IN THE SUPREME COURT OF FLORIDA

Case No. SC17-839

Lower Tribunal Case No. 03-CF-2151

MARK TWILEGAR,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Twilegar's successive motion for post-conviction relief following summary denial of his claims pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d. 40 (Fla. 2016) and related other claims. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court

"T"—trial transcripts on direct appeal to this Court

"Supp. R." -- supplemental record on direct appeal to this Court;

"PC-R" -- record on the 3.851 appeal to this Court.

"Supp. PC-R." – supplemental record on the 3.851 appeal to this Court.

"PC-R2." – Record on the instant successive 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Twilegar has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Twilegar, through counsel, accordingly urges that the Court permit oral argument.

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PROCEDURAL HISTORY

The Circuit Court for the Twentieth Judicial Circuit, in and for Lee County, Florida entered the judgments of convictions and death sentence at issue.

On April 3, 2003 Mr. Twilegar was indicted for one count of first-degree murder, either by premeditated design or in the course of a robbery, in the death of David Thomas. R. 12). Mr. Twilegar's trial began on January 16, 2007. Following closing arguments on January 26, 2007, Mr. Twilegar was found guilty of one count of first-degree premeditated murder. (R. 1106).

Prior to trial, Mr. Twilegar waived presentation of mitigating evidence (R. 339-42) and waived the penalty phase jury. (R. 679, 1247-1251, T. 41-44). However, prior to waiving his penalty phase jury, Mr. Twilegar filed three separate motions challenging the constitutionality of Florida's capital sentencing statute pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002) requesting a unanimous jury in the penalty phase and requesting special verdict forms in the penalty phase. (R. 280, 292, 318). The State objected to Mr. Twilegar's waiver of the jury indicating "that if the defendant is requesting a jury to determine his guilt, that same jury should have some say in providing an advisory opinion to the Court." (R. 31). The State further submitted that its position was supported by the statute," arguing this isn't Wendy's, it's not a la carte, you can't pick and choose what you want to do." (R. 32). The

State made clear that the statute only provided for waiver of the jury in "circumstances when a defendant has pled guilty or there has been a bench trial, a defendant may then request to have a jury to provide an advisory opinion with regard to the penalty phase. And then it indicates, unless the defendant waives it. But that's in the statutory scheme, and understanding that the defendant didn't have a jury the first time." (R. 32).

The penalty phase was conducted on February 16, 2007. At the instruction of Mr. Twilegar, the defense remained silent. On February 19, 2007 the *Spencer*[1] hearing was held. On August 14, 2007 the court sentenced Mr. Twilegar to death, finding two aggravating circumstances[2], no statutory mitigating circumstances and four non-statutory mitigating circumstances[3].

Mr. Twilegar timely appealed his convictions and sentences to the Florida Supreme Court. (R. 1926-27). The Florida Supreme Court affirmed Mr. Twilegar's convictions and sentences on January 7, 2010. *Twilegar v. State*, 42 So. 3d 177 (Fla.

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

[2] The Court found that the following aggravating circumstances were established: (1) the capital felony was committed for pecuniary gain (great weight); (2) the capital felony was committed in a cold, calculated and premeditated manner (CCP) (great weight).

[3] The Court found the following non-statutory mitigating circumstances: (1) the defendant had a disadvantaged and dysfunctional family background and childhood (little weight); (2) the defendant had received a limited formal education in that he had completed only the seventh grade (little weight); (3) the defendant had abused drugs as a teenager (very little weight); (4) the alternative punishment to death is life in prison without parole (significant weight).

2010). Mr. Twilegar's motion for rehearing was denied on August 9, 2010 and the mandate was issued August 25, 2010. On November 8, 2010 Twilegar filed his Petition for Writ of Certiorari in the United States Supreme Court. The petition was denied on February 22, 2011.

On February 7, 2012, Mr. Twilegar timely filed his initial motion for postconviction relief. (PC-R. 1089-1202). Amended motions were filed thereafter on October 1, 2012 and December 26, 2012. (PC-R. 1848-1612; 1951-2029). At the case management conference held October 26, 2012, all claims except claim III(d), dealing with a claim of ineffective assistance of counsel both pre-trial and guilt phase, were denied evidentiary development. (PC-R. 1821-1841).

The circuit court conducted an evidentiary hearing on July 15-17, 2013. At the hearing the court heard testimony and received evidence related to Mr. Twilegar's claim of ineffective assistance of counsel for failure to utilize an expert in forensic pathology, failure to effectively cross examine the medical examiner, and failure to adequately challenge the State's wholly circumstantial case. Following the hearing, the court denied Mr. Twilegar's motion for postconviction relief on September 27, 2013. (PC-R. 2958-2975). A timely notice of appeal was filed to this Court on October 28, 2013. (PC-R. 3199-3200).

Mr. Twilegar filed his initial brief on the merits on March 31, 2014. On May 28, 2015 this Court issued an order denying relief. *Twilegar v, State*, No. SC13-

2169, 2015 WL 2458011, (Fla. May 28, 2015). A motion for rehearing was timely filed and subsequently denied on September 17, 2015.

On October 2, 2015 Mr. Twilegar timely filed his Petition for Writ of Habeas Corpus in the United States Middle District Court, Lee County, Florida. Mr. Twilegar's habeas petition currently remains pending before the District Court.

On January 11, 2017, Mr. Twilegar filed a successive Rule 3.851 motion raising three separate claims for relief challenging his sentence of death. Claim I was based upon Mr. Twilegar's rights under the Sixth Amendment and the decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Claim II was based upon the Eighth Amendment and the Florida Constitution as relied upon by this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2017), and this Court's holding in that case requiring a unanimous recommendation of death by the jury before a death sentence could be authorized. Claim III argued that Mr. Twilegar's previously raised claims pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984) must be reevaluated.

The circuit court held a case management conference on February 15, 2017. Thereafter, the circuit court entered an order summarily denying Mr. Twilegar's successive 3.851 motion on March 31, 2017.

On April 28, 2017 Mr. Twilegar timely filed a Notice of Appeal to this Court.

On June 15, 2017 this Court entered an order directing counsel for both parties to submit briefing addressing why the lower court's order should not be affirmed

based upon this Court's precedent established in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Mr. Twilegar's response to that order follows.

SUMMARY OF ARGUMENT

Due process does not permit Mr. Twilegar to be foreclosed by the decision rendered in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Mr. Twilegar deserves an individualized appellate review particularly because Mullens did not raise the same issues at stake here. *Mullens* is distinguishable from Mr. Twilegar's case. In *Mullens*, there was no challenge to the validity of the jury waiver, based on either the voluntariness of the waiver itself or on the impact of the unconstitutional statute on defense counsel's advice to waive a jury. The defendant in *Mullens* did not even have a guilt-phase jury to waive for the penalty phase. Mullens plead guilty to the offenses and thereafter voluntarily waived his right to a penalty-phase jury. *See Mullens*, 197 So. 3d at 38-40. Here, Mr. Twilegar challenges the validity of his waiver in light of *Hurst v. Florida* 136 S. Ct. 616 (2016), *Hurst v. State* 202 So. 3d 40 (Fla. 2016), the Florida Constitution and the Sixth and Eighth Amendment of the United States Constitution.

ARGUMENT I

MR. TWILEGAR'S DEATH SENTENCE STANDS IN VIOLATION OF *HURST V. FLORIDA, HURST V. STATE*, THE SIXTH AND EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION BECAUSE A JURY DID NOT MAKE THE FINDINGS OF FACT NECESSARY TO RENDER MR. TWILEGAR ELIGIBLE FOR A DEATH SENTENCE

Hurst v. Florida and *Hurst v. State* apply to Mr. Twilegar's case. In *Mosley v. State*, the Florida Supreme Court addressed the retroactivity of *Hurst v. Florida* and *Hurst v. State* under both the fundamental fairness doctrine and *Witt v. State*, 387 So. 2d 922 (1980). *Mosley* v. State, 209 So. 3d 1248, 1274-1283 (Fla. 2016). Under a standard *Witt* analysis, the *Mosley* Court found "*Hurst* should be applied to Mosley and other defendants whose sentences became final after the United States Supreme Court issued its opinion in *Ring*." Mr. Twilegar clearly falls into this category, as *Ring* was issued on June 24, 2002, and Mr. Twilegar's conviction did not become final until February 22, 2011, when the United States Supreme Court denied certiorari in *Twilegar v. Florida*, 131 S. Ct. 1476 (2011). *See Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) (finality occurs when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied").

Because Mr. Twilegar falls squarely within the post-*Ring* category, he should receive the benefit of the change in law notwithstanding his waiver of the jury at

penalty phase based on the unique circumstances of his case, standing alone and as these circumstances distinguish his case from *Mullens v. State*, 197 So. 3d 16 (Fla. 2016).

Due process does not permit Mr. Twilegar to be foreclosed by the decision rendered in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). The United States Supreme Court has explained the bedrock nature of the right to due process:

> The words of Webster, so often quoted, that by 'the law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S. Ct. 383, 387, 42 L. Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L. Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.'

Powell v. Alabama, 287 U.S. 45, 68 (1932) (emphasis added). In a capital case in which a death sentence has been imposed, courts are required to go further when considering challenges to the death sentence. The Eighth Amendment requires more due to a special need for reliability. *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's

prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). The process by which the Court has directed Mr. Twilegar to proceed in his appeal, indicates its intention on binding Mr. Twilegar to the outcome rendered in Mullens' appeal, regardless of the fact the record on appeal in each case is distinct and separate from one another. The fact that this Court has *sua sponte* issued identical orders, in at least two other cases,[4] employing the same truncated procedure it does here reflects baseless prejudgment of the appeals and their scope.

Mr. Twilegar deserves an individualized appellate process, particularly because Mullens did not raise the same issues at stake here. *Mullens* is distinguishable from Mr. Twilegar's case. In *Mullens*, there was no challenge to the validity of the jury waiver, based on either the voluntariness of the waiver itself or on the impact of the unconstitutional statute on defense counsel's advice to waive a jury. The defendant in *Mullens* did not even have a guilt-phase jury to waive for the penalty phase. The defendant in *Mullens* plead guilty to the offenses and thereafter voluntarily waived his right to a penalty-phase jury. *See Mullens*, 197 So. 3d at 38-40.

[4] *See Kenneth Darcell Quince v. State of Florida*, SC17-931; *Jeremiah M. Rogers v. State of Florida*, SC17-1050.

While this Court has asked Mr. Twilegar to address the precedent set forth in *Mullens*, Mr. Twilegar points out that this Court's decision in *Wright v. State*, 213 So. 3d 881 (Fla. 2017), another capital case dealing with a defendant's waiver of their penalty phase jury, is also distinguishable. In *Wright*, this Court did evaluate the validity of the penalty phase jury waiver. *See Wright*, 213 So. 3d at 903. This Court concluded that the record established that Wright's waiver was valid because he was not intellectually disabled. In addition, this Court noted that Wright's decision to waive a penalty-phase jury was based on his own preference "that the judge determine whether a death sentence was appropriate because he felt that a judge would be more objective than the same jury who convicted him." *Id.*

In neither case, either *Mullens* or *Wright*, did the Court examine the validity of the waiver in light of *Hurst v. Florida's* requirements that the jury must make all necessary findings of fact or those set forth in *Hurst v. State* requiring that all necessary findings of fact must be unanimous. In that regard, no evaluation was conducted to determine the validity of the waiver in context of the understanding that counsel's advice to waive was predicated upon counsel's understanding of Florida's uncconstitutional sentencing scheme as it existed at that time. Here, Mr. Twilegar's penalty phase jury waiver is not a valid basis to deny him the opportunity to seek *Hurst* relief. His waiver of a penalty phase jury is not valid in the *Hurst* context because it was rendered based on counsel's advice at the time, advice that

was impacted by Florida's unconstitutional sentencing scheme and was later invalidated by *Hurst*.

In three separate motions, Mr. Twilegar challenged the unconstitutionality of Florida's capital sentencing scheme pursuant to *Ring v. Arizona* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), specifically moved for a unanimous jury finding as to sentence, and moved for special verdicts as to sentence. (R. 280, 292, 318). And while Mr. Twilegar withdrew these motions, it was done so in the context of his desire to not present mitigation or contest anything related to the penalty phase (R. 590-600), nothing more. Mr. Twilegar's responses to the trial court regarding withdraw of these motions reflect a desire to discount anything mentioning mitigation or penalty phase. Mr. Twilegar was intent on securing a death recommendation ***from the jury*** (R. 597). At this juncture, there was no indication that he wished to waive the penalty phase jury. In fact, the record demonstrates that only later, upon the advice of counsel, did Mr. Twilegar waive the penalty phase jury. The record reflects that the decision was made in the eleventh hour[5] and Mr. Twilegar was not making this decision on his own.

The record bears out that it was trial counsel's idea to waive the penalty phase jury (T. 30, 42). And, while questioning his own position, counsel believed Mr. Twilegar could waive his rights under *Apprendi* and *Ring* (T. 31). Unlike the

[5] Mr. Twilegar's waiver occurred the morning trial began (T. 3).

circumstances in *Wright v. State*, 213 So. 3d 881, 903 (Fla. 2017), there was no reasoning provided on the record for counsel's "idea." Counsel merely indicated that he discussed the advantages and disadvantages with Mr. Twilegar (T. 30). In *Wright*, the record reflected that during trial, Wright "preferred that the judge determine whether a death sentence was appropriate because ***he*** felt that a judge would be more objective than the same jury that convicted him." *Wright,* 213 So. 3d at 903. (emphasis added). Wright's decision was not implicated by the unconstitutional sentencing statute. In contrast, there is no basis on the record in Mr. Twilegar's case, other than speculation by the judge as to a myriad of reasons a defendant may want to waive the jury (T. 33). Therefore there is no way to discern the extent of the unconstitutional *Hurst* error on Mr. Twilegar's waiver.[6]

When Mr. Twilegar waived his penalty phase jury, he was never informed that he had a right to a unanimous jury verdict on any aggravator[7], that a jury would

[6] Mr. Twilegar argued below that to the extent the record did not provide a reason for the waiver absent advice based on the unconstitutional sentencing scheme, evidentiary development was required.

[7] The fact that the Mr. Twilegar was unaware that the jury must unanimously find any aggravator is particularly troubling in his case. Mr. Twilegar's invalid waiver of the jury resulted in the finding of the pecuniary gain aggravator by the judge alone which the jury had rejected in its guilt phase verdict. Specifically, the jury found Mr. Twilegar guilty of first degree premeditated murder rejecting the alternate felony murder theory that the murder occurred during the course of a robbery. (R. 1106). The court admitted at the end of trial that the evidence of robbery was weaker evidence, and the jury declined to find felony murder. Mr. Twilegar had explained the source of the money he spent in August and September of 2002, admitting he sold marijuana and manufactured methamphetamine. The money was

have to unanimously find that the aggravators were sufficient to outweigh the mitigators, or that the jury's recommendation would have to be unanimous. He was also never told that individual jurors "are not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances." *See Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016). Thus, Mr. Twilegar's waiver was based on an unconstitutional application of his Sixth and Eighth Amendment rights, predicated on unconstitutional instructions by the court and erroneous advice from counsel. Mr. Twilegar's waiver of a penalty phase jury is not valid in the *Hurst* context because it was rendered based on counsel's advice at the time, and that advice from counsel was impacted by Florida's unconstitutional sentencing scheme, which was invalidated by *Hurst*. Counsel's advice was grounded on their understanding of Florida's unconstitutional sentencing scheme, and counsel would not have provided the same advice in a proceeding that comported with *Hurst*, the Sixth Amendment, and Eighth Amendment.

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in $100 bills, and there is no evidence Mr. Twilegar went to a bank and changed Thomas' $20 bills. Mr. Twilegar spent nowhere near $25,000 and no additional money was ever discovered. In order to establish pecuniary gain as an aggravating factor, the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire to obtain money, property, or other financial gain. *See Finney v. State*, 660 So.2d 674, 680 (Fla. 1995). The standard is not that pecuniary gain was possibly the motive, or that it was more probable than not that it was the motive.

Any purported waiver by Mr. Twilegar to be sentenced under an unconstitutional capital sentencing scheme does not equal a constitutionally adequate waiver of his Sixth Amendment right to be sentenced under a constitutional statute. Mr. Twilegar's alleged waiver was not knowing, intelligent, and voluntary because his decision was made in light of the unconstitutional sentencing statute and based upon advice from counsel premised upon that same unconstitutional sentencing scheme. Any argument that Mr. Twilegar would have made the same decision had there been a constitutional statute in place is pure speculation. The fundamental unfairness of Mr. Twilegar's reliance on an unconstitutional statute in deciding to waive his penalty phase jury dictates relief.

Significantly, aside from *Wright v. State*, each of the jury waiver cases that were denied relief pursuant to *Hurst v. Florida* involved a guilty plea or a non-jury trial on guilt. *See Mullens v. State*, 197 So. 3d 16 (Fla. 2016)(defendant waived his right to jury sentencing after he pleaded guilty to two counts of first-degree murder); *Brant v. State,* 197 So. 3d 1051 (Fla. 2016)(waiving penalty phase jury based on the defendant's decision alone after a guilty plea); *Davis v. State*, 207 So. 3d 177 (Fla. 2016)(defendant was convicted after a bench trial and subsequently waived penalty phase jury); *Knight v. State*, 211 So 3d 1 (Fla. 2016)(defendant waived penalty phase jury after a non-jury trial). The defendant in *Mullens* decided to plead guilty to the

offenses and thereafter voluntarily waived his right to a penalty-phase jury. *Mullens*, 197 So. 3d at 38-40.

Unlike the defendant in *Mullens*, Mr. Twilegar did not plead guilty or waive the jury for the guilt phase of trial. This is an important distinction, because at the time of Mr. Twilegar's trial, a guilty plea was treated differently from a waiver of a penalty phase jury. If someone wished to waive a jury trial and plead guilty, the court would fully explain all of the rights the person was abandoning, including the right to unanimous jury factfinding on each element of each charge. *See* Fla. R. Crim. P. 3.172(c)(3). This Court's reasoning in *Mullens* rests on the idea that "[i]n states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding" because "the defendants knew that when they entered a guilty plea, they fully forfeited their right to a jury trial." *Mullens*, 197 So. 3d at 39. This Court's reasoning presumes that such people were fully and correctly advised of their right to a jury determination of guilt or innocence—and that the jury's findings of fact would have to be unanimous and beyond a reasonable doubt—and they chose to plead guilty anyway. Based on the guilty plea, there was a presumption for *Hurst* purposes of a valid waiver.[8] But capital defendants in Florida

[8] This reasoning explains why in *Wright*, in the absence of a guilty plea or a waiver of the trial jury, the Court did then review the validity of the penalty phase jury waiver. There the Court did deny relief but did so based upon the determination

were never told that they had a right to unanimous jury factfinding at the penalty phase on each aggravator, or that the jury's recommendation would have to be unanimous, because until *Hurst*, no Florida court had ever applied *Apprendi*/*Ring* to a capital trial.

The Court then analogized the waiver of a guilt phase jury resulting from a guilty plea to the waiver of a penalty phase jury, to support the conclusion that "we fail to see how Mullens, who was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right, can claim error." *Id*. at 39-40. In denying relief in *Mullens*, this Court held that "Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Id*. at 40. But, this Court evaluated the waiver in the context of *Hurst* without considering arguments regarding the validity of Mullens' waiver itself. The Court did not examine the validity of the waiver in terms of counsel's advice to waive, based on counsel's understanding of Florida's prior sentencing scheme. Here, Mr. Twilegar challenges the validity of his waiver in light of *Hurst*.

Moreover, *Mullens* and all of the cases involving a waiver of the penalty phase jury that have been disposed of by this Court, fail to address a claim premised upon

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that the record supported the finding that Wright's waiver was premised upon the belief that the judge would be more objective than the jury, thereby removing implications that the waiver was effected by the unconstitutional statute.

Hurst v. State, the Florida Constitution and the Eighth Amendment of the United States Constitution. In *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), this Court acknowledged that "*Hurst* said nothing about whether a defendant could waive the Sixth Amendment right to jury factfinding in sentencing procedures as recognized by *Ring [v. Arizona,* 536 U.S. 584 (2004)] and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)." *Mullens*, 197 So. 3d at 38. The Court continued that "[a]lthough the United States Supreme Court has not directly addressed whether a defendant can waive his or her rights to jury factfinding in the specific context of capital sentencing, the Court has concluded that defendants are free to waive the general right to jury factfinding that was recognized in *Apprendi*." *Id*. Of course, this acknowledgement is all in the context of the Sixth Amendment.

However, in *Hurst v. State*, this Court ruled that on the basis of the Eighth Amendment and the Florida Constitution, the evolving standards of decency now require "unanimity in a recommendation of death in order for death to be considered and imposed." *Hurst*, 202 So. 3d at 62. Quoting the United States Supreme Court, this Court in *Hurst v. State* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" *Id*. at 61. Then, after a review of the capital sentencing laws throughout the United States, this Court found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

Id. Accordingly, the Court concluded:

> [T]he United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

Id. at 63. The right to a life sentence unless a jury unanimously recommends a death sentence, as recognized in *Hurst v. State*, establishes a presumption of a life sentence that is the equivalent of the guilt phase presumption of innocence.

This Court recognized that the requirement that the jury must unanimously recommend death before this presumption of a life sentence can be overcome does not arise from the Sixth Amendment or from *Hurst v. Florida* or from *Ring v. Arizona*. It is a right emanating from the Florida Constitution and alternatively the Eighth Amendment. The requirement that the jury unanimously vote in favor of a death recommendation before a death sentence is authorized was embraced as a way to enhance the reliability of death sentences. *Hurst v. State*, 202 So. 3d at 59 ("We also note that the requirement of unanimity in capital jury findings will help to ensure the heightened level of protection necessary for a defendant who stands to lose his life as a penalty.). *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The

fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case."). In holding that requiring unanimity would produce more reliable death sentences, this Court acknowledged that death sentences imposed without the unanimous support of a jury lacked the requisite reliability. This was explained in *Bevel v. State*: "After our more recent decision in *Hurst*, 202 So. 3d 40, where we determined that **a reliable penalty phase proceeding requires** that 'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed,' 202 So. 3d at 59, we must consider whether the unpresented mitigation evidence would have swayed one juror to make 'a critical difference.' *Phillips*, 608 So. 2d at 783." *Bevel v. State*, __ So. 3d __, 2017 WL 2590702 at *10 (Fla. June 15, 2017) (emphasis added).

This Court's recognition that "a reliable penalty phase requires" a unanimous jury death recommendation means that Mr. Twilegar's waiver of the penalty phase jury renders his death sentence unreliable. Under the Eighth Amendment, in the absence of these jury findings, Mr. Twilegar's execution would thus constitute cruel and unusual punishment, and his death sentence must be vacated.

There being only judge-found facts available in this case to make Mr.

Twilegar eligible for death violates the Eighth Amendment. As an Eighth Amendment concept, death-eligibility contemplates that "society will inflict death upon only a small sample of the eligible criminals," *Furman v. Georgia*, 408 U.S. 238, 300 (1972) (Brennan, J., concurring), who have committed the "worst of the worst" murders, *see Coddington v. State*, 254 P.3d 684, 709 (Okla. 2011), which is determined in Florida by factfindings as to individual aggravating circumstances, sufficiency of the aggravating circumstances, and that the aggravating circumstances outweigh any and all mitigation. These fact findings are how Florida ensures that "this most irrevocable of sanctions [will] be reserved for a small number of extreme cases." *Gregg v. Georgia*, 428 U.S. 153, 182 (1976). In this sense, Mr. Twilegar has no say as to whether his crime rises to the level of the worst of the worst in Florida based on the requisite fact findings and a constitutional statute. *Hurst v. State*, the Florida Constitution and the Eighth Amendment require findings by a unanimous jury as to what he is eligible for, and deserves, regardless of his wishes.

Due to Mr. Twilegar's invalid waiver, premised on an unconstitutional statute, no jury made any findings at all regarding the elements necessary to allow for the imposition of a death sentence. In the absence of such findings, we must presume that the appropriate sentence is life. Mr. Twilegar's sentence stands in violation of the Eighth Amendment and the Florida Constitution.

ARGUMENT II

THE NEW LAW THAT WOULD GOVERN AT A RESENTENCING MUST BE PART OF THE PREJUDICE ANALYSES OF MR. TWILEGAR'S PREVIOUSLY PRESENTED STRICKLAND CLAIMS. THE NEW LAW, DUE PROCESS, AND THE EIGHTH AMENDMENT ALL REQUIRE THIS COURT TO REVISIT MR. TWILEGAR'S PREVIOUS CLAIMS AND DETERMINE WHETHER A DIFFERENT OUTCOME IS LIKELY TO RESULT.

On March 7, 2016, Chapter 2016-13 was signed into law. It substantially revised Florida's capital sentencing statute. As the Staff Analysis of the Criminal Justice Subcommittee accompanying HB 7101 (Chapter 2016-13) makes clear, its adoption was intended to cure the constitutional defect in Florida's capital sentencing scheme identified in *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Perry v. State*, the Florida Supreme Court addressed the newly revised statute. While generally approving all other aspects of the newly revised statute, it held that the provision making a 10-2 vote by the jury a necessary predicate for a death sentence was unconstitutional because it did not require unanimity. *Perry* held: to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death. 210 So. 3d at 640. Jurors may also choose to vote in favor of a life sentence in order

to be merciful. *Id*. ("This final jury recommendation, apart from the findings that sufficient aggravating factors exist and that the aggravating factors outweigh the mitigating circumstances, has sometimes been referred to as the 'mercy' recommendation.").[9]

This is the law, which was announced on October 14, 2016, that now governs when a death sentence is vacated and a resentencing ordered in a capital case.[10] In *Hurst v. State*, the Florida Supreme Court explained:

> Requiring a unanimous jury recommendation before death may be imposed, in accord with precepts of the Eighth Amendment and Florida's right to trial by jury, is a critical step toward ensuring that Florida will continue to have a constitutional and viable death penalty law, which is surely the intent of the Legislature. The requirement will dispel most, if not all, doubts about the future validity and longterm viability of the death penalty in Florida.

Hurst v. State, 202 So. 3d at 62.

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[9] Residual doubt, while not necessarily mitigating, could lead one of more jurors to chose mercy and vote in favor of a life sentence.

[10] Of course, this has now been codified. On March 13, 2017, the Governor signed Chapter 2017-1 into law. The preamble explained itself as "[a]n act relating to sentencing for capital felonies; amending ss. 921.141 and 921.142, F.S.; requiring jury unanimity rather than a certain number of jurors for a sentencing recommendation of death." Chapter 2017-1 amended § 921.141(2)(c) to provide: "If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole." Section 921.141(3)(a) provides that "[i]f the jury has recommended a sentence of ...[l]ife without the possibility of parole, the court shall impose the recommended sentence." As a result, Florida's capital sentencing statute now precludes the imposition of a death sentence unless a jury returns a unanimous death recommendation.

This Court has recently recognized the effect that the defendant's right to a life sentence unless a jury unanimously returns a death recommendation has on this Court's standard of review in capital cases. In *Bevel v. State*, __ So. 3d __, 2017 WL 2590702 (Fla. June 15, 2017), this Court found that the decision in *Hurst v. State* mandating a unanimous death recommendation before the presumption of a life sentence is overcome altered the prejudice analysis of *Brady/Giglio*[11] claims and *Strickland* claims. Under *Bevel*, this Court's standard of review for harmless error must also change. It no longer takes six jurors voting for a life recommendation for an advisory life recommendation to result. Now, one juror voting for life means a life sentence is the only sentence to be imposed for a first degree murder conviction.

Here, Mr. Twilegar's claim arose from the fact that at a resentencing if one is ordered as a result of his ineffective assistance of counsel claims, Mr. Twilegar will have a right to a life sentence unless the jury returns a unanimous death recommendation. The claim asks how this affects the validity of this Court's rejection of Mr. Twilegar's *Strickland* claims in his previous successive motion to vacate. Mr. Twilegar's challenge is to this Court's affirmance of the denial of his prior Rule 3.851 motions. This Court's recent decision in *Bevel v. State*, 2017 WL 2590702, supports the validity of Mr. Twilegar's argument.

[11] *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972).

The previous rejection of Mr. Twilegar's *Strickland* claim must be reevaluated in light of the new requirement that juries must unanimously make the necessary findings of fact and return a unanimous death recommendation before a death sentence is even a sentencing option. Certainly the *Strickland* prejudice analysis requires a determination of whether confidence in the reliability of the outcome—the imposition of a death sentence—is undermined by the evidence the jury did not hear due to the *Strickland* violation. The U.S. Supreme Court in *Strickland* made clear that:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of a particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland, 466 U.S. at 696. The new Florida law must be part of the evaluation of whether confidence in the reliability of the outcome is undermined, particularly since the touchstone of the new Florida law is the likely enhancement of the reliability of any resulting death sentence.

All of the evidence that would be admissible at a resentencing must be evaluated in light of the new law, including evidence resulting from counsel's failure to utilize a forensic pathologist presented to meet the *Strickland* prejudice prong in determining the impact that evidence may have had on the jury's determination of

aggravators. While this Court rejected Mr. Twilegar's ineffective assistance of counsel claim on the basis that trial counsel's strategy was not unreasonable, where trial counsel needed to convince only one juror, not six, counsel's reasonableness is diminished. The additional questioning and issues surrounding the medical examiner's work and opinions were vital to challenging the State's circumstantial theory of the crime. Evidence of inconsistencies and deficiencies in the medical examiner's autopsy of the victim, challenges to her theory regarding the inhalation of sand and whether the victim was buried alive, and evidence supporting the presence of additional shotgun injuries all would have provided the necessary challenges to the sufficiency of the State's evidence.

Furthermore, in *Hurst v. State*, the Florida Supreme Court explained that, in accordance with Florida's capital sentencing scheme, the jury has a "right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances." *Hurst*, 202 So. 3d at 58, citing *Brooks v. State*, 762 So. 2d 879, 902 (Fla. 2000). In other words, before a judge can impose the death penalty, the jury must be told it has the right to recommend a life sentence, even if the precedent factual findings are all made unanimously. In the context of gaining mercy from just one juror, residual doubt would certainly be a reason one or more jurors might vote for mercy particularly in a highly circumstantial case, even if the jury unanimously otherwise

made the findings required by the new law. In this regard, counsel's strategy to exclude critical evidence challenging the State's theory of the case is not reasonable. Particularly when the evidence showing the number of gunshot injuries to the victim and passive inhalation of the sand refutes the critical assertion that Thomas was killed and buried at the same spot outside Mr. Twilegar's tent where he had been allegedly seen digging a hole earlier that day.

With all of the new evidence that would be admissible at a resentencing in combination with constitutionally sound instructions regarding aggravators, the State cannot demonstrate beyond a reasonable doubt that not a single juror would have voted in favor of a life sentence. A single juror voting for a life sentence under *Hurst v. State* would mean that a life sentence would be the only sentencing option. Thus, when the proper consideration is given to the new Florida law arising from the *Hurst v. State*, it is more likely than not that Mr. Twilegar would not have waived the jury and would be able to persuade at least one juror to vote for a life sentence. That means it is more likely than not that a life sentence would be required and that the outcome of a resentencing would be different. Similarly, one juror's vote in favor of a life sentence is much more likely to undermine confidence in the reliability of the decision to impose death in light of the new unanimity requirement when a court is considering the prejudice arising from *Strickland* claims.

CONCLUSION

For the reasons argued in Mr. Twilegar's Successive Motion to Vacate Judgments of Convictions and Sentence and the arguments herein, Mr. Twilegar is entitled to relief in the form of a life sentence or a new penalty phase proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been provided to all counsel of record via the Florida Court e-filing portal on the 5th day of July, 2017.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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