IN THE SUPREME COURT OF FLORIDA
CASE NO. SC16-224

ENOCH D. HALL,

Petitioner,

v.

JULIE JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ETC.,

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

PAMELA JO BONDI
ATTORNEY GENERAL

STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 050218

Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
CapApp@MyFloridaLegal.com
Stacey.Kircher@MyFloridaLegal.com
Telephone (386)238-4990
Facsimile (386)226-0457

COUNSEL FOR RESPONDENT

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondents, by and through undersigned counsel, and respond as follows to Hall's petition for a writ of habeas corpus which was filed on February 4, 2016. For the reasons set out below, Respondents move this Honorable Court to deny the petition.

RESPONSE TO PRELIMINARY STATEMENT

The "Preliminary Statement" found on page 1 of the petition correctly refers to Article 1, Section 13 of the Florida Constitution. The citation form and abbreviations used in the petition are accurately described. Petitioner's claims of error are denied.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

The Respondents defer to the Court's judgment as to whether oral argument is necessary or justified in this case.

RESPONSE TO INTRODUCTION

Petitioner's claims of deficiency, prejudice, and error are denied. The standard of review for a habeas petition is correctly cited in *Freeman v. State/Singletary*, 761 So. 2d 1055, 1069 (Fla. 2000), which states:

> The issue of appellate counsel's effectiveness is appropriately raised in a petition for writ of habeas corpus. However, ineffective assistance of appellate counsel may not be used as a disguise to raise issues which should have been raised on direct appeal or in a postconviction

motion. In evaluating an ineffectiveness claim, the court must determine

> whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result.

Pope v. Wainwright, 496 So. 2d 798, 800 (Fla. 1986). *See also Haliburton*, 691 So. 2d at 470; *Hardwick*, 648 So. 2d at 104. The defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based. *See Knight v. State*, 394 So. 2d 997 (Fla.1981). "In the case of appellate counsel, this means the deficiency must concern an issue which is error affecting the outcome, not simply harmless error." *Id.* at 1001. In addition, ineffective assistance of counsel cannot be argued where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *See Medina v. Dugger*, 586 So. 2d 317 (Fla. 1991); *Atkins v. Dugger*, 541 So.2d 1165, 1167 (Fla. 1989) ("Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points.").

Freeman v. State/Singletary, 761 So. 2d 1055, 1069 (Fla. 2000). Hall is not entitled to a second appeal, and a habeas petition is not for that purpose. *Miller v. State/Jones*, 161 So. 3d 354, 384 (Fla. 2015) ("Petitions for habeas corpus relief may not be used as a second appeal for substantive issues that have already been raised or that are procedurally barred").

RESPONSE TO JURISDICTION

In this original action, the Petitioner raises a claim challenging the constitutionality of his convictions and sentences and the judgment of this Court. Provided Hall articulates a valid claim, this Court would have jurisdiction under Article V, Section 3(b)(9) of the Florida Constitution. *See also Reynolds v. State,* 99 So. 3d 459, 465 (Fla. 2012), *Fla. R. App. P*. 9.030(a)(3), *Fla. R. App. P*. 9.100(a). Nevertheless, Hall is not entitled to habeas relief.

RESPONSE TO GROUNDS

Petitioner contends that his capital conviction and sentence of death were obtained and affirmed in violation of his rights under the "Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution." (*Petition* at 4). This serial listing of amendments to the Constitution of the United States does nothing to narrow, focus or identify the claims contained in the *Petition,* and leaves the Respondent and the Court to speculate about what Hall is actually claiming as a basis for relief. For example, Claims I-VII are all Sixth Amendment claims of ineffectiveness of counsel – such claims are governed by the well-settled *Strickland v. Washington* standard. If there is any other constitutional basis for Claims I-VII, such basis is not identified in the *Petition*. These claims were addressed by the circuit court upon the denial of post-conviction relief, where the

postconviction court properly identified and applied the controlling *Strickland v. Washington* standard. Respondents deny any error.

RESPONSE TO PROCEDURAL HISTORY

Petitioner's procedural history and underlying facts are incomplete and denied. Respondent relies on this Court's summary of the facts as detailed in its 2012 direct appeal decision affirming Hall's conviction and death sentence:

> **OVERVIEW**
>
> Enoch D. Hall was convicted of the first-degree murder of Officer Donna Fitzgerald. Fitzgerald's body was found in the paint room at Tomoka Correctional Institute (TCI). She had been stabbed, strangled by ligature, and suffered blunt force trauma to her head. Hall, an inmate at TCI, was apprehended by TCI personnel. Hall continued to repeat "I freaked out. I snapped. I killed her." Hall was indicted by a grand jury for the murder. A jury returned a verdict of guilty of first-degree murder and recommended that Hall be sentenced to death by a unanimous vote. This is Hall's direct appeal.
>
> **FACTS AND PROCEDURAL HISTORY**
>
> On July 10, 2008, Enoch Hall was indicted by the grand jury for the murder of Florida Department of Corrections Officer Donna Fitzgerald. Hall was an inmate at TCI, who worked as a welder in the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (PRIDE) compound,[1] where inmates work refurbishing vehicles. Sergeant Suzanne Webster was working as the TCI control room supervisor, where she was responsible for getting a count from all areas of the prison as to the number of inmates in each area. When Webster had not heard from Fitzgerald, who was working in the PRIDE compound that night, Webster radioed Officer Chad Weber, who went to the PRIDE facility with Sergeant Bruce MacNeil to search for Fitzgerald. Weber saw Hall run through an open door on the other end of one of the PRIDE buildings and Weber and MacNeil pursued Hall. Weber caught up to Hall, who repeatedly stated "I freaked out. I snapped. I killed her." Hall responded to Weber's

commands and placed his hands on the wall and was handcuffed. Weber took possession of the PRIDE keys that Hall had in his hands. Officer Chad Birch shouted from inside the building, "Officer down!" and Hall remained outside with other officers while Captain Shannon Wiggins and Officers Weber and MacNeil entered the building and located Fitzgerald's body. Fitzgerald's body was found lying face down on top of a cart in the paint room. The upper part of her body was wrapped in gray wool blankets, and the bottom half of her body came over the back of the cart, with her pants and underwear pulled down to her knees. Inside a bucket of water that was on the floor next to Fitzgerald's legs was Hall's bloody T-shirt. Hall was escorted to the medical facility (MTC) of the prison by Officers Brian Dickerson and Gary Schweit. Several officers took turns watching Hall while he sat in the MTC. Hall was later escorted to a conference room to talk with investigators from the Florida Department of Law Enforcement (FDLE) and then to a cell. Hall gave three statements to FDLE agents throughout the night regarding the events of the murder.

> [FN1] The PRIDE compound consists of numerous outbuildings and one main bay area.

Guilt Phase

A jury trial commenced on October 12, 2009. Daniel Radcliffe, a crime scene investigator for FDLE, testified that he found two packets of pills in a file cabinet in the paint room of PRIDE where the body was discovered. The pill packets had an inmate's name on them, Franklin Prince, and were labeled Ibuprofen 800 milligrams and Carbamazepine, a generic equivalent of Tegretol, 200 milligrams, an anti-seizure medication. Hall's white T-shirt was found in a bucket of water with other shirts in the paint room, and Hall's pants were found in a pile of clothes, also in the paint room. Months later, Hall's blue prison shirt was found lodged on top of a paint booth. Granules of Speedy Dry, an oil absorbent material, were found on the ground in front of the welding shed and in a coffee can next to the shed. The granules tested positive for blood and DNA testing confirmed that it was Fitzgerald's. A broom found nearby had Fitzgerald's blood on the broom head. Blood was found on the walls of the welding shed. Also found in the welding shed was a cap, which had Fitzgerald's blood on it. Hall's clothes, including his underwear, tested positive for

Fitzgerald's blood. A sexual assault analysis was performed on Fitzgerald's body. Jillian White, a crime lab analyst with the FDLE, testified that there was no evidence of semen on the body. Wiggins testified that he was a commander of the TCI rapid response team and as part of his job would search prisons for weapons. Wiggins testified that shanks made in the PRIDE facility differed from the usual ones made by inmates in that they had a machined edge made by a grinder. Wiggins testified that the shank recovered from the wall of the paint room which appeared to be the murder weapon had a meticulously sharpened point like those made from a tool grinder in the PRIDE facility.

The State played the three confessions Hall made on the night of the murder. In the first statement, given to FDLE agents and TCI personnel, Hall admitted to killing Fitzgerald and stated that he had taken four pills that Frank Prince, another inmate working in PRIDE, had given to him. Later that day, when his shift ended, Hall went looking for more pills, but was unable to find any and became angry. Officer Fitzgerald came in and laughed and called Hall by his nickname, "Possum, come on, get out of there." Hall told her to get out. Fitzgerald grabbed Hall's arm and he "freaked out" and began to stab her with a sharp piece of metal that he found on the floor of the room. Hall then took off his bloody shirt, put it in a bucket of water, and put on one of Prince's shirts. He picked up the PRIDE keys and continued to look for pills. Hall stated that he did not remember pulling Fitzgerald's pants down. Hall said that he did not want to have sex with Fitzgerald. Hall repeatedly stated that he just wanted to get high.

The second statement, given at about 1:30 a.m., was taken by Agent Stephen Miller of the FDLE upon Hall's request in the cell in which Hall had been placed. During this interview, Hall admitted that he killed Fitzgerald somewhere other than the room where she was found. Fitzgerald found Hall searching for pills in the office. He ran out past her, she chased him to the welding shed, and he stabbed her there. Hall carried her to the office and placed her on the cart. Hall said he threw some dirt on the blood outside the welding shed. Hall told Miller that he hid the knife in a cinderblock wall near the welding shed. Hall also told Miller he did not think he was "going to make it

to tomorrow." Miller told Hall that he would transport him to the branch jail in a little while.

The third statement was given at about 3:30 a.m. and was made only to the FDLE agents. In this third statement, Hall agreed that in his first statement he said he killed Fitzgerald inside the PRIDE building, but in his second statement he admitted to killing her in the welding area outside the PRIDE building. Hall admitted that he stayed behind in the PRIDE compound to look for drugs. While looking for drugs, Hall found the shank by the sink in Prince's office and took it with him. When he realized Fitzgerald was looking for him, Hall hid inside the welding shed. Fitzgerald opened the shed door and came in and tried to grab him. He tried to run past her, but she would not let go, so he stabbed her. Hall did not recall how many times he stabbed her, but said he stabbed her enough times "just to get by." Fitzgerald fell to the ground inside the shed; he did not know whether or not she was alive. He hid the shank in the wall and spread some Speedy Dry on the ground in the welding area to soak up the blood. Hall wrapped her up in a towel and blankets and carried her back to the paint room/office. Hall placed her on a cart. He then continued to look for pills, but was not able to find any. Hall went back to the room where Fitzgerald was and pulled down her pants. He did not sexually assault her. Hall said he put his shirt in a bucket of water, put on Prince's shirt, but kept on his own pants. Corrections officers entered the PRIDE facility and he attempted to run from them.

Dr. Predrag Bulic, the Volusia County associate medical examiner, testified for the State about the injuries Fitzgerald sustained based on her autopsy results. He testified that Fitzgerald's body bore evidence of blunt force injuries, mostly on her face, consistent with those caused by punches from a hand. Fitzgerald's hands and arms had sustained defensive wounds caused by a sharp instrument consistent with a knife. Fifteen additional stab wounds were inflicted upon Fitzgerald, including on her stomach, back, and chest. Dr. Bulic also testified that a gold chain necklace on Fitzgerald's body had been pulled tightly around her mouth and neck from behind in a manner so as to exert sufficient force to leave a postmortem mark consistent with ligation. On October 23, 2009, Hall was convicted of first-degree murder.

Penalty Phase

The penalty phase commenced on October 27, 2009. The defense renewed its previously argued motion to preclude the State from offering evidence of the length of Hall's sentences he was serving when he killed Fitzgerald. The trial court denied the motion and the State offered evidence that Hall was serving two consecutive life sentences when he murdered Fitzgerald.

The State also offered evidence that Hall had committed prior violent felonies, introducing testimony from two women whom Hall had raped. The defense objected to the testimony of the two women as highly prejudicial and irrelevant. The trial court overruled the objection and allowed the testimonies.

Victim impact statements were published for the jury. Donald and Dana Shure, Officer Fitzgerald's younger brother and sister, prepared written statements and read them to the jury. Joanne Dunn, Fitzgerald's mother, also read a statement to the jury.

The defense presented several witnesses during the penalty phase to support mitigation. James Hall, Hall's father, testified that Hall was a good son and got along well with his two younger brothers. He also testified that Hall had been raped in jail at age 19, when his girlfriend's mother's boyfriend, a law enforcement officer, arranged to have him put in jail after a dispute. After his release, Hall became afraid and mostly stayed home, and he eventually started living in a shelter in the woods. James Hall had not seen his son since 1995. Hall's mother, Betty Hall, also testified regarding her son's love for sports growing up. Dr. Reid Hines, a dentist, testified telephonically that he and Hall had played sports together in high school and that Hall was an excellent athlete. Bruce Hall, the former plant manager for PRIDE, testified that Hall started at PRIDE as an apprentice welder and eventually worked his way up to lead welder. Rodney Callahan, an inmate who used to work with Hall, described him as a very good worker, conscientious, and responsible.

Dr. Daniel Buffington, a pharmacologist, testified for the defense that, among other possible side effects, both Ibuprofen and Tegretol have

the capacity to alter someone's behavior. The State called Dr. Wade Myers on rebuttal, who testified that most people who take an overdose of Ibuprofen do not have any side effects and the remaining people typically complain of nausea, and that Tegretol has an anti-aggression component to it, and, in his opinion, it "would be very unlikely" to cause aggression—"You're going to get the opposite effect."

The jury returned a recommendation of death by a unanimous vote.

Spencer [2] Hearing

In support of the defense's contention that Hall should receive the emotionally and mentally disturbed statutory mitigator, Dr. Harry Krop testified for the defense that Hall had a cognitive disorder, not otherwise specified, coercive paraphilia disorder-multiple sexual offender, and an alcohol substance abuse disorder. Krop testified that Hall had a serious emotional disorder at the time of the offense and that Hall's ingestion of Tegretol could bring out his underlying psychological traits.

[FN2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

The State offered rebuttal testimony from Dr. William Riebsame, a forensic psychologist and professor of psychology, and Dr. Jeffery Danziger, a board certified forensic psychiatrist. Riebsame testified that the results of the tests administered to Hall by Krop were questionable, because Krop failed to test for malingering. Danziger testified that he administered two tests to determine whether Hall was mentally ill or was malingering. A score of more than 14 is highly correlated with malingering and Hall's score was 29. Danziger arrived at the opinion that Hall has a history of substance abuse, adult anti-social behavior, history of sexually-related charges, possible psychosexual disorder, and pseudo-seizure disorder by history. Danziger strongly disagreed with any attempt by Buffington to diagnose a psychological condition and disagreed with Buffington's opinion that Tegretol could unmask an underlying psychological illness. The trial court found that Hall did not establish the existence of mental or emotional disturbance as a statutory mitigating circumstance and gave it no weight.

> In the trial court's Sentencing Order, the court found five aggravators: (1) previously convicted of a felony and under sentence of imprisonment—great weight; (2) previously convicted of another capital felony or of a felony involving the use or threat of violence to the person—great weight; (3) committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws—great weight; (4) especially heinous, atrocious or cruel—very great weight; (5) cold, calculated, and premeditated—very great weight; (6) the victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties—no weight—merged with aggravator number 3 as listed above. In mitigation, the sentencing court found no statutory mitigators and eight non-statutory mitigating circumstances: (1) Hall was a good son and brother—some weight; (2) Hall's family loves him—little weight; (3) Hall was a good athlete who won awards and medals—little weight; (4) Hall was a victim of sexual abuse—some weight; (5) Hall was productively employed while in prison—some weight; (6) Hall cooperated with law enforcement—some weight; (7) Hall showed remorse—little weight; and (8) Hall displayed appropriate courtroom behavior—little weight. The trial court concluded that the aggravating circumstances far outweighed the mitigation and gave great weight to the jury's unanimous recommendation of death. Thus, the trial court imposed the sentence of death. This direct appeal followed.

Hall v. State, 107 So. 3d 262, 267-71 (Fla. 2012).

ISSUES RAISED ON APPEAL

As framed by this Court, Hall raised the following issues on direct appeal:

> (1) Whether the trial court properly denied Hall's motion to suppress his confessions;
>
> (2) Whether the trial court erred by admitting opinion testimony of the medical examiner regarding the sequence of wounds and the position of the victim;
>
> (3) Whether the trial court erred in admitting prior crime evidence

during the penalty phase (and whether the State's argument in penalty phase closing about the prior crimes constituted fundamental error);

(4) Whether the trial court erred in admitting evidence of non-statutory aggravating circumstances;

(5) Whether the death sentence is proportionate (and specifically whether the trial court erred in finding the HAC and CCP aggravators); and

(6) Whether Florida's death sentencing scheme is unconstitutional under *Ring*.[3]

[FN3] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

Hall, 107 So. 3d at 271. This Court also reviewed the sufficiency of the evidence to support Hall's conviction and the proportionality of his death sentence. This Court rejected claims (1) through (4) and claim (6) in their entirety. *Id*. at 273-77, 280. This Court struck the CCP aggravator but found that its application to Hall's death sentence was harmless beyond a reasonable doubt. *Id*. at 278-79. This Court rejected the remainder of Hall's arguments about aggravation, mitigation, and proportionality in claim (5). *Id*. at 275-77, 279. This Court affirmed Hall's conviction and death sentence. *Id*. at 281. Hall's *Petition for Writ of Certiorari* to the United States Supreme Court was denied on October 7, 2013. *Hall v. Florida*, 134 S.Ct. 203 (2013).

POSTCONVICTION PROCEEDINGS

Hall filed a Motion to Vacate Judgment of Conviction and Sentence

pursuant to *Fla. R. Crim. P*. 3.851 on September 17, 2014, raising eleven (11) claims with subclaims:

> (1) Whether trial counsel was ineffective for failing to challenge a juror for cause during voir dire;
>
> (2) Whether trial counsel was ineffective at the guilt phase in the investigation and development of a defense and in challenging the State's case at Hall's trial;
>
> (3) Whether trial counsel was ineffective for not objecting to the testimony of Frederick Evins;
>
> (4) Whether trial counsel was ineffective in the investigation of Hall's family history;
>
> (5) Whether trial counsel was ineffective in the presentation of Dr. Krop's testimony;
>
> (6) Whether trial counsel was ineffective in his penalty phase argument regarding statutory mental health mitigation;
>
> (7) Whether trial counsel was ineffective in the penalty phase regarding the case in mitigation presented;
>
> (8) Whether cumulative error entitles Hall to relief;
>
> (9) Whether the statutory instruction to the jury regarding its role in capital sentencing is facially vague and overbroad by unconstitutionally diluting the jury's sense of responsibility in the sentencing process and whether trial counsel was ineffective for failing to litigate the issue;
>
> (10) Competency to be Executed; and
>
> (11) Whether Florida's capital sentencing statute is unconstitutional on its face and as applied and whether trial counsel was ineffective in litigating this issue.

(R1188-1266). The State responded. (R1391-1434). The circuit court held a case management conference on January 27, 2015. (R112-150). The court issued an order granting an evidentiary hearing on Claims I through VIII, and ruled that Claims IX through XI would be decided at the conclusion of the evidentiary hearing. (V2, R1507-1508).

An evidentiary hearing was held May 4-7, 2015. (R151-1052). Hall's motion for postconviction relief was denied on July 8, 2015, (R2254-2281) and his motion for rehearing was denied on August 7, 2015. (R2283-2286). A notice of appeal was filed on September 2, 2015. (R2292-2293). Hall filed his *Initial Brief* appealing the post-conviction court's denial of his motion to vacate along with a petition for writ of habeas corpus on February 4, 2016. This *Response* follows.[1]

ARGUMENT

LEGAL STANDARD FOR STATE HABEAS PETITIONS

In raising a state habeas claim, "[t]he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based." *Freeman* v. *State,* 761 So. 2d 1055, 1069 (Fla.

[1] The State's *Answer Brief* in Case No. SC15-1662, Hall's appeal from the denial of post-conviction relief, contains a detailed summary of facts and procedural history and is being submitted along with the instant response.

2000) (citing *Knight* v. *State*, 394 So. 2d 997, 1001 (Fla. 1981)).

> Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel. *See Thompson* v. *State*, 759 So. 2d 650, 660 (Fla. 2000); *Teffeteller* v. *Dugger*, 734 So. 2d 1009, 1026 (Fla. 1999).
>
> When analyzing the merits of the claim, "[t]he criteria for proving ineffective assistance of appellate counsel parallel the *Strickland* standard for ineffective trial counsel." *Wilson* v. *Wainwright*, 474 So. 2d 1162, 1163 (Fla. 1985). Thus, this Court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited to those situations where the petitioner establishes first, that appellate counsel's performance was *deficient* because "the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance" and second, that the petitioner was *prejudiced* because appellate counsel's deficiency "compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Thompson*, 759 So. 2d at 660 (emphasis supplied) (quoting *Groover* v. *Singletary*, 656 So. 2d 424, 425 (Fla. 1995)); *see, e.g., Teffeteller*, 734 So. 2d at 1027. If a legal issue "would in all probability have been found to be without merit" had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. *Williamson* v. *Dugger*, 651 So. 2d 84, 86 (Fla. 1994); *see, e.g., Kokal* v. *Dugger*, 718 So. 2d 138, 142 (Fla. 1998); *Groover*, 656 So. 2d at 425. This is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. *See, e.g., Groover*, 656 So. 2d at 425; *Medina* v. *Dugger*, 586 So. 2d 317, 318 (Fla. 1991).

Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000). Stated differently:

> In order to grant habeas relief on the basis of ineffective assistance of appellate counsel, this Court must determine "first, whether the alleged omissions are of such magnitude as to constitute a serious

> error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995) (quoting *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986)); *see, e.g., Teffeteller v. Dugger*, 734 So. 2d 1009, 1027 (Fla. 1999).

Thompson v. State, 759 So. 2d 650, 660 (Fla. 2000).

Appellate counsel need not raise every conceivable claim on appeal to be effective. *Freeman*, 761 So. 2d at 1070; *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990).

Habeas relief based on appellate counsel's ineffectiveness "is limited to those situations where the petitioner establishes first, that appellate counsel's performance was deficient and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result." *Davis v. State/Crosby*, 928 So. 2d 1089, 1126 (Fla. 2005).

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision. *Strickland v. Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Smith v. State*, 457 So. 2d 1380 (Fla. 1984).

Johnson v. Wainwright, 463 So. 2d 207, 209 (Fla. 1985). Further, in order to grant habeas relief on the basis of ineffectiveness of appellate counsel, this Court must determine whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result. *Simmons v. State*, 105 So. 3d 475, 512 (Fla. 2012) (citing *Pope v. Wainwright*, 496 So.2d 798, 800 (Fla.1986)).

CLAIM I: HALL WAS ACCORDED EFFECTIVE APPELLATE COUNSEL; BOTH A *CALDWELL*[2] CLAIM AND A UNANIMITY CLAIM WOULD HAVE BEEN MERITLESS ON DIRECT APPEAL. (RESTATED)

In his first ground for relief, Hall makes the argument that his appellate counsel was deficient on direct appeal for both failing to raise a claim that the standard jury instructions diminished the jury's sense of responsibility because its sentence was advisory, and for failing to argue that the Eighth Amendment requires a unanimous death recommendation. (*Petition* at 7). Such arguments are an attempt to re-litigate the direct appeal. "[C]laims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been

[2] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

raised on direct appeal or in a postconviction motion." *Rutherford,* 774 So. 2d at 643 (citing *Thompson,* 759 So. 2d at 657 n. 6; *Hardwick v. Dugger*, 648 So. 2d 100, 106 (Fla. 1994); *Breedlove v. Singletary,* 595 So. 2d 8, 10 (Fla. 1992)). However, both of these issues, even if properly presented in this habeas petition, are meritless nonetheless.

Primarily, to the extent Hall is arguing a theory of ineffectiveness of his appellate counsel for failing to challenge the non-unanimity clause in Florida's death penalty sentencing statute, such a claim would not have been compelling on direct appeal because **Hall's jury recommended death by unanimous vote.**

To the extent Hall is arguing a theory of ineffectiveness of his appellate counsel for failing to challenge Florida's standard jury instructions as to the word "advisory," such a claim would have been meritless if raised on direct appeal. This issue was not preserved for appeal because there was no contemporaneous objection during the delivery of the jury instructions. (DAR, V35, R3584; 3596). *Phillips v. Dugger*, 515 So. 2d 227, 227-28 (Fla. 1987) (holding that a *Caldwell* claim presented in a habeas petition was procedurally barred because trial counsel did not object to these comments at the time they were made, and his direct appeal did not argue that the jury was in any way adversely influenced by them.) The failure to object to this issue at trial and to raise it on direct appeal means the claim is procedurally barred.

This Court made clear in *Coday v. State*, 946 So. 2d 988, 995 (Fla. 2006) that "[i]ssues pertaining to jury instructions are not preserved for appellate review unless a specific objection has been voiced at trial." *Overton v. State*, 801 So. 2d 877, 901 (Fla. 2001); *see also State v. Delva*, 575 So. 2d 643, 644 (Fla. 1991) (holding that instructions are subject to the contemporaneous objection rule, and, absent an objection at trial, can be raised on appeal only if fundamental error occurred). Here, like in *Coday*, trial counsel argued a motion at the charge conference and renewed his objections generally[3] but failed to raise a contemporaneous objection, so the *Caldwell* issue was not preserved. (*See* DAR, V35, R3502-3505; 3584). There can be no ineffective assistance of appellate counsel where the issue was not preserved for appeal or where the appellate attorney chose not to argue the issue as a matter of strategy. *Freeman v. State*, 761 So. 2d 1055, 1069 (Fla. 2000).

Lack of preservation aside, appellate counsel cannot be ineffective for failing to raise a meritless claim. *Simmons v. State*, 105 So. 3d at 512. *Caldwell*

[3] Trial counsel seems to renew his objections specifically to the instructions pertaining to aggravators and "due process, equal protection and a fair trial," but arguably, does not renew his *Caldwell* objection at the conclusion of the charge conference. (DAR, V35, R3546). Admittedly however, there was a lengthy charge conference and quite a bit of confusion among the attorneys as to the new standard jury instructions that had been released that day, and trial counsel attempted to make several relevant objections, without much success. (*See* DAR, V35, R3462-3547).

held that it is unconstitutional "to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Specifically, *Caldwell* condemned a prosecutor's argument—rather than a court instruction—that misled the jury as to its responsibility in sentencing. This Court has consistently rejected *Caldwell* challenges to Florida's standard jury instructions claiming that the word "advisory" unconstitutionally diminishes the jury's sense of responsibility. *Smith v. State*, 151 So. 3d 1177 (Fla. 2014).

Regarding instructing the jury on its advisory role in recommending a sentence, this Court maintained in *Snelgrove v. State*, 107 So. 3d 242, 255 (Fla. 2012), *as revised on denial of reh'g* (Jan. 31, 2013) that jury instructions that track the standard, approved jury instructions and adequately address the role of the penalty phase jury are proper, *citing Phillips v. State*, 39 So. 3d 296, 304 (Fla. 2010), which held:

> This Court has repeatedly rejected claims that the standard jury instructions impermissibly shift the burden to the defense to prove that death is not the appropriate sentence or that these instructions unconstitutionally denigrate the role of the jury in violation of *Caldwell v. Mississippi* [, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)]." *Chavez v. State*, 12 So. 3d 199, 214 (Fla. 2009) (citing *Taylor v. State*, 937 So. 2d 590, 599 (Fla. 2006)) (citing *Elledge v. State*, 911 So. 2d 57, 79 (Fla. 2005); *Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005); *Sweet v. Moore*, 822 So. 2d 1269, 1274 (Fla. 2002)). As this Court has stated, "[T]he standard jury instructions fully advise the jury of the importance of its role, correctly state the

> law, and do not denigrate the role of the jury." *Reese v. State,* 14 So. 3d 913, 920 (Fla. 2009) (quoting *Barnhill v. State,* 971 So. 2d 106, 117 (Fla. 2007).

Phillips, at 304 (quoting *Reese v. State,* 14 So. 3d 913, 920 (Fla. 2009)).

As stated by this Court in *Rigterink v. State*, 66 So. 3d 866, 897 (Fla. 2011):

> Given this Court's prior rulings in this area, instructing the jury in accordance with Florida's standard penalty-phase instructions did not result in error and, consequently, this claim is without merit. This Court has consistently rejected similar claims. *See, e.g., Mansfield*, 911 So. 2d at 1180; *Sochor*, 619 So. 2d at 291; *Turner*, 614 So. 2d at 1079. Informing the jury that its recommended sentence is "advisory" is a correct statement of Florida law and does not violate *Caldwell*. *See, e.g., Combs v. State*, 525 So. 2d 853, 855–58 (Fla. 1988).

Rigterink v. State, 66 So. 3d at 897. *Accord Brown v. State*, 126 So. 3d 211, 221 (Fla. 2013), *reh'g denied* (Nov. 13, 2013), *cert. denied*, 134 S. Ct. 2141, 188 L. Ed. 2d 1130 (2014); *Patrick v. State,* 104 So. 3d 1046, 1064 (Fla. 2012).

Petitioner is not entitled to relief because the jury was properly instructed. Instructing the jury that its sentencing recommendation was advisory and that the judge would be the ultimate sentencer was an accurate statement of Florida law at the time Hall was convicted and sentenced. This Court has consistently held that the standard penalty phase jury instructions fully advised the jury of the importance of its role, correctly stated the law, did not denigrate the role of the jury, and did not violate *Caldwell*. *See Jones v. State/McNeil,* 998 So. 2d 573, 590 (Fla. 2008); *Brown v. State*, 721 So. 2d 274, 283 (Fla. 1998); *Perez v. State,* 919 So. 2d 347, 368 (Fla. 2005); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001);

Sochor v. State, 619 So. 2d 285, 291 (Fla.1993); *Combs v. State*, 525 So. 2d 853 (Fla.1988). Had appellate counsel raised this issue on direct appeal, this Court would have rejected it, as it has consistently rejected similar claims. "We have also repeatedly rejected objections based on *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), to Florida's standard jury instructions." *Mansfield v. State*, 911 So. 2d 1160, 1180 (Fla. 2005) (internal citations omitted). The trial judge informed the jury its advisory role would be given deference and attributed "great weight." He instructed the jury, ". . . a human life is a stake, and bring to bear your best judgment in reaching your advisory sentence." (DAR, V35, R3594; 3511-3512). The jury's sense of responsibility was not diminished nor was it led to believe the responsibility for determining Hall's sentence lay elsewhere. Therefore, there was no *Caldwell* violation, even viewed through the new lens of *Hurst*.

Hall has failed to show that appellate counsel seriously erred in declining to raise a *Caldwell* claim on direct appeal. *Valle v. Moore*, 837 So. 2d 905, 908 (Fla. 2002) (holding, "appellate counsel cannot be deemed ineffective for failing to raise nonmeritorious claims on appeal"). Had they been presented, such would be unavailing because the jury was properly instructed that its advisory role would be given "great weight" such that the instructions did not unconstitutionally diminish the jury's sense of responsibility in determining a sentence so there can be no

prejudice. *Pope v. Wainwright*, 496 So. 2d 798, 800 (Fla. 1986); *see also Lynch v. State*, 2 So. 3d 47, 84–85 (Fla. 2008). Appellate counsel was not ineffective, and Petitioner has proven neither deficiency nor prejudice as required under *Strickland* to be entitled to habeas relief. This Court should deny all relief on Ground I.

CLAIM II: HALL IS NOT ENTITLED TO RELIEF BECAUSE HE ATTACKED FLORIDA'S CAPITAL SENTENCING STATUTE ON DIRECT APPEAL AND HE IS NOT ENTITLED TO RELIEF UNDER *HURST*. (RESTATED)

In his second ground for relief, Hall makes several unsupported arguments. He claims that he is entitled to relief because (1) the circuit court erred in denying his constitutionality claim; (2) Florida's capital sentencing scheme deprives Hall of due process of law; (3) the death penalty constitutes cruel and unusual punishment on its face and as applied; (4) that Florida's death penalty statute violates Hall's Eighth Amendment rights because it allows for arbitrary and capricious imposition of the death penalty; (5) death by lethal injection constitutes cruel and unusual punishment; (6) Florida's statute does not define a standard of proof for aggravating and mitigating circumstances, does not define "sufficient," does not define what the judge's consideration of each should be; and finally (7) a *Ring/Hurst* claim. (*Petition* at 8-9). Hall also subsequently argues that Florida's capital sentencing procedure is (8) "faulty because it does not utilize the independent re-weighing of aggravating and mitigating circumstances envisioned

in *Profitt v. Florida*, 428 U.S. 242 (1976);" (9) aggravating circumstances have been applied in a "vague and inconsistent manner;" and (10) that Florida law creates a "presumption of death." (*Petition* at 10-11). However, none of these sub-claims regarding the constitutionality of Florida's death penalty statute is properly presented in this state habeas petition when the issues were already litigated at trial, on direct appeal, and in Hall's postconviction motion, and are meritless, in any event.

This claim is procedurally barred. Hall never makes the argument that his appellate counsel was ineffective for failing to raise these claims attacking Florida's death penalty statute. In fact, Hall's appellate counsel *did* raise the *Ring* claim he now claims entitles him to relief. Hall admits in his Petition that this claim was already raised on direct appeal stating, "*Hurst* applies to Mr. Hall especially in light of the fact that at trial and on direct appeal he preserved his Sixth and Eighth Amendment challenges to Florida's statute. R1124-1172/V8 and ROA – Initial Brief 4/4/11" (*Petition* at 10). Hall also raised this issue in his motion for postconviction relief, framed as, "[w]hether Florida's capital sentencing statute is unconstitutional on its face and as applied and whether trial counsel was ineffective in litigating this issue" which was denied by the circuit court. (R1188-1266; 2254-2281). *See Johnston v. State,* 63 So. 3d 730, 746 (Fla. 2011) (Finding Petitioner's claim is procedurally barred when it was already raised in direct

appeal); *Schoenwetter v. State*, 46 So. 3d 535, 562 (Fla. 2010) ("Because every argument raised in this portion of appellant's habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851, this claim is rejected as procedurally barred."); *Blanco v. Wainwright*, 507 So. 2d 1377, 1384 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.").

This Court decided Hall's *Ring* claim on direct appeal in the following way:

> Hall contends that Florida's death statute violates *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Ring*, the United States Supreme Court held that where an aggravating circumstance operates as the functional equivalent of an element of a greater offense in capital sentencing, the Sixth Amendment to the United States Constitution requires that the aggravating circumstance must be found by a jury. *Id.* at 602, 122 S.Ct. 2428. This Court has held that *Ring* does not apply to cases where the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable. *Victorino v. State*, 23 So. 3d 87, 107–08 (Fla. 2009). Hall qualified for both the prior violent felony and the under-sentence-of-imprisonment aggravators. We find Hall's claim without merit.

Hall v. State, 107 So. 3d at 280.

To the extent Hall is now arguing the recently decided *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst* has not been found to retroactively apply, and Hall's case was final on October 7, 2013. He is not entitled to any additional analysis of his *Ring* claim under *Hurst*.

When a constitutional rule is announced, its requirements apply to defendants whose convictions or sentences are pending on direct review or not otherwise final. *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). However, once a criminal conviction has been upheld on appeal, the application of a new rule of constitutional criminal procedure is limited. The Supreme Court has held that new rules of criminal procedure will apply retroactively only if they fit within one of two narrow exceptions.[4] *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004). In *Schriro v. Summerlin*, the Supreme Court directly addressed whether its decision in *Ring v. Arizona* was retroactive. *Summerlin*, 542 U.S. at 349. The Court held the decision in *Ring* was **procedural** and non-retroactive. *Id*. at 353. This was because *Ring* only "altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment." *Id*. The Court concluded its opinion stating: "The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as

[4] Those exceptions are: (1) a substantive rule that "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or if it prohibits a certain category of punishment for a class of defendants because of their status or offense"; and (2) a procedural rule which constitutes a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Teague v. Lane*, 489 U.S. 288, 310–13 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Butler v. McKellar*, 494 U.S. 407 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990)).

we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Summerlin*, 542 U.S. at 358. *See Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (holding *Crawford v. Washington*, 541 U.S. 36 (2004) was not retroactive under *Teague* and relying extensively on the analysis of *Summerlin*).

This Court has also already decided that *Ring* does not apply retroactively in Florida. Logically, no case applying *Ring*—such as *Hurst* – should apply retroactively. In *Johnson v. State*, 904 So. 2d 400, 412 (Fla. 2005), this Court comprehensively applied the *Witt* factors to determine that *Ring* was not subject to retroactive application. This Court concluded:

> We conclude that the three *Witt* factors, separately and together, weigh against the retroactive application of *Ring* in Florida. To apply *Ring* retroactively "would, we are convinced, destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state ... beyond any tolerable limit." *Witt*, 387 So. 2d at 929-30. Our analysis reveals that *Ring*, although an important development in criminal procedure, is not a "jurisprudential upheaval" of "sufficient magnitude to necessitate retroactive application." *Id*. at 929. We therefore hold that *Ring* does not apply retroactively in Florida and affirm the denial of Johnson's request for collateral relief under *Ring*.

Johnson v. State, 904 So. 2d at 412.

Ring did not create a new constitutional right. That right was created by the Sixth Amendment guaranteeing the right to a jury trial.[5] If *Ring* was not retroactive, then *Hurst* cannot be retroactive as *Hurst* is merely an application of *Ring* to Florida. In fact, the decision in *Hurst* is based on an entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*, and acknowledging that every federal circuit to consider the issue reached the same conclusion); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*, applying *Apprendi*'s "prototypical procedural rule" in various contexts are not retroactive); *Crayton v. United States*, 799 F.3d 623, 624-25 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 424 (2015) (holding that *Alleyne v. United States*, 133 S. Ct.

[5] The right to a jury trial was extended to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968). But, in *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*), the Court declined to apply the holding of *Duncan* retroactively. *Apprendi* merely extended the right to a jury trial to the sentencing phase, when the State sought to increase the maximum possible punishment. *Apprendi*, 530 U.S. at 494.

2151, 2156 (2013), which extended *Apprendi* from maximum to minimum sentences, did not, like *Apprendi* or *Ring*, apply retroactively); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).

Moreover, Petitioner would not have been entitled to any relief even if appellate counsel had raised the claim on direct appeal under the subsequently-decided *Hurst* because the Supreme Court specifically excluded from consideration cases in which one of the aggravators was a conviction for a prior violent felony. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). In *Franklin v. State*, 965 So. 2d 79, 101-02 (Fla. 2007), this Court held:

> Additionally, *Ring* did not alter the express exemption in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), that prior convictions are exempt from the Sixth Amendment requirements announced in the two cases. This Court has repeatedly relied on the presence of the prior violent felony aggravating circumstance in denying *Ring* claims. *See, e.g., Smith v. State*, 866 So. 2d 51, 68 (Fla. 2004) (denying relief on *Ring* claim and "specifically not[ing] that one of the aggravating factors present in this matter is a prior violent felony conviction"); *Davis v. State*, 875 So. 2d 359, 374 (Fla. 2003) (stating that "[w]e have denied relief in direct appeals where there has been a prior violent felony aggravator"); *Johnston v.*

> *State*, 863 So. 2d 271, 286 (Fla. 2003) (stating that the existence of a "prior violent felony conviction alone satisfies constitutional mandates because the conviction was heard by a jury and determined beyond a reasonable doubt"), *cert. denied*, 541 U.S. 946, 124 S.Ct. 1676, 158 L.Ed.2d 372 (2004); *Henry v. State*, 862 So. 2d 679, 687 (Fla. 2003) (stating in postconviction case that this Court has previously rejected *Ring* claims "in cases involving the aggravating factor of a previous violent felony conviction").

Franklin v. State, 965 So. 2d at 101-02.

To the extent it is relevant; Hurst was in a distinctly different position from Hall. *Hurst* presented the United States Supreme Court with a "pure" claim under *Ring*, where none of the established aggravating circumstances were identifiable as having come from a jury verdict. *Hurst*, 147 So. 3d at 445–47. In Florida, a defendant is *eligible* for a capital sentence if at least one aggravating factor applied to the case. *See Ault v. State*, 53 So. 3d 175, 205 (Fla. 2010); *Zommer v. State*, 31 So. 3d 733, 752-54 (Fla. 2010); *State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005). In Hall's case, a unanmious jury had already convicted him of prior violent felonies for kidnapping, sexual battery, and aggravated battery on a person over 65 against Grace Shelly; the sexual battery conviction against Rebecca Blocker; and the kidnapping against Dawn Dansforth, for which the certified convictions were introduced into evidence. Moreover, Hall was under the sentence of imprisonment of two consecutive life sentences at the time he murdered Corrections Officer Donna Fitzgerald. As a result of these aggravators, Hall became eligible for the

higher range penalty-death.

In *Alleyne*, 133 S. Ct. at 2162-63, the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime." In Florida, only one aggravating factor is necessary to support the higher range penalty-death. This Court has consistently rejected *Ring* claims where the defendant is convicted of a qualfying contemporaneous felony. *Ellerbee v. State*, 87 So. 3d 730, 747 (Fla. 2012). Unlike Hurst, Halls's death sentence eligibility is supported by unanimous jury findings. Each of these facts, independently, and considered together, remove Hall from any considerations under *Ring/Hurst.*

The United States Supreme Court recognized the distinction of an enhanced sentence supported by a prior conviction. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (permitting judge to impose higher sentence based on prior conviction); *Ring*, 536 U.S. at 598 n.4 (noting *Ring* does not challenge *Almendarez-Torres*, "which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence"); *Alleyne*, 133 S. Ct. at 2160 n.1 (affirming *Almendarez-Torres* provides valid exception for prior convictions). Consequently, this Court's well-established precedent that any *Ring* claim (or now *Hurst* claim) is meritless in the face of a prior qualifying felony conviction was not disturbed. Since Hall entered the penalty phase already

qualified for a death recommendation, any error could only be harmless, even if *Hurst* is found to retroactively apply. This line of authority was undisturbed by the recent decision in *Hurst*. *See also, Smith v. Florida,* 136 S.Ct. 980 (2016); *Hobart v. Florida,* 136 S.Ct. 1454 (2016).

Appellant takes the position that any *Hurst* error is structural and not subject to harmless error review. Because *Ring* is merely procedural, then a decision applying *Ring*, such as *Hurst*, could only be procedural. Harmless error review is available to a procedural rule. Moreover, the Court necessarily contemplated harmless error review in *Hurst* when the Court stated:

> Finally, we do not reach the State's assertion that any error was harmless. *See Neder v. United States*, 527 U.S. 1, 18-19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U.S. at 609 n.7."

Hurst, at 624.

Thus, if this Court were to find that *Hurst* applies retroactively, and somehow Hall was within the scope of the *Ring/Hurst* analysis, any error in sentencing Hall to death, contrary to Petitioner's position, would be subject to harmless error review in the context of a *Ring/Hurst* claim – which asks only whether a defendant's Sixth Amendment right to jury sentencing – was violated under the facts of his particular case. Given the facts of this case, any error this

Court could attribute to sentencing Hall to death could only be harmless.

Petitioner next presents the meritless argument that Section 775.082(2), *Florida Statutes* entitles Hall to an automatic life sentence. It is pivotal to note however, *Hurst* did not determine capital punishment to be unconstitutional; *Hurst* merely invalidated Florida's procedures for implementation, finding that they *could* result in a Sixth Amendment violation if the judge makes factual findings which are **not supported by a jury verdict**. *See, State v. Perry*, Case No. 5D16-516, (Fla. 5th DCA Mar. 16, 2016).[6] Section 775.082(2), *Florida Statutes* does not apply because it provides that life sentences without parole are mandated "[i]n the event the death penalty in a capital felony is held to be unconstitutional." This provision was enacted following *Furman v. Georgia*, 408 U.S. 238 (1972), in order to fully protect society in the event that capital punishment as a whole for capital felonies were to be deemed unconstitutional. *See Coker v. Georgia*, 433 U.S. 584

[6] "*Hurst* determined that Florida's procedure to impose the death penalty was unconstitutional, not the penalty itself. The Court recognized that section 775.082(1), Florida Statutes (2010), "does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.'" 136 S. Ct. at 622 (quoting §775.082(1), Fla. Stat. (2010)). In holding Florida's capital sentencing procedure unconstitutional, the Court was particularly concerned that "Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id*. We believe that *Hurst*'s holding is narrow and based solely on the Court's determination that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id*. at 619. Thus, we have no difficulty in concluding that *Hurst* struck the process of imposing a sentence of death, not the penalty itself." (*Slip op*. at 5).

(1977). In *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), this Court explained that following *Furman*, the Attorney General filed the motion requesting that this Court relinquish jurisdiction to the respective circuit courts for resentencing to life, taking the position that the death sentences were illegal sentences.[7] That is certainly not the case here.

Furman was a decision that invalidated all death penalty statutes in the country, with the United States Supreme Court offering nine separate opinions that left many courts "not yet certain what rule of law, if any, was announced." *Donaldson v. Sack*, 265 So. 2d 499, 565 n. 10 (Fla. 1972) (Roberts, C.J., concurring specially). The Court held that the death penalty, as imposed for murder and for rape, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The various separate opinions provided little guidance on what procedures might be necessary in order to satisfy the constitutional issues, and whether a constitutional scheme would be possible. The situation following *Furman* simply has no application to the limited procedural ruling issued by the Supreme Court in *Hurst*. *Hurst* merely prompted the change in procedure in sentencing a defendant to death, but did not

[7] It is also notable that this was before the time that either this Court or the United States Supreme Court had determined the appropriate rules for retroactivity, as in *Teague v. Lane*, 489 U.S. 288 (1989), and *Witt v. State*, 387 So. 2d 922 (1980).

constitutionally invalidate all prior death penalty cases.

A decision to commute Hall's sentence based on §775.082(2), *Fla. Stat*. would ignore the considerable interests of the citizens of this State and, in particular, victims' family members upon whom the emotional toll of such an action cannot be measured. Moreover, the flood of litigation that has already begun as a result of the *Hurst* decision would be exponentially amplified as every defendant sought relief, regardless of the finality of their sentences or the decades since their convictions. Hall has failed to present any valid claims to be entitled to habeas relief. This Court should deny all relief on Ground II.

CONCLUSION

Based on the foregoing authority and arguments, Respondents respectfully request that this Honorable Court deny Hall's petition for a writ of habeas corpus.

CERTIFICATE OF SERVICE

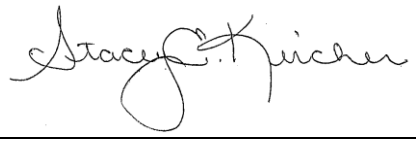
I certify that a copy hereof has been furnished by E-Portal filing to Anne Marie Mirialakis (mirialakis@ccmr.state.fl.us, support@ccmr.state.fl.us) and Richard Kiley (kiley@ccmr.state.fl.us, support@ccmr.state.fl.us), Assistants CCRC-Middle Region, 12973 N. Telecom Parkway, Temple Terrance, Florida 33637 on this 16th day of May, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14-point font.

Respectfully submitted and certified,

PAMELA JO BONDI
ATTORNEY GENERAL

/S/ 

STACEY E. KIRCHER
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 050218
Office of the Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, Florida 32118
CapApp@MyFloridaLegal.com
Stacey.Kircher@MyFloridaLegal.com
Telephone (386) 238-4990
Facsimile (386) 226-0457