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

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

ENOCH D. HALL
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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RECEIVED, 09/05/2017 11:43:26 AM, Clerk, Supreme Court

REQUEST FOR ORAL ARGUMENT

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

JURISDICTIONAL STATEMENT

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

PRELIMINARY STATEMENT ABOUT THE RECORD

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

TABLE OF CONTENTS

REQUEST FOR ORAL ARGUMENT ii

JURISDICTINAL STATEMENT ii

PRELIMINARY STATEMENT ABOUT THE RECORD ii

TABLE OF CONTENTS.. iii

TABLE OF AUTHORITIES v

OTHER AUTHORITIES vii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 3

STANDARD OF REVIEW 4

ARGUMENT 1 - IN LIGHT OF *HURST I* AND *II,* DEFENDANT'S DEATH SENTENCE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDEMENTS OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION……4

A. CCP Aggravator Stricken…………………………………………… 9
B. Mental Health Mitigation Presented to Judge, Not the Jury…………13
C. *Caldwell v. Mississippi*………………………………………………17

ARGUMENT 2 - UNDER *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION………………………………………………………19

ARGUMENT 3 - THIS COURT SHOULD VACATE MR. HALL'S DEATH SENTENCE BECAUSE THE FACT-FINDING THAT SUBJECTED HIM TO A DEATH SENTENCE WAS NOT PROVEN BEYOND A REASONABLE DOUBT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND

FOURTNEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION........20

ARGUMENT 4 - IN LIGHT OF *HURST, PERRY V. STATE* AND *HURST II*, DEFENDANT'S DEATH SENTENCE VIOLATES THE FLORIDA CONSTITUTION, INCLUDING ARTICLE I, SECTIONS 15 AND 16, AS WELL AS FLORIDA'S HISTORY OF REQUIRING A UNANIMOUS JURY VERDICT……………………………………………………………………21

CONCLUSION……………………………………………………………...23

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE...26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey,
530 U.S. 466, 490 (2000)....20
Arizona v. Fulminante,
499 U.S. 279, 310 (1991)....6
Ault v. State,
213 So. 3d. 670, 680 (Fla. 2017) 12
Bevel v. State,
---So.3d---, 2017 WL 2590702, at *6 (Fla. June 15, 2017)....11
Brecht v. Abrahamson,
507 U.S. 619, 630 (1993)....6
Caldwell v. Mississippi,
472 U.S. 320 (1985)....16
Calloway v. State,
210 So.3d 1160, 1200 (Fla. 2017) 12
Clemons v. Mississippi,
494 U.S. 738, 753 (1990)....8
Cole v. State,
-- So.3d --, 2017 WL 2806992, at *10 (Fla. June 29, 2017) 11
Cunningham v. California,
549 U.S. 270, 273 (2007)....20
Davis v. State,
207 So. 3d 142, 175 (Fla. 2016) 7
Hall v. Florida,
134 S.Ct. 203 (2013)....1
Hall v. State,
107 So. 3d 262 (Fla. 2012) 1
Hall v. State,
107 So.3d 262, 276-278 (Fla. 2012)....9
Hall v. State,
212 So. 3d 1001 (Fla. 2017) 2
Hall v. State,
212 So.3d 1001, 1033-1034 (Fla. 2017)....8

Hurst v. Florida,
136 S. Ct. 616 (2016)....................2
Hurst v. State,
147 So. 3d 435, 440 (Fla. 2014) 16
Hurst v. State,
202 So. 3d 40 (Fla. 2016) 2
Hurst v. State,
819 So.2d 689, 694 (Fla. 2002) 16
In re Winship,
397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)....................20
Jones v. United States,
526 U.S. 227, 232, 119 S. Ct. 1215, 1219 (1999)....................23
King v. State,
211 So. 3d 866, 890 (Fla. 2017) 8
King v. State,
211 So.3d 866 (Fla. 2017) 10
Mann v. Dugger,
844 F.2d 1446, 1454-55 (11th Cir. 1988)....................17
McGirth v. State,
209 So.3d 1146, 1164 (Fla. 2017) 12
Middleton v. State,
-- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017) 10
Mosely v. State,
209 So.3d 1248, 1275 (Fla. 2016) 4
Mosley v. State,
209 So.3d 1248, 1284 (Fla. 2016) 12
Neder v. United States,
527 U.S 1, 25 (1999)....................5
Orange County v. Williams,
702 So.2d 1245 (Fla. 1997) ii
Perry v. State,
210 So. 3d 630 (Fla. 2016) 17
Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 7
Simmons v. State,
207 So.3d 860, 867 (Fla. 2016) 12

Sochor v. Florida,
504 U.S. 527, 540 (1992)....8
Sochor v. State,
883 So. 2d 766, 771-72 (Fla. 2004)....4
Spencer v. State,
615 So.2d 688 (Fla. 1993)....13
Stephens v. State,
748 So.2d 1028 (Fla. 2000)....4
Stephens v. State,
748 So.2d 1028, 1032 (Fla. 2000)....4
Sullivan v. Louisiana,
508 U.S. 275, 278 (1993)....20
Tompkins v. State,
894 So.2d 584, 879-60 (Fla. 2005)....2
Truehill v. State,
211 So.3d 930, 956 (Fla. 2017)....10
U.S. v. Booker,
543 U.S. 220, 244 (2005)....20
Williams v. State,
209 So.3d 543, 567 (Fla. 2017)....12
Wood v. State,
209 So.3d 1217, 1234 (Fla. 2017)....10
Wood v. State,
209 So.3d 1217, 1233 (Fla. 2017)....11

Rules

Fla. Const. art. V, § 3(b)(1)....ii
Fla. R. App. P. 9.320....ii
Fla. R. Crim. P. 3.851....4

STATEMENT OF PROCEDURAL HISTORY AND FACTS

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

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

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

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

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

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

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

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

SUMMARY OF THE ARGUMENT

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

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

STANDARD OF REVIEW

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

ARGUMENT 1

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

CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Sixth Amendment right enunciated in *Hurst v. Florida,* and found applicable to Florida's capital sentencing scheme, guarantees that all facts that are statutorily necessary before a judge is authorized to impose a sentence of death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial**.** *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but rather, "requires a judge to find these facts." *Id.* at 622. On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means "that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, at 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

A. CCP Aggravator Stricken

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] *Id.*, at 59-66.

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

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

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

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

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

C. *Caldwell v. Mississippi*

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

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

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

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

Mr. Hall has not litigated a *Caldwell* claim directly, since the *Hurst* rulings. Now, in light of *Hurst I* and *II* and *In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017), the issue of whether Mr. Hall's penalty phase jury instructions violated his constitutional rights warrants closer scrutiny and the precedent established in *Caldwell* should be re-considered. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

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

ARGUMENT 2

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

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

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

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

ARGUMENT 3

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

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

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

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

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

ARGUMENT 4

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

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

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

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

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

Thus, the new statute was found to be unconstitutional.

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

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

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

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

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

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

CONCLUSION

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

death sentence and order a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

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