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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Mr. Twilegar submits this Reply to the State's Answer Brief. Mr. Twilegar will not reply to every argument raised by the State. However, Mr. Twilegar neither abandons nor concedes any issues and/or claims not specifically addressed in this Reply. Mr. Twilegar expressly relies on arguments made in his Initial Brief for any claims and/or issues that are only partially addressed or not addressed at all in this Reply.

ARGUMENT IN REPLY

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

Contrary to the State's assertion, the circuit court's order denying relief stating that Mr. Twilegar's case was governed by *Mullens* was not "indisputably correct." (Answer at 3). The State, like the circuit court below, fails to acknowledge that *Mullens v. State*, 197 So. 3d 16 (Fla. 2016) is distinguishable from Mr. Twilegar's case. While both cases deal with waivers of the penalty phase jury, *Mullens* did not challenge the validity of his waiver on appeal. No claims were raised by Mullens challenging the validity of his waiver based on an unconstitutional statute and the impact which it had on his counsel's advice to him or the voluntariness of the waiver itself. Mullens entire supplemental brief following *Hurst v. Florida* argued that he was entitled to relief pursuant to Fla. Stat. 775.082. That is not the argument here. These distinctions alone separate Mr. Twilegar's case from *Mullens*, rendering it incompatible for purposes of comparison to Mr. Twilegar's case.

While the State argues that Mr. Twilegar's waiver of his penalty phase jury is fatal to a claim for relief under *Hurst v. State* (Answer at 5), it misunderstands that

Mr. Twilegar's claim is based on *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) invalidating his waiver. The State also ignores that the record does not support the circuit court's finding that his waiver was knowing and voluntary in light of *Hurst v. Florida* and *Hurst v. State*. Regardless of whether Mr. Twilegar was specifically warned by the trial court that the law was unsettled and could change (Answer at 5), that does not render his waiver knowing and voluntary. There is simply no basis for presuming that Mr. Twilegar made a knowing and intelligent waiver, or that counsel made an informed and reasonable tactical decision where it was based upon consideration of an unconstitutional sentencing statute. Simply put, Mr. Twilegar could not waive that which he did not know. *See Gardner v. Florida*, 430 U.S. 349, 361-62 (1979). That is, he was at the very least incapable of knowingly waiving his right to a penalty phase jury where he was not advised, pursuant to a constitutional statute, as to his right to a unanimous jury determination of all the facts necessary for imposition of a death sentence. Nothing in the record indicates that he was informed of that right, nor is there anything in the record that establishes that the decision to do so was borne out of some form of "strategy" attributable to counsel's informed and reasonably competent advice.

While the State faithfully reproduces portions of the record where Mr. Twilegar expressed his desire to receive a sentence of death if found guilty, it does

so without any context as to the reason provided by Mr. Twilegar for making that decision. The record is likewise void of any strategy offered by counsel for advising Mr. Twilegar to waive the penalty phase jury. The State has wholly ignored that counsel himself stated on the record that this was his idea. Waiver of the jury for the penalty phase was not premised on Mr. Twilegar's desire to receive a death sentence or not present any mitigation.

The record of the colloquy at the December 18, 2006 hearing, relied upon by the State, merely establishes that Mr. Twilegar wished to prohibit presentation of mitigation:

> "Okay. As I see it, any motion that specifically mentions mitigation or penalty phase, that that could lead to a life sentence, not a death sentence. And I'm adamant that if I'm convicted, let's get it over with, get'er done, death sentence, let's go. I don't want all the appeals. I don't want to do 20 years on death row waiting for it. I don't want a life sentence. Let's get it done. And the first step would be to get rid of these motions because they do say 'penalty phase' and 'mitigation' on them."

(R. 597). Contrary to the State's argument, these statements do not conflict with any unanimity argument. (Answer at 5). Rather, they establish that Mr. Twilegar was withdrawing those motions out of the misguided, and either misinformed or uninformed, belief that litigation of those motions would somehow require presentation of mitigation evidence on his behalf to the jury. Mr. Twilegar's comments at the December 18, 2006 hearing are clear that he was withdrawing those

motions because of the mere mention of "mitigation" and "penalty phase." It does not even reflect a clear understanding by Mr. Twilegar of what he was waiving in those motions.

Mr. Twilegar's withdrawal of his motion demanding penalty phase jury unanimity does not undermine his claim as the State asserts. (Answer at 6). Likewise, his doing so was not entirely inconsistent with his statements to the court in 2006 that he did not want a life sentence if found guilty. (Answer at 6). Those statements, and his withdrawal of the *Ring* motions were only consistent with his refusal to cooperate in any manner prior to trial with mitigation specialists, psychologists, or his attorneys in attempts to investigate and establish mitigation evidence. Despite his decision to prohibit any reference to mitigation and thereby withdraw the pretrial *Ring* motions, that decision cannot be conflated with his waiver of the jury for the penalty phase. Mr. Twilegar's insistence on prohibiting mitigation of any sort from being presented was ongoing, long before the start of trial. However, it was not until the morning trial began that the trial court first hears his request to waive the jury. In fact, counsel states that he had only discussed it with Mr. Twilegar "one time last week and then again yesterday." (T. 42). The State ignores this timing.

The State also ignores that waiving the jury was entirely counsel's idea. As McLoughlin stated during the January 16, 2007 colloquy, "And that it was—**it was my idea**, **I presented it to you**, and you voluntary (sic) and knowledgably agreed

with **my idea**." (R. 42) (emphasis added). The State correctly notes that "[Mr.] Twilegar's claim logically prevails only if his waiver was made in reliance on that aspect of counsel's advice that was later deemed erroneous." (Answer at 6). There is nothing in Mr. Twilegar's record which indicates that his waiver of the penalty phase jury was not premised on the unconstitutional statute and counsel's erroneous advice. Counsel merely tells the trial court that he discussed it with Mr. Twilegar.

To the extent that the State relies upon *Brady v. United States*, 397 U.S. 742 (1970) for the proposition that Mr. Twilegar's waiver was valid, it is misplaced and simply wrong. At best, *Brady* stands for the proposition that in assessing the validity of Mr. Twilegar's waiver the Court must look at what influenced the waiver of the constitutional right and here, if the unconstitutional statue was at the heart of his waiver, then the waiver cannot be knowing, intelligent and voluntary. Certainly not knowing. For this reason, *Brady* is distinguishable.

First and foremost, *Brady* deals with the issue of the entering of a guilty plea at trial and the waiver of a procedural rule. At issue in *Brady* was whether the availability of the death penalty as a possible sentence for violation of the Federal Kidnapping Act rendered bargained for guilty pleas by defendants inherently coercive where they could avoid the death penalty under the then enacted federal statute §1201(a). The core question at the heart of *Brady* was the determination of whether Brady's guilty plea was voluntary and intelligent under the totality of the

circumstances,[1] including whether his plea could reasonably have been based on the strength of the case against him. Specifically the Supreme Court found:

> Petitioner, advised by competent counsel, tendered his plea after his codefendant, who had already given a confession, determined to plead guilty and became available to testify against petitioner. It was this development that the District Court found to have triggered Brady's guilty plea.

Brady, 397 U.S. at 749. The United States Supreme Court ruled that Brady's guilty plea and subsequent waiver of a penalty phase jury under § 1201(a) was not unconstitutional where he knowingly, voluntarily, and intelligently entered his pleas with sufficient awareness of the relevant circumstances and likely consequences. *Id.* at 748.

That is not the scenario present from the facts in the record in Mr. Twilegar's case. Contrary to the State's contention, and as argued above, Mr. Twilegar's waiver of the jury cannot be construed to have been premised on the desire to avoid presentation of mitigation or to secure a death sentence. Unlike the scenario in *Brady*, it cannot be said that it was tied to any particular strategy, as the record is void as to counsel's reasoning for advising Mr. Twilegar to waive. And, most significantly for purposes of analysis of the totality of the circumstances, it was not

[1] Contrary to Mr. Twilegar's case where he indicated an evidentiary hearing was necessary to the extent the reasoning for counsel's advice could not be determined on the record, but was denied a hearing, an evidentiary hearing was held in *Brady* to determine whether the plea was voluntarily made or the result of the coercive statute. *Brady*, 397 U.S. at 749.

done knowingly and voluntarily where it was based on advice from counsel that was not only predicated on an unconstitutional sentencing statute but also wholly ill-fated and objectively unreasonable under the circumstances. No reasonable counsel would have advised that withdrawing of those motions and waiver of the penalty phase jury was necessary in order to fulfill Mr. Twilegar's wish to avoid presentation of mitigation. Unlike in *Brady*, the record in Mr. Twilegar's case makes clear that his decision to waive his penalty phase jury did not come on the heels of objectively reasonable and competent advice from counsel tied to any reasonable strategy or as the result of an informed, voluntary, knowing decision on the part of Mr. Twilegar. It could not have been because it was premised on an unconstitutional statute.

Furthermore, waiver of the penalty phase jury was a waiver of substantive rights under the Florida Constitution and the Eighth Amendment, not procedural rules, as was the case in *Brady*. *Hurst v. State* found that because the Florida Constitution granted a criminal defendant the substantive right to be convicted of a criminal offense only upon a unanimous jury verdict, a jury in a capital case was required to unanimously find all of the necessary facts and unanimously recommend a death sentence before such a sentence could be imposed. *Hurst v. State*, 202 So. 3d at 44 ("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 *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court reiterated that in *Hurst v. State*, "**we held, based on Florida's independent constitutional right to trial by jury that, in order for the trial court to impose a sentence of death, the jury's recommendation for a sentence of death must be unanimous**." *Id*. (emphasis added). 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.

Without Mr. Twilegar's consideration of the substantive right to unanimity, so too is Mr. Twilegar's waiver unreliable. Based upon that need for increased reliability as the framework for this Court's holding in *Hurst v. State*, and its extension of the right to a unanimous jury recommendation under the Florida

Constitution and the Eighth amendment, any waiver by a capital defendant that is not made without contemplation of those rights and sufficient awareness of the relevant circumstances and likely consequences cannot be deemed knowing and voluntary. This Court's analysis, therefore, must take into account Mr. Twilegar's substantive right to unanimity when reviewing the validity of his waiver and the impact that both counsel's inability to effectively instruct him on his rights and the unconstitutional sentencing statute had on the reliability of the outcome of his capital sentencing proceedings.

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.

Mr. Twilegar relies on the argument presented in his initial brief.

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 19th 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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