice Kidwell's analysis, as well as Hall's arguments, ignores important parts of the HAC narrowing construction adopted by the Idaho Supreme Court in *State v. Osborn*, 631 P.2d 187, 200 (Idaho 1981), and fails to recognize the presumption that juries follow the law as explained in the jury instructions. Consequently, Hall has failed to establish the HAC aggravator is contrary to *Maynard* or conflicts with *Moore*. Because Hall has also failed to establish this issue involves an important question of federal law or provides any other compelling reason, certiorari should be denied.

Recognizing this Court has reasoned that Idaho's utter disregard aggravator is not unconstitutionally vague, *see Arave v. Creech*, 507 U.S. 463 (1993), Hall's argument regarding the utter disregard and propensity aggravators is based exclusively upon the fact that juries must now find statutory aggravators. (Pet.,

pp.18-21.) Because the analysis in *Creech* was not based upon judge sentencing and juries are presumed to follow the jury instructions, Hall's argument fails. Moreover, based upon this Court's prior precedent, this issue does not involve an important question of federal law nor is there any other compelling reason for this Court to grant certiorari.

Finally, Hall contends that Idaho's felony-murder aggravator fails to narrow the class of person eligible for the death penalty. However, the question as framed before this Court was not presented to the Idaho Supreme Court where the question was whether narrowing could occur when the felony-murder aggravator duplicates an element of first-degree murder. Irrespective, Hall has failed to establish this case is the proper vehicle to resolve the alleged split on the constitutionality of the felony-murder aggravator, particularly since any alleged error would be harmless since Hall was also convicted of premeditated murder and the jury found three other constitutional aggravators.

I.
With Their Limiting Constructions, Idaho's HAC, Utter Disregard And Propensity Aggravators Are Not Unconstitutionally Vague

A. Principles Of Law Governing Vagueness Challenges To Aggravators

In *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)), this Court

reaffirmed the principle that, "'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" The state is required to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and 'make rationally reviewable the process for imposing a sentence of death.'" *Id*. (quoting *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)). These objective standards must narrow the class of people eligible for the death penalty. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). The narrowing function may be provided in one of two ways: "The legislature may itself narrow the definition of capital offenses . . . so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for the narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988).

"Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty." *Maynard*, 486 U.S. at 361-62. As explained in *Bell v. Cone*, 543 U.S. 447, 453 (2005) (quoting *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (emphasis in original), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2000)), "The law

governing vagueness challenges to statutory aggravating circumstances was summarized aptly in *Walton*":

> When a federal court is asked to review a state court's application of an individual statutory aggravating or mitigating circumstance in a particular case, it must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer. If so, then the federal court must attempt to determine whether the state courts have further defined the vague terms and, if they have done so, whether those definitions are constitutionally sufficient, i.e., whether they provide *some* guidance to the sentencer.

"If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm." *Creech*, 507 U.S. at 474 (emphasis in original). But when the state court has given "substance to the operative terms," the aggravator meets constitutional standards. *Walton*, 497 U.S. at 654.

B. Idaho's Capital Sentencing Procedures

As recognized in *Creech*, 507 U.S. at 475 (citing I.C. § 18-4004 (1987)), "The class of murderers eligible for capital punishment under Idaho law is defined broadly to include all first-degree murderers." Likewise, "the category of first-degree murders is also broad" because it "includes premeditated murders and those carried

out by means of poison, lying in wait, or certain kinds of torture." *Id*. (citing I.C. § 18-4003(a)). Additionally, "murders that otherwise would be classified as second degree, I.C. § 18-4003(g)—including homicides committed without 'considerable provocation' or under circumstances demonstrating 'an abandoned and malignant heart' (a term of art that refers to unintentional homicide committed with extreme recklessness)—become first degree if they are accompanied by one of a number of enumerated circumstances." *Id*. (citation omitted). Examples include when the victim is a fellow prison inmate, I.C. § 18-4003(e), or a member of law enforcement or judicial officer performing official duties, § 18-4003(b); the defendant is serving a sentence for murder, § 18-4003(c); and when the murder occurs during a prison escape, § 18-4003(f), or the commission or attempted commission of arson, rape, robbery, burglary, kidnapping, or mayhem, § 18-4003(d). *Creech*, 507 U.S. at 475.[2]

Because the class of murderers eligible for the death penalty is broad, Idaho utilizes "narrowing by jury findings of aggravating circumstances at the penalty phase." *See Lowenfield*, 484 U.S. at 246. After a murderer is adjudged guilty, "a special sentencing hearing" is "held promptly for the purpose of hearing all relevant evidence and arguments of counsel in

[2] Since *Creech* was issued, I.C. § 18-4003(d) was amended to include, "aggravated battery on a child under twelve (12) years of age," 1991 Idaho Sess. Laws, Ch.227, § 1, pp.546-47, and "an act of terrorism, as defined in section 18-8102, Idaho Code, or the use of a weapon of mass destruction, biological weapon or chemical weapon," 2002 Idaho Sess. Laws, Ch.222, § 4, p.627.

aggravation and mitigation of the offense." I.C. § 19-2515(5)(a) (2003). The jury, or the court if a jury is waived, must unanimously find at least one statutory aggravator beyond a reasonable doubt before the death penalty may be imposed. I.C. § 19-2515(3)(b). When a statutory aggravating circumstance is found, "the defendant shall be sentenced to death unless mitigating circumstances which may be presented are found to be sufficiently compelling that the death penalty would be unjust." Id. The death penalty cannot be imposed unless the jury unanimously finds at least one statutory aggravating factor and unanimously finds the death penalty should be imposed. Id. At the time Hall murdered Lynn, Idaho had ten statutory aggravating factors, including the four listed above. I.C. § 19-2515(9)(a)-(j).

C. Certiorari Is Not Warranted Regarding The HAC Aggravator And Its Limiting Construction

Idaho Code 19-2515(9)(e) states, "The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." In *Osborn*, 631 P.2d at 199, the Idaho Supreme Court, relying upon *Gregg*, 428 U.S. at 201, concluded that Idaho's HAC aggravator is "facially constitutional." However, relying upon *Godfrey*, 466 U.S. at 446, the court recognized it "must place a limiting construction upon these statutory aggravating circumstances so as to avoid the possibility of the application in an unconstitutional manner." *Osborn*, 631 P.2d at 200.

Addressing the HAC aggravator, the Idaho Supreme Court looked to other jurisdictions that had an opportunity to construe similar language. In *State v. Dixon*, 283 So.2d 1 (Fla. 1973), the defendant challenged a statutory aggravator where "[t]he capital felony was especially heinous, atrocious or cruel." The Idaho Supreme Court adopted Florida's limitation for that phrase:

> [W]e feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Osborn, 631 P.2d at 200 (emphasis omitted) (quoting *Dixon*, 283 So.2d at 9).

Importantly, the Idaho Supreme Court recognized the construction used in *Dixon* was approved by this Court in *Proffitt v. Florida*, 428 U.S. 242, 255-56 (1976). *Osborn*, 631 P.2d at 200. In *Proffitt*, this Court focused upon the Florida Supreme Court recognizing that the

Florida Legislature "intended something 'especially' heinous or cruel when it authorized the death penalty for first degree murder." 428 U.S. at 255 (quoting *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975)). "As a consequence, the court has indicated that the [HAC aggravator] is directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" *Id*. (quoting *Dixon*, 283 So.2d at 9).

The Idaho Supreme Court also examined the phrase, "manifesting exceptional depravity." *Osborn*, 631 P.2d at 200. In *State v. Simants*, 250 N.W.2d 881, 891 (Neb. 1977), the Nebraska Supreme Court stated:

> In interpreting this portion of the statute, the key word is "exceptional." It might be argued that every murder involves depravity. The use of the word "exceptional," however, confines it only to those situations where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence.

Adopting the definitions from *Dixon* and *Simants*, the Idaho Supreme Court concluded:

> With these constructions, i.e., that the murder must be accompanied by acts setting it apart from the norm of murders and that its commission manifest such depravity as to offend all standards of morality and intelligence, the aggravating circumstance contained in I.C.

> § 19-2515(f)(5) is sufficiently definite and limited to guide the sentencing court's discretion in imposing the death penalty.

Osborn, 631 P.2d at 200.

Relying upon *Maynard*, 485 U.S. at 364, Hall contends, "this Court struck down as unconstitutionally vague an Oklahoma HAC aggravator that was, in relevant part, indistinguishable from Idaho's." (Pet., p.11.) Hall's argument is correct as far as it goes. However, Hall ignores the limiting construction from *Osborn*, particularly the limitations placed upon the phrase, "especially heinous, atrocious or cruel" that were approved by this Court in *Proffitt*, and instead focuses upon the bare language from the aggravator, specifically the word, "especially." (Pet., pp.11-13.) In *Walton*, 497 U.S. at 654, this Court recognized that in *Maynard*, "the jury was instructed only in the bare terms of the relevant statute or in terms nearly as vague" and the state appellate court failed to "affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented." That is in stark comparison to Hall's case where Idaho has a limiting construction for the HAC aggravator and it was applied to the facts of Hall's case.

In *Walton*, this Court scrutinized Arizona's HAC aggravator, which the Arizona Supreme Court has narrowed, stating, "'a crime is committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death,' and that '[m]ental anguish includes a victim's uncertainty

as to his ultimate fate.' " 497 U.S. at 654 (quoting *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989)). Comparing the limiting construction from *Proffitt*, this Court explained, "The Arizona Supreme Court's construction also is similar to the construction of Florida's 'especially heinous, atrocious, or cruel' aggravating circumstance that we approved in *Proffitt*." *Walton*, 497 U.S. at 655. Comparing the limitations that were approved from *Proffitt* and *Walton*, the first part of Idaho's limiting instruction regarding the phrase, "heinous, atrocious, and cruel," provides the necessary guidance to limit the jury's discretion.

Moreover, as recognized by the Ninth Circuit, because the limiting construction for the first phrase of Idaho's HAC aggravator has been approved by this Court, the fact that there is additional limitation from the second phrase is of no consequence. *Leavitt v. Arave*, 383 F.3d 809, 836-37 (9th Cir. 2004). The court recognized, "[W]e need not ask ourselves whether the definition of 'exceptional depravity' used in Nebraska sufficiently limits that concept. Again, whether it does or not is of no consequence. The language that makes it part of the heinous, atrocious or cruel aggravator is not disjunction—it is conjunctive in nature." *Id*. at 837 (footnote omitted). Moreover, the Ninth Circuit recognized that "[o]nce it is decided that the murder was heinous, atrocious or cruel under the properly limited definition of that phrase, the fact that for Idaho purposes it must also 'manifest exceptional depravity' can do nothing but help a murderer like [Hall], even if we

thought that the latter phrase would be a bit too spongy standing alone." *Id*. (footnote omitted).

Hall contends that *Leavitt* is inapposite because "[t]he limiting instruction in *Leavitt* . . . was *not* the instruction actually given in this case" because the "*Leavitt* instruction was considerably more elaborate and precise, asking, among other things, whether the defendant's offense was 'a conscienceless or pitiless crime which [wa]s unnecessarily torturous to the victim.'" (Pet, p.15 n.3) (emphasis in original) (quoting *Leavitt*, 383 F.3d at 835-36). However, the issue before the Ninth Circuit was a vagueness challenge that merely addressed the constitutionality of the HAC aggravator and its limiting construction.

Additionally, before the Idaho Supreme Court, Hall never challenged the HAC jury instruction, but made the same vagueness challenge that was raised in *Leavitt*. (Pet's App., p.48a) ("[Hall] contends that three of the statutory aggravators, set forth in Idaho Code sections 19-2515(9)(e), (9)(f), and (9)(g), are unconstitutionally vague because they fail to provide the sentencing authority with sufficient guidance to avoid the arbitrary and capricious application of capital punishment in violation of the Eighth Amendment."). Because this Court has repeatedly held that a federal constitutional issue must first be raised in the state court before it may be raised before this Court, *Illinois v. Gates*, 462 U.S. 213, 217-24 (1983), Hall should not be permitted to morph his vagueness challenge into a challenge regarding the jury instructions. *See also Reynolds v. Florida*, ___ U.S. ___, 139 S.Ct. 27, 29 (2018)

(Breyer, J., opinion respecting the denial of certiorari) (agreeing that certiorari should not be granted respecting a "closely related question" because "the Florida Supreme Court did not fully consider that question, or the defendants may not have properly raised it").

The state recognizes that even if Hall did not raise a specific jury instruction question before the lower court, this Court may still address the question if it was addressed by the lower court. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997). However, as interpreted by the Idaho Supreme Court, the issue Hall raised did not deal with the instruction given to the jury, but whether the three statutory aggravators are unconstitutionally vague because they failed to adequately guide the jury's discretion. (Pet's App., p.48a.)

Irrespective of whether the jury instruction contained the language regarding the "conscienceless or pitiless crime which is unnecessarily torturous to the victim," the instruction contained all of the other limitations, and explained that, while "[i]t might be thought that every murder involves depravity," "exceptional depravity exists only where depravity is apparent to such an extent as to obviously offend all standards of morality and intelligence." (Pet's App., p.202a.) Moreover, the focus of the instruction was upon the "defendant's state of mind at the time of the offense, as reflected by his words and acts." (Id.) Considering the entirety of the instruction, even if it is considered by this Court, it provided sufficient guidance to the jury to channel its discretion such that it is not unconstitutionally vague.

Contrary to Hall's contention (Pet., pp.14-15), neither does Idaho's limiting construction conflict with *Moore I*, 904 F.2d at 1228-33. Hearing Moore's case en banc after he was resentenced, the Eighth Circuit reconsidered its initial decision, and concluded *Moore I* involved a "misstep." *Moore v. Kinney (Moore II)*, 320 F.3d 767, 771-75 (8th Cir. 2003) (en banc). Addressing *Moore I*, the en banc court concluded the prior panel "failed to correctly predict the direction the United States Supreme Court's death penalty jurisprudence would take. . . . [O]ne month after *Moore I* was issued, the United States Supreme Court upheld the validity and constitutionality of the State of Arizona's narrowing scheme in *Walton*," which considered an aggravating factor that "was almost identical to Nebraska's 'exceptional depravity' formulation." *Moore II*, 320 F.3d at 771. Recognizing it was not bound by the "misstep in *Moore I*," the en banc court began "with a clean slate" in reviewing Moore's resentencing, and concluded Nebraska's narrowing construction was not unconstitutionally vague. *Id*. at 771-75; *see also Leavitt*, 383 F.3d at 837 n.35 (citing *Moore II* and recognizing the Eighth Circuit "now seems to have thought better of" its decision in *Moore I*).

Finally, Hall contends that the advent of jury sentencing has changed the calculus in determining whether a limiting construction provides sufficient guidance to channel the jury's discretion. (Pet., pp.15-18.) Contrary to Hall's argument, *Proffitt* does not support his position. When addressing the question of whether Florida's sentencing procedures were

constitutional, the Court explained, "To answer these questions, which are not unlike those considered by a Georgia sentencing jury, *Gregg v. Georgia*, 428 U.S. at 197 [ ], the sentencing judge must focus on the individual circumstances of each homicide and each defendant." *Proffitt*, 428 U.S. at 252. This Court recognized, "[I]t would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a judge is more experienced in sentencing than a jury, and therefore, is better able to impose sentences similar to those imposed in analogous cases." *Id*. The Court never premised its decision on judge sentencing, but merely recognized there would be greater consistency imposing the death penalty in similar cases if judges were the factfinders. Indeed, the Court noted that "trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." *Id*. at 253. But juries can also be given that same "specific and detailed guidance." And juries, similar to judges, are presumed to follow its instructions and "understand a judge's answer to its question" even when they involve sentencing instructions in death penalty cases. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *see also Kansas v. Carr*, ___ U.S. ___, 136 S.Ct. 633, 645 (2016) ("[We] have continued to apply the presumption to instructions regarding mitigating evidence in capital-sentencing proceedings.").

The question of whether a narrowing construction is constitutional is not premised upon whether the factfinder is a judge or a jury—both are presumed to follow the law. Rather, the question is whether the jury was "properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in *Maynard* and *Godfrey*." *Walton*, 497 U.S. at 653. Indeed, in *Maynard*, and *Godfrey*, there was no limiting construction for the jury to consider. Rather, the bare statute was given to the jury and the appellate courts applied a limiting construction this Court determined was unconstitutional. *Maynard*, 486 U.S. at 360-61 (recognizing it was the Oklahoma Court of Criminal Appeals that applied the infirm narrowing instruction); *Godfrey*, 446 U.S. at 426 ("Both orally and in writing, the judge quoted to the jury the statutory language of the § (b)(7) aggravating circumstance in its entirety.").

Hall also complains that "juries in capital sentencing cases often fail to understand their instructions" and "lack the experience necessary to make the comparative judgments that are *required* in sentencing." (Pet., p.17) (emphasis in original). In Hall's case, the same complaint was made by Justice Kidwell when he opined, "Requiring a lay-jury with no experience in sentencing to weigh aggravating and mitigating circumstances will lead to unpredictable and inconsistent results." (Pet's App., pp.180a-181a.) However, the question of whether juries understand the instructions

given can be made in virtually every criminal or civil trial. Irrespective, juries are presumed to follow the instructions. Hall's argument regarding "comparative judgments" (and Justice Kidwell's) is also unavailing because it involves proportionality review, which was rejected in *Walton*, 497 U.S. at 655-56, and *Creech*, 507 U.S. at 476-77. Irrespective, Hall's argument presumes that every trial judge that presides over a death penalty case has prior experience with other death penalty cases, a presumption that is untenable because few judges, particularly in Idaho, have presided over multiple death penalty cases.

Moreover, Idaho, like Florida, has a statutory "provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants." *Proffitt*, 428 U.S. at 258. Idaho Code § 19-2827(a) mandates that, whenever a death sentence is imposed, "the sentence shall be reviewed on the record by the supreme court of Idaho." That review "shall consider the punishment as well as any errors enumerated by way of appeal," I.C. § 19-2827(b). And "[w]ith regard to the sentence the court shall determine":

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-215, Idaho Code.

I.C. § 19-2827(c). That review by the Idaho Supreme Court "can assure consistency, fairness, and rationality in the evenhanded operation of the state law." *Proffitt*, 528 U.S. at 259-60.

Not only has Hall failed to establish Idaho's HAC narrowing construction is contrary to this Court's precedent or that there is a split with any court regarding the limiting construction used for the HAC aggravator in Idaho, but he has failed to otherwise establish an important question of federal law that should be settled by this Court. *See* Supreme Court Rule 10(b), (c); *cf. Tolan v. Cotton*, 572 U.S. 650, 661 (2014) (Alito, J., concurring in the judgment) (certiorari may be inappropriate when the question has little impact outside the respective parties). This Court should deny Hall's Petition for Certiorari with regard to the HAC aggravator.

D. Certiorari Is Not Warranted Regarding The Utter Disregard Or Propensity Aggravators And Their Limiting Constructions

This Court has previously reasoned that Idaho's utter disregard aggravator and narrowing construction meet constitutional standards. *Creech*, 507 U.S. at 471-78. Nevertheless, contending that *Creech* "was expressly premised on the judicial sentencing scheme then used in the State," Hall asserts the utter disregard aggravator and its narrowing construction fail to provide "sufficient guidance in a regime where juries, rather than judges, are the decision-makers." (Pet.,

p.18.) Hall's only argument regarding the propensity aggravator is the same—jury sentencing somehow results in the propensity aggravator and narrow construction being unconstitutionally vague. However, as explained above, the advent of juries has not changed the calculus in determining where a statutory aggravator and its limiting construction provide sufficient guidance to the factfinder.

Idaho Code § 19-2515(9)(f) states, "By the murder, or circumstances surrounding its commission, the defendant exhibited utter disregard for human life." In *Osborn*, 631 P.2d at 200-01, the Idaho Supreme Court recognized the utter disregard aggravator could potentially overlap with three other statutory aggravators. Consequently, the court explained "that the phrase 'utter disregard' must be viewed in reference to acts other than those set forth in" the other aggravators. The court also concluded "that the phrase [utter disregard] is meant to be reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." *Id*. at 201.

While this Court recognized in *Creech* that the sentencer was a judge and "the federal court must presume that the judge knew and applied any existing narrowing construction," 507 U.S. at 471, the Court's focus was the narrowing construction, not that the factfinder was a judge. This Court explained that the phrase, "'cold-blooded, pitiless slayer' is not without content," and, relying upon dictionary definitions, concluded, "In ordinary usage, then, the phrase

'cold-blooded pitiless slayer' refers to a killer who kills without feeling or sympathy." *Id*. at 472. As discussed by this Court, "The terms 'cold-blooded' and 'pitiless' describe the defendant's state of mind: not his *mens rea*, but his attitude toward his conduct and his victim. The law has long recognized that a defendant's state of mind is not a 'subjective' matter, but a fact to be inferred from the surrounding circumstances." *Id*. at 473. The Court specifically recognized "that legislators use words in their ordinary, everyday senses," and there is no reason to suppose that judges do otherwise. *Id*. (citations omitted).

Based upon the facts presented at the trial or sentencing hearing, juries are also capable of determining a killer's "attitude toward [Hall's] conduct and his victim" that is a "fact" "inferred from the surrounding circumstances." *Id*. Likewise, juries are capable of understanding jury instructions that contain words of "ordinary usage." *See U.S. v. Stefanik*, 674 F.3d 71, 79 (1st Cir. 2012) (reviewing a jury instruction where the trial court "looked to the Modern Federal Jury Instructions, which contained a definition consistent with accepted and ordinary usage"); *U.S. v. Richards*, 967 F.2d 1189, 1196 (8th Cir. 1992) ("[I]n prosecutions under 18 U.S.C. § 922(g), the ordinary usage of the word 'transport' requires the government to establish that the defendant acted knowingly, as the indictment and the instructions here required.").

In *Creech*, 507 U.S. at 475, the Court also acknowledged that "the word 'pitiless,' standing alone, might not narrow the class of defendants eligible for the

death penalty. A sentencing judge might conclude that every first-degree murderer is 'pitiless,' because it is difficult to imagine how a person with any mercy or compassion could kill another human being without justification." However, the Court concluded that, "[g]iven the statutory scheme," "we believe that a sentencing judge reasonably could find that not all Idaho capital defendants are 'cold-blooded. . . .' Some, for example, kill with anger, jealousy, revenge, or a variety of other emotions." *Id*.

Based upon the evidence presented in a specific case, juries are no less capable of determining whether killers "exhibit feeling" such as when they kill with anger, jealousy, revenge, or other emotions. *Id*. (emphasis omitted). Everyday, juries are required to "draw inferences about a defendant's intent based on all the facts and circumstances of a crime's commission." *Rosemond v. U.S.*, 572 U.S. 65, 77 n.8 (2014). Additionally, in *Tuilaepa v. California*, 512 U.S. 967, 974 (1994), this Court cited *Creech* when it recognized that states "may adopt capital sentencing processes that rely upon the jury, in its sound judgment, to exercise wide discretion. That is evident from the numerous factors we have upheld against vagueness challenges." There is no reason to believe juries cannot make those same inferences in determining when a defendant kills with anger, jealousy, revenge, or a variety of other emotions versus a murder that is "reflective of acts or circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer," *Osborn*, 631 P.2d at 201, "a

killer who kills without feeling or sympathy," *Creech*, 507 U.S. at 201.

Moreover, as explained above, because Idaho is such a small state and particularly with the advent of jury sentencing, it is no more likely that "[judges] will almost always sit on no more than one death penalty [case], because death penalty cases are uncommon." (Amicus Brief, p.5.) Therefore, judges are no more "informed" or "repeat players" than juries when it comes to following the limiting construction. (Pet., p.19.)

Hall makes the same general arguments regarding Idaho's propensity aggravator. (Pet., pp.20-21.) Idaho Code § 19-2515(9)(h), states, "The defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." While recognizing this language in and of itself "does not fail as being facially unconstitutional," *State v. Creech*, 670 P.2d 463, 471 (Idaho 1983), the Idaho Supreme Court nevertheless provided a narrowing construction:

> [W]e construe the 'propensity' language to specify that person who is a willing, predisposed killer, a killer who tends toward destroying the life of another, one who kills with less than the normal amount of provocation. We would hold that propensity assumes a proclivity, a susceptibility, and even an affinity toward committing the act of murder.

Id. at 472.

The same analysis regarding the utter disregard aggravator and its narrowing construction applies to Idaho's propensity aggravator and its narrowing construction; there is no reason to believe a jury cannot make the requisite findings for the propensity aggravator and its narrowing construction. Indeed, in *Jurek v. Texas*, 428 U.S. 262, 270-72 (1976), the Court compared the capital sentencing procedures from Georgia and Florida that were examined in *Gregg*, 428 U.S. 153, and *Proffitt*, 428 U.S. 242, and the Court found there was no significant difference between the respective statutes because "[e]ach requires the *sentencing authority* to focus on the particularized nature of the crime." *Jurek*, 428 U.S. at 271 (emphasis added).

Texas' penal code limits capital homicides to intentional and knowing murders committed in five situations. *Id*. at 268. If the jury returns a guilty verdict, it is then required to answer three questions, one of which includes, "(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id*. at 269. If the jury affirmatively answers all three questions, including the question regarding propensity, the death penalty is imposed. *Id*. Focusing upon the propensity question, this Court recognized:

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our

> criminal system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any *sentencing authority* must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.

Id. at 275 (footnotes omitted) (emphasis added). This Court then held, "The task a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." *Id*. at 275-76.

If a Texas jury can answer the requisite question regarding propensity without further guidance from a narrowing construction, certainly an Idaho jury can make the same determination regarding propensity especially with a narrowing construction. Based upon this Court's precedent, Hall has failed to establish an important constitutional question that should be settled by this Court, particularly since no other jurisdiction has opined that jury sentencing somehow modified the calculus associated with determining whether a statutory aggravator and its narrowing construction are unconstitutionally vague.

II.
Idaho's Felony-Murder Aggravator Sufficiently Narrows The Class Of Killers Eligible For The Death Penalty

A. Hall Failed To Properly Raise The Question Before The Idaho Supreme Court

This Court has repeatedly held that federal constitutional issues must first be raised in state court before being raised before this Court. *Gates*, 462 U.S. at 217-24. Several purposes have been identified by this Court in support of this policy. First, "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id*. at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). Second, "'due regard for the appropriate relationship of this Court to state courts,' *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435-36 [] (1940), demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and equally important, proposed changes in existing remedies for unconstitutional actions." *Id*. Finally, "we permit a state court, even if it agrees with the State as a matter of federal law, to rest its decision on an adequate and independent state ground." *Id*. at 222. Even when a "closely related question" is raised below, certiorari should not be granted. *Reynolds*, 139 S.Ct. at 29.

As explained in the habeas context of fair presentation to the state's highest court, "it is not enough to make a general appeal to a constitutional guarantee as

broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

Focusing upon *McConnell v. State*, 102 P.3d 606, 623-24 (Nev. 2004), before the Idaho Supreme Court Hall raised a narrow issue based upon whether Idaho's felony-murder aggravator sufficiently narrowed the class of individuals eligible for the death penalty when the aggravator is virtually identical to the elements for the substantive offense of felony-murder. The Idaho Supreme Court characterized Hall's challenge as arguing that the "felony-murder aggravator in section 19-2515(g) violates the Eighth and Fourteenth Amendments because it does not meaningfully narrow the class of person eligible for the death penalty in cases where the defendant is convicted on a felony-murder theory." (Pet's App., pp.54a-55a.) Relying upon *Tuilaepa*, the Idaho court rejected Hall's argument:

> To render a defendant eligible for the death penalty in a homicide case . . . the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. *The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)*. . . . [T]he aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder. Second, the

> aggravating circumstance may not be unconstitutionally vague.

(Pet's App., p.56a) (emphasis in original) (quoting *Tuilaepa*, 512 U.S. at 971-72).

While Hall phrases his question in the same general manner, it is not the question he argues where he now makes a broad-based challenge that felony-murder aggravators are unconstitutional because they "fail[ ] to adequately narrow the class of defendants eligible for the death penalty" since the narrowing requirement is only met when "an aggravator does not apply to literally *all* first-degree murders." (Pet's, pp.21-22) (emphasis in original). The state's argument is bolstered by Hall's reply brief before the Idaho Supreme Court where he contended the state has misunderstood his argument, and asserted, "He has never claimed felony-murder is an invalid aggravator; he has simply observed that in Idaho, felony-murder cannot be the basis for the underlying first degree murder conviction and simultaneously serve the narrowing function required by aggravating circumstances." (Reply Brief, p.44.)

Because the broad-based question Hall now argues before this Court was never raised before the Idaho Supreme Court or addressed by that court, Hall's invitation to address this question should be rejected.

B. Certiorari Is Not Warranted Regarding The Felony-Murder Aggravator

1. There Is No Division Among State Courts Or The Federal Circuits

Relying upon *McConnell*, Hall contends "there is a clear, acknowledged, and well-defined conflict between state courts of last resort" regarding the question of whether a felony-murder aggravator sufficiently narrows those killers eligible for the death penalty. (Pet., p.22.) However, *McConnell* is readily distinguishable from Hall's case because the only two aggravators found by the jury were necessarily part of the underlying charge of felony-murder. 102 P.2d at 620. This is in stark contrast to Hall's case where the jury found four statutory aggravators. (Pet's App., pp.188a-189a.)

Because *McConnell* is the only case where any court has concluded the felony-murder aggravator is unconstitutionally vague even when the defendant has been convicted of both felony-murder and premeditated murder, it is an outlier that does not warrant granting certiorari in Hall's case. *See In Re Williams*, 898 F.3d 1098, 1110 (11th Cir. 2018) (recognizing this Court does not generally review outlier cases); *Strayhorn v. Wyeth Pharmaceuticals, Inc.*, 737 F.3d 378, 405-06 (6th Cir. 2013) (declining to follow an outlier case). Hall contends that three other state cases have "taken an intermediate position between Nevada and Idaho, holding that when felony murder is the only basis for a murder conviction, felony-murder aggravators may not serve as the foundation for imposition of the death penalty." (Pet., p.26.) However, an intermediate

position does not create the split advocated by Hall. Moreover, one of the cases upon which Hall relies—*State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn. 1992)—was based upon state constitutional law. In *State v. Howell*, 868 S.W.2d 238, 259 (Tenn. 1993) (citation and emphasis omitted), the court explained that in *Middlebrooks*, "this Court held that it is unconstitutional under the Tennessee Constitution, Article 1, Section 16, to use the felony murder aggravating circumstances to support imposition of the death penalty for a conviction of felony murder, although it can be used to support imposition of the death penalty for premeditated murder." The state constitutional basis for *Middlebrooks* was recognized in *Coe v. Bell*, 161 F.3d 320, 348 (6th Cir. 1998). Indeed, *Middlebrooks* specifically explained, "*Lowenfield* is inapposite and provides no rationale for constitutionality under the Tennessee Constitution." 840 S.W.2d at 346.

State v. Cherry, 257 S.E.2d 567 (N.C. 1979), focused upon the "merger rule" resulting in the court opining, "Once the underlying felony has been used to obtain a conviction of first degree murder, it has become an element of that crime and may not thereafter be the basis for additional prosecution or sentence." At least one court has rejected *Cherry*, concluding it was "premised either on an interpretation of the North Carolina capital sentencing statute or on a North Carolina rule of merger." *Stebbing v. State*, 473 A.2d 903, 917 (Md. 1984). Moreover, *Cherry* was issued long before *Lowenfield*, which recognized a statutory aggravator can duplicate the elements of felony-murder. 484 U.S.

at 246. In *Page v. U.S.*, 715 A.2d 890, 892 n.3 (D.C. 1998), the court declined to follow *Cherry* "in light of the Supreme Court's decision in *Lowenfield*."

Nevertheless, in *Engberg v. Meyer*, 820 P.2d 70, 90 (Wyo. 1991), the court found *Cherry* "particularly persuasive." The court also attempted to distinguish *Lowenfield*, noting that in Louisiana the narrowing process takes place during the guilt-phase of the trial, while in Wyoming the narrowing took place during the sentencing. *Id*. at 91. However, this argument is unpersuasive because the Supreme Court explained that narrowing can take place either at the guilt-phase or the sentencing-phase. *Lowenfield*, 484 U.S. at 246.

As recognized in *State v. Santiago*, 49 A.3d 566, 663 (Conn. 2012), *superseded in part on other grounds*, *State v. Santiago*, 122 A.3d 1 (Conn. 2015), the cases cited by Hall are readily distinguishable "because none expressly rejects the underlying reasoning of *Lowenfield* as a matter of state constitutional law, and all concern the distinct question of whether it is permissible to use the underlying felony as the sole aggravating factor when felony murder is the capital offense under broadly worded first degree murder statutes." Not only was the felony-murder not the "sole aggravating factor" in Hall's case, but he was convicted of both felony-murder and premeditated murder.

Importantly, Hall recognizes that no federal circuits have adopted his analysis. (Pet., p.27.) Relying at least in part on *Lowenfield*, every circuit to address the question has rejected Hall's position. *See U.S. v. Higgs*,

353 F.3d 281, 315 (4th Cir. 2003) (upholding the federal statute); *Marshall v. Hendricks*, 307 F.3d 36, 82-84 (3d Cir. 2002) (upholding New Jersey's statute); *Coe*, 161 F.3d at 350 (upholding Tennessee's statute); *Deputy v. Taylor*, 19 F.3d 1485, 1500-02 (3d Cir. 1994) (upholding Delaware's statute); *Johnson v. Dugger*, 932 F.2d 1360, 1368-70 (11th Cir. 1991) (upholding Florida's statute); *Byrne v. Butler*, 845 F.2d 501, 515 n.12 (5th Cir. 1988) (upholding Louisiana's statute); *Julius v. Johnson*, 840 F.2d 1533, 1540 (11th Cir. 1988) (upholding Florida's statute); *Perry v. Lockhart*, 871 F.2d 1384, 1393 (8th Cir. 1985) (upholding Arkansas statute and holding that *Lowenfield* overruled *Collins v. Lockhart*, 754 F.2d 258, 264 (8th Cir. 1985)).

Likewise, other states have rejected Hall's argument. *See Ballinger v. State*, 667 So.2d 1242, 1260-61 (Miss. 1995); *Ferguson v. State*, 642 A.2d 772 (Del. 1994); *Oken v. State*, 681 A.2d 30, 52 (Md. 1996).

2. The Idaho Supreme Court's Decision Is Consistent With This Court's Precedent

Hall contends that because Idaho's class of death eligible killers is broadly defined at the guilt-phase, the narrowing function cannot occur at that same phase, but must occur at the penalty-phase. (Pet., pp.27-28.) However, Hall's contention is in direct contravention of *Tuilaepa*, 512 U.S. at 971-72 (citations omitted), which states, "To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and

find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)." *See also Higgs*, 353 F.3d at 315 (citing *Lowenfield*, 484 U.S. at 246) ("[T]he Eighth Amendment does not prohibit the use of an aggravating factor during the sentencing phase that duplicates one or more elements of the offense of the crime found at the guilt phase.").

Loving v. U.S., 517 U.S. 748, 755 (1996), is not to the contrary. In *Loving*, this Court reviewed whether the military capital punishment scheme required aggravating factors. 517 U.S. at 755-56. Recognizing the broad nature of the types of murders that were death eligible, including premeditated murder and felony-murder, the Court answered affirmatively, concluding, "The statute's selection of the two types of murder for the death penalty, however, does not narrow the death-eligible class in a way consistent with our cases." The Court explained that the military felony-murder rule permitted death to be imposed "even if the accused had no intent to kill and even if he did not do the killing himself," which violated *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

However, Idaho utilizes statutory aggravating factors, and the felony-murder aggravator complies with the dictates from *Enmund* and *Tison v. Arizona*, 481 U.S. 137 (1987). Enmund was convicted of felony-murder and sentenced to death even though there was no evidence he was present during the killing or had any knowledge of his co-defendants' plan to rob an

elderly couple that led to the couple's murders. *Id*. at 786. This Court explained that a sentence of death imposed even when the defendant did not kill, attempt to kill, intend to kill, and was not even present at the killing violated the Eighth Amendment prohibition against cruel and unusual punishment. *Id*. 458 U.S. at 797-801. In *Tison*, 481 U.S. at 158, the Court modified *Enmund*, explaining it is not necessary that a defendant "intend to kill" before the death penalty is imposed, merely "major participation in the felony committed, combined with reckless indifference to human life." Because I.C. § 19-2515(9)(g) is basically a codification of *Enmund* and *Tison* that further narrows the felony-murder aggravator, there is no constitutional violation as found in *Loving*.

Hall also misconstrues the Idaho Supreme Court's decision by stating the court "held that the only constitutional narrowing requirement is that an aggravator not apply to *literally every* first-degree felony murder." (Pet., p.28) (emphasis in original). The state court actually stated that I.C. § 19-2515(9)(g) "may apply to many murderers, but it certainly does not apply to every first-degree murder—which is all the narrowing required by *Tuilaepa*." (Pet's App., p.57a.) This is the very language used in *Tuilaepa*, when this Court explained that aggravating circumstances must meet two requirements, the first being that "the circumstances may not apply to every defendant convicted of a murder." 512 U.S. at 972.

Hall's final argument appears to be based upon the disproportionality resulting from allegedly making

every felony-murderer eligible for the death penalty while not including others. (Pet., pp.29-31.) However, "it is well settled that under the Eighth Amendment death is not a disproportionate punishment for felony murder so long as the defendant in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used, or the defendant was a major participant in the felony and exhibited reckless indifference to human life." *Middlebrooks*, 840 S.W.2d at 349 (Drowota, J., concurring and dissenting) (citing *Tison*, 481 U.S. at 158; *Enmund*, 458 U.S. at 797).

Justices Stevens and Ginsburg have recognized that the risks of not sufficiently narrowing the class of individuals "can never be entirely eliminated," and discussed the necessity of "requiring the jury to make an individualized determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa*, 512 U.S. at 982-83 (Stevens, J., concurring). Therefore, even if the narrowing capacity of the felony-murder aggravator is "largely theoretical," as opined in *McConnell*, 102 P.3d at 623, that "theoretical" narrowing is sufficient based upon Hall's ability to have the jury "consider all evidence relevant to a fair sentencing decision," *Tuilaepa*, 512 U.S. at 983.

When Idaho's capital sentencing procedures are viewed as a whole—which includes a bifurcated proceeding, consideration of mitigating circumstances, requiring the jury to determine whether the collective mitigation makes imposition of the death penalty unjust, and mandatory review by the Idaho Supreme Court—it fulfills the mandate required under this

Court's capital jurisprudence, and eliminates the concern espoused in *Furman v. Georgia*, 408 U.S. 238 (1972), that capital sentencing procedures not create a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner.

III.
This Is Not An Appropriate Case To Resolve These Questions

Hall initially contends this Court has previously "recognized the importance of the questions raised in this case by granting review" on Tennessee's felony-murder aggravator in *Tennessee v. Middlebrooks*, 507 U.S. 1028 (1993). (Pet., p.31.) However, after oral argument, the Court concluded that certiorari was improvidently granted. *Tennessee v. Middlebrooks*, 510 U.S. 124 (1993). While Hall hypothesizes the Court's reasoning was based upon the contention that the Tennessee Supreme Court's decision relied on both the Tennessee and United States Constitutions, it is just as likely the Court concluded the question did not involve an important question of federal law or provide any other compelling reason to decide the question. Moreover, because the federal circuits are in unison regarding felony-murder aggravators and it appears there has only been one state court outlier to decide otherwise—*McConnell*—there is no reason for this

Court to now resolve the felony-murder aggravator in Hall's case.[3]

Assuming there is a split with Nevada as a result of *McConnell*, Hall's case is not an appropriate vehicle to decide this question because Hall was also found guilty of premeditated murder. (Pet's App., p.185a.) In *McConnell*, 102 P.3d at 620, the Nevada Supreme Court still affirmed the defendant's sentence because he pled guilty to both felony-murder and premeditated murder. Therefore, the court recognized that the felony-murder aggravator did not impact the conviction for premeditated murder.

Moreover, assuming just one of Idaho's statutory aggravators is constitutional, any alleged error would be harmless because, in Idaho, the jury is required to weigh the collective mitigation against the statutory aggravators individually. *State v. Charboneau*, 774 P.2d 299, 323 (Idaho 1989). "When such an analysis is followed, the invalidation of one or more of the aggravating circumstances has no effect on the validity of the sentence imposed; the court has already determined that any one of the aggravating circumstances standing alone outweighs all the mitigating circumstances, thus justifying the death sentence." *State v. Hairston*, 988 P.2d 1170, 1184 (Idaho 1999). Therefore,

[3] The state suggests that Nevada did not seek certiorari in *McConnell* because the defendant's death sentence was actually affirmed since he was also convicted of premeditated murder, and Nevada did not even brief the issue before the Nevada Supreme Court. 102 P.3d at 620 & n.36.

Hall's reliance upon *Brown v. Sanders*, 546 U.S. 220 (2002), is inapposite. (Pet., p.34.)

The jury found four statutory aggravators and properly weighed the collective mitigation against each statutory aggravator individually. (Pet's App., pp.188a-192a.) Because this Court found Idaho's utter disregard aggravator constitutional in *Creech*, 507 U.S. at 471-78, and the advent of jury sentencing did not change that analysis, any alleged error associated with any of the three remaining aggravators would be harmless under *Chapman v. California*, 386 U.S. 18, 24 (1987), which requires the state to establish that any error "was harmless beyond a reasonable doubt."

As Justice Sotomayor recognized in *Carr*, 136 S.Ct. at 647 (Sotomayor, J., dissenting) (quotation and citation omitted), "Even where a state court has wrongly decided an important question of federal law, we often decline to grant certiorari, instead reserving such grants for instances where the benefits of hearing a case outweigh the costs of so doing." Those costs include issuing opinions that have little effect if a lower court is able to reinstate its holding as a matter of state law. Because Hall was also convicted of premeditated murder, the felony-murder aggravator is irrelevant in his case, and if there is just one valid statutory aggravator, any alleged error would be harmless beyond a reasonable doubt.

CONCLUSION

The state respectfully requests that Hall's Petition for a Writ of Certiorari be denied.

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Respectfully submitted,

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