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

REPLY TO ANSWER BRIEF OF APPELLEE

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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. All references to volumes are designated as "V" followed by the volume number. References to the successive postconviction record are designated "SPCR" followed by the page number. References to the State's Answer Brief are designated as "AB" followed by the page number of the brief. References to the Appellant's Initial Brief are designated as "IB" followed by the page number of the brief.

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REPLY TO STATE'S ANSWER

ARGUMENT 1 - In light of *Hurst I*[1] and *Hurst II*[2], Defendant's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and the corresponding provisions of the Florida Constitution.

The Appellee argues that simply because the advisory panel's death sentence recommendation was unanimous, that no additional inquiries need to be made in a harmless error analysis. This is incorrect and objectively an unreasonable application of law, as well as an unreasonable application of the facts. Just because this Court has consistently denied most *Hurst* claims where there was a unanimous jury recommendation, does not mean that this Court has ceased to perform a thoughtful analysis on a case-by-case basis. Mr. Hall has demonstrated in his initial brief why his case is exceptional. The stricken CCP aggravator, important mental health mitigation withheld from the trier-of-fact, along with a jury instruction that shifted the jurors' responsibility, all set Mr. Hall's case apart from other cases denied relief. The conclusory nature of the harmless error analysis the Appellee is urging this Court to use would be wholly unreasonable under the circumstances of this particular case.

A. CCP Aggravator Stricken

The Appellee argues that this Court's failure to address the stricken CCP

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

aggravator, (the cold, calculated and premeditated aggravator), in Mr. Hall's original postconviction appeal is not meaningful, because this Court noted that four aggravators were found. AB 7 In so arguing, the Appellee is focusing on quantity of aggravators, rather than quality, a perspective prosecutors have repeatedly advised jurors not to use when considering their sentencing recommendation.

The Appellee cites *Middleton*[3] for the proposition that the stricken CCP aggravator is a harmless *Hurst* error. AB 8 However, a review of *Middleton* reveals that this Court did not address the stricken CCP aggravator in the context of its *Hurst* harmless error analysis. *Id*., at 1184-1185. The harmless error analysis performed by this Court as to the stricken CCP aggravator was viewed only from the perspective of the trial court's imposition of a death sentence:

> In its sentencing order, the trial court expressly stated that any of the considered aggravating circumstances found in this case, standing alone, would be sufficient to outweigh the mitigation in total presented regarding the Christensen murder. In *Smith v. State*, 28 So. 3d 838, 868 (Fla. 2009), this Court held that the trial court's erroneous finding of the CCP aggravator was harmless because the sentencing order provided that "any one of the aggravators found (except the felony probation aggravator) was sufficient to outweigh the mitigating circumstances found in this case and due to the other applicable aggravating factors." Therefore, it is clear that the trial court would have imposed a death sentence for Middleton absent the avoid arrest and CCP aggravators. Because we conclude that there is no reasonable possibility that the erroneous findings of the avoid arrest and CCP aggravators contributed to Middleton's death sentence, the errors were harmless.

[3] *Middleton v. State*, 220 So. 3d 1152, 1185 (Fla. 2017).

Id., at 1172. As Mr. Hall contends in his initial brief, and as Justice Pariente has pointed out in the cases cited there[4], this stricken aggravator must be considered as part of a *Hurst* harmless error analysis and what effect it had on the advisory panel's recommendation. IB 10-11 Since there is no information from the trial as to what weight the jurors gave this aggravator, it is mere speculation as to how this aggravator contributed to Mr. Hall's sentence.

Cozzie,[5] the second case cited in Appellee's Answer, also deals with a harmless error analysis as to a stricken aggravator, the murder was committed for the purpose of avoiding arrest. As in *Middleton*, the harmless error analysis for this stricken aggravator is considered in light of its effect on the trial court's decision to sentence defendant to death. However, in *Cozzie*, this aggravator was not even submitted to the jury, but was only considered by the trial court. *Id*., at 10. Therefore, *Cozzie* does not deal with the issue of how this aggravator may have affected the jury's recommendation, because the jury was never asked to consider this aggravator. Under a *Hurst* analysis, this case is irrelevant and not responsive to Appellant's claim.

The importance of the stricken CCP aggravator cannot be underestimated, as

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[4] *Middleton v. State*, -- So.3d --, 2017 WL 2374697 (Fla. June 1, 2017); *Cole v. State*, -- So.3d --, 2017 WL 2806992, at *10 (Fla. June 29, 2017).
[5] *Cozzie v. State*, 2017 WL 1954976, at *9 (Fla. May 11, 2017), *reh'g denied*, 2017 WL 3751293 (Fla. Aug. 31, 2017).

it goes directly to the State's theory of the case against Mr. Hall. *See*, IB 12-13. The State cannot meet its burden of proof that the *Hurst* error was harmless.

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

The Appellee would also dismiss Mr. Hall's argument that this Court should consider how the *Hurst* error affected trial counsel's decisions when contemplating withholding mitigation evidence from a jury, at a time when they believed the judge was the trier-of-fact. This claim is mischaracterized as a "prototype ineffectiveness claim." AB 10 Mr. Hall anticipated this mischaracterization in his initial brief and went to great lengths to explain the important distinction between his argument and a typical ineffective assistance of counsel ("IAC") claim. Naturally, trial counsel cannot be held accountable for failing to consider a law that did not exist. However, when considering whether the *Hurst* error was harmless, it is necessary to consider how it impacted counsel's decision making – in essence how the *Hurst* error prejudiced Mr. Hall case, because his attorneys were laboring under false assumptions. No competent attorney would fail to present evidence to the trier-of-fact and still expect that evidence to have any impact on their client's sentence. Had counsel known that it only took one juror to save Mr. Hall's life, important mental health evidence would not have been withheld from the jury. Mr. Hall is seeking relief pursuant to a harmless error analysis of the *Hurst* violation, rather than an IAC claim.

C. *Caldwell v. Mississippi*[6]

The Appellee argues that this Court has rejected a *Caldwell* argument, citing *Hall*.[7] AB 10-11 In Mr. Hall's original post-conviction appeal cited by the State, the State's argument omits the fact that *Hall* did not raise a *Caldwell* claim directly. Rather, in his state petition for writ of habeas corpus, Mr. Hall raised the issue, "*Appellate counsel was ineffective for failing to challenge* the fact that Mr. Hall's jury was unconstitutionally instructed by the Court that its role was merely 'advisory.'" (R3583-3584/V35)" Emphasis added. This Court addressed only that issue, as stated. In the *Hall* opinion, this Court cited post-*Caldwell*/pre-*Hurst* Florida law to show that this Court has denied *Caldwell* claims in the past:

> With regard to challenges to the standard jury instructions in death penalty cases, this Court has repeatedly held that
>
> > challenges to "the standard jury instructions that refer to the jury as advisory and that refer to the jury's verdict as a recommendation violate *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)" are without merit. *Card v. State*, 803 So.2d 613, 628 (Fla. 2001); …
>
> *Dufour*, 905 So.2d at 67.

Hall, at 1032-1033. In conclusion, this Court found:

> "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." Id. at 71 (quoting *Rutherford*, 774 So.2d at 643). Due to the clear and extensive case law that establishes that claims challenging the constitutionality of the standard jury instructions, as they

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[6] *Caldwell v. Mississippi*, 472 U.S. 320 (1985).
[7] *Hall v. State*, 212 So. 3d 1001 (Fla. 2017).

> apply to the jury's advisory role, are entirely without merit, we conclude that appellate counsel was not ineffective for failing to raise this meritless claim and thus deny Hall relief on this claim.

Id. This holding only addresses whether appellate counsel was ineffective for failing to raise a claim that the Florida Supreme Court has denied in the past. However, this Court has yet to speak to the issue of how the rulings in *Hurst I* and *II* impact Florida's death penalty jury instructions, and what effect the pre-*Hurst* jury instructions had on an improperly instructed jury.

In the past, this Court has reasoned that the United States Supreme Court has accepted Florida's jury role as advisory, therefore the instructions are merely a reflection of law set out in Florida Statute 921.141 (1985). *See*, *Combs v. State*, 525 So. 2d 853, 857 (Fla. 1988), citing to *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Court in *Combs* went on to point out:

> A simple reading of section 921.141, Florida Statutes (1985), explains why the prosecutor and defense counsel stated to the jury that its role was to render an advisory sentence. That statute provides in part:
>
> > (2) ADVISORY SENTENCE BY THE JURY. — After hearing all the evidence, the jury shall deliberate and render *an advisory sentence to the court*, based upon the following matters:
> >
> > (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. — Notwithstanding the recommendation of a majority of the jury, *the court*, after weighing the aggravating and mitigating circumstances, *shall enter a sentence* of life imprisonment or death... .
>
> *Id.* (emphasis added). Clearly, under our process, the court is the final decision-maker and the sentencer — not the jury.

Id. This reasoning has not been valid, since the Supreme Court rendered its opinion in *Apprendi*[8] and *Ring*[9]. Last year, the Supreme Court reiterated its position concerning the jury's role in *Hurst I*, ruling that Florida's death penalty statute is unconstitutional. The Supreme Court found:

> [T]he jury's function under the Florida death penalty statute is advisory only." *Spaziano v. State*, 433 So.2d 508, 512 (Fla.1983).
>
> ---
>
> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S., at 640-641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi*. Indeed, today is not the first time we have recognized as much. In *Ring*, we held that another pre-*Apprendi* decision — *Walton*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 — could not "survive the reasoning of *Apprendi*." 536 U.S., at 603, 122 S.Ct. 2428.

Hurst I, at 622-623. In overruling *Spaziano*, the foundation for this Court's reasoning that Florida's death penalty instructions do not violate *Caldwell* is not supported, and has not been supported since the Supreme Court rendered its decisions in *Apprendi* and *Ring* over fifteen years ago. Therefore, this *Caldwell* violation dates back to *Apprendi/Ring*, at the very least. Similarly, this Court has

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[8] *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).
[9] *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

recognized that since *Ring,* Florida's death sentencing statute is a violation of the Sixth Amendment. *See, Mosley v. State*, 209 So.3d 1248 (Fla. 2016).

The jury's belief that it was not ultimately responsible for Mr. Hall's death sentence is a violation of the principles annunciated in *Caldwell*. Here, in light of the impact of the "advisory" instructions to the jury, this Court cannot even be certain that the jury would have made the same unanimous *recommendation* without the *Caldwell* error. And, critically, the Court cannot be sure that Mr. Hall would have received a death sentence.[10]

In the wake of *Hurst I* and *II*, this Court completely revamped Florida's death penalty jury instructions, notably removing the word "advisory recommendation" and replacing it with "verdict." *See, In Re: Standard Criminal Jury Instructions in Capital Cases*, SC17-583 (Fla. April 13, 2017). Therefore, in light of the fact that this Court took steps to amend the death penalty jury instructions so that they conform to United States Supreme Court law, this Court must also address the fact that Mr. Hall's jury's instructions prejudiced his case and the reasonable probability that the *Caldwell* error could have contributed to his death sentence.

[10] *See also, Rose v. Clark*, 478 U.S. 570, 578 (1986) (recognizing that an "error is harmless if, beyond a reasonable doubt, it did not *contribute to the verdict* obtained.") (Internal quotation marks and citation omitted).

Finally, it is important to note that *Caldwell* represents an Eighth Amendment violation:

> On reaching the merits, we conclude that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.
>
> ---
>
> Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with — and indeed as indispensable to — the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina, supra*, at 305 (plurality opinion). See also *Eddings* v. *Oklahoma, supra*; *Lockett* v. *Ohio, supra*.

Caldwell, at 329-330. Therefore, since the Supreme Court considers a *Caldwell* violation an Eighth Amendment violation, it is tantamount to cruel and unusual punishment. The State cannot establish that such an error is harmless.

ARGUEMNT 2 – Under *Hurst II*, Defendant's death sentence violates the Eighth Amendment of the U.S. Constitution, and the corresponding provisions of the Florida Constitution.

The State contends that *Hurst* is satisfied when the jury unanimously recommends a death sentence. AB 11. The Appellee's brief cites the following cases to support this proposition: *Davis v.State*, 207 So. 3d 142, 174 (Fla. 2016); *Truehill v. State*, 211 So. 3d 930, 956 (Fla. 2017); *King v. State*, 211 So. 3d 866, 891 (Fla. 2017); *Knight v. State*, 2017 WL 411329, *14 (Fla. Jan. 31, 2017);

Kaczmar v. State, 2017 WL 410214, *4 (Fla. Jan. 31, 2017); and *Middleton*, 220 So. 3d at 1184-5. AB 12 However, none of these cases have been considered from the perspective that the *Hurst II* error in those defendants' cases is a violation of the Eighth Amendment. This Court has only reached its conclusions based on a harmless error analysis pursuant to a violation of the Sixth Amendment.

According to *Hurst II*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a *properly instructed* penalty-phase *jury* has voted unanimously in favor of the imposition of death, *after* unanimously finding and weighing the aggravators and the mitigators *properly* before them.[11] To do otherwise is a violation of the Eighth Amendment.

CONCLUSION

Wherefore, for all the reasons stated above and in his initial brief, Mr. Hall prays this Court order that his death sentence be vacated.

CERTIFICATE OF SERVICE

I HEREBY CEERTIFY that on September 20, 2017, I electronically filed the forgoing Brief with the Clerk of the Florida Supreme Court by using Florida

[11] *Hurst II*, at 60-61. *See also*, *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). (The US Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.")

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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