No. SC17-1050

IN THE

Supreme Court of Florida

JEREMIAH RODGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S BRIEF IN RESPONSE TO SHOW CAUSE ORDER

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INTRODUCTION[1]

This appeal asks the Court to review the circuit court's failure to hold an evidentiary hearing and summary denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), on the basis of invalid jury sentencing and post-conviction waivers. The circuit court erred in denying *Hurst* relief without a hearing because, unlike in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), Appellant Jeremiah Rodgers proffered evidence indicating that his waivers were invalid due to an undiscovered mental condition, gender dysphoria, that prevented him from knowingly and voluntarily surrendering his rights.[2]

Appellant proffered two expert opinions from highly-qualified psychiatrists indicating that gender dysphoria rendered his waivers involuntary. The proffered

[1] Appellant has provided a condensed brief here per this Court's order, but requests the opportunity to provide the Court with a full appellate brief consistent with Fla. R. App. P. 9.210, allowing the opportunity to fully present all of his issues on appeal.

[2] Assistant Attorney General Charmaine Millsaps, representing the State, acknowledged at an April 2017 hearing that "I don't dispute this diagnosis," and that "some diagnosis like this is in the record." ROA at 151. The majority of Appellant's life has been spent in horrific environments with extensive sexual, physical, and emotional abuse, in civil confinement facilities, or in prison. In all of these circumstances, Appellant learned that suppression of the truth of his gender was necessary for his survival even though he has known since childhood that his true gender is female. Appellant uses the male pronouns of "he" and "him" in this brief for consistency with the record, though in the future it will be more appropriate and consistent with prevailing medical standards and legal norms to refer to Appellant by the pronouns of "she" and "her".

evidence showed that prior examiners who found Appellant competent at the time of his waivers performed grossly insufficient evaluations, ignoring clear signs of gender dysphoria. Those flawed evaluations cannot support the circuit court's summary denial of *Hurst* relief. This is a case where an evidentiary hearing is necessary. A hearing will establish that the waivers were not knowing and voluntary.

Because his waivers were invalid, Appellant should be afforded the same *Hurst* relief this Court has extended to dozens of individuals whose death sentences, like Appellant's, became final after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) (holding that *Hurst* is retroactive to all post-*Ring* death sentences). Appellant's first sentencing jury recommended the death penalty by a 9-3 vote, thus obviating potential harmless-error concerns under this Court's harmless error precedent.[3]

Even if this Court does not agree that the circuit court should have held a hearing to allow Appellant to present evidence regarding the validity of his waivers, the present appeal should not be summarily rejected. For instance, even if Appellant validly waived his right to a second penalty jury, he could not have anticipated at the time of the waiver that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have

[3] Of note, Appellant's co-defendant, whose jury recommended death by an 11-1 vote, was granted *Hurst* relief. *State v. Lawrence*, Case No. 1998-CF-270, No. 783 (Santa Rosa Cty., Fla. Mar. 27, 2017).

knowingly waived his Sixth and Eighth Amendment arguments under *Hurst*. In addition, Appellant has arguments to present that *Mullens* itself contravenes federal law. In particular, under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), Appellant could not have waived his rights to jury factfinding and juror unanimity because those rights were not recognized by Florida courts at the time he entered his waivers.

Accordingly, for the reasons explained further below, Appellant respectfully requests that this Court vacate the decision below and remand for a hearing.

REQUEST FOR ORAL ARGUMENT

This appeal presents important issues regarding the intersection of *Hurst* and Appellant's right to a hearing on credible new evidence indicating that his jury and post-conviction waivers were invalid due to an undiscovered mental condition. Accordingly, Appellant respectfully requests the opportunity for his counsel to present oral argument on these issues pursuant to Fla. R. App. P. 9.320.

BACKGROUND

In 1998, Appellant pleaded guilty to murder. *Rodgers v. State,* 934 So. 2d 1207, 1210 (Fla. 2006). An advisory jury recommended a death sentence by a vote of 9 to 3. *Id.* The court, not the jury, then made the critical findings of fact required to impose a sentence of death. *Id.* The court, not the jury, made findings of fact that aggravating factors had been proven beyond a reasonable doubt, that the aggravators

were sufficient to justify the imposition of the death penalty, and that the aggravators were not outweighed by the mitigation.[4]

On direct appeal, Appellant challenged Florida's capital sentencing scheme under *Ring*. Initial Br. at 99 ("*Ring* applies to Florida's capital sentencing scheme."). This Court affirmed Appellant's conviction but reversed his death sentence and remanded for a new penalty phase, concluding that the trial court had improperly excluded mitigation showing that Appellant had been under the substantial domination of his more culpable co-defendant. *Rodgers,* 934 So. 2d at 1220 ("Given the extensive mitigation which was presented in the case, including Rodgers' significant mental health history, we cannot say that the State has shown that there is no reasonable possibility that the error in excluding this evidence did not contribute to the sentence of death."). The Court did not address the *Ring* claim.

Shortly after jury selection for the second penalty phase, Appellant stated to the judge: "I can count on a death sentence with you I feel, but with this jury, I mean,

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[4] The court found two aggravators: (1) Appellant was previously convicted of a violent felony; and (2) the offense was cold, calculated, and premeditated. *Rodgers*, 3 So. 3d at 1131. The court found multiple mitigators: (1) Appellant's youth; (2) Appellant was sexually abused by his mother; he was physically abused by his father; Appellant's parents abandoned him; his parents abused drugs and alcohol; his family had a legacy of domestic violence; and there was a history of suicide among Appellant's relatives; (2) at the age of sixteen, Appellant was incarcerated as an adult and was sexually abused in prison; (3) Appellant suffered from mental illness; (4) Appellant had a positive impact on the inmate population; (5) Appellant expressed genuine remorse for the murder; and (6) Appellant provided assistance to officers in solving prior crimes. *Id.*

it could go six/six or I don't know how it's going to go; but I say go without the jury." *Rodgers v. State*, 3 So. 3d 1127, 1130 (Fla. 2009). The court again made the findings necessary to impose a death sentence. The court found that the same aggravating factors that it found at the first sentencing, that those aggravators were sufficient for the death penalty, and that those aggravators were not outweighed by the same mitigating circumstances found at the first sentencing. *Id.* at 1131. This Court affirmed. *Id.* at 1135.

On July 5, 2010, after post-conviction counsel had been appointed, Appellant wrote the circuit court a letter, seeking to end further appeals and to expedite the execution process. In 2011, the circuit court ruled that Appellant had competently discharged his appointed counsel and waived post-conviction proceedings. Appellant's discharged counsel unsuccessfully appealed that ruling. *Rodgers v. State,* 104 So. 3d 1087 (2012).

On January 11, 2017, Appellant filed a Rule 3.851 motion in the circuit court seeking relief under *Hurst v. Florida* and *Hurst v. State*. In his motion, Appellant proffered evidence, in the form of two expert opinions from highly-qualified psychiatrists, indicating that previous mental health examiners had overlooked evidence of gender dysphoria, a condition that prevented him from knowingly and voluntarily waiving his rights. Appellant requested an evidentiary hearing regarding the validity of his waivers. On May 27, 2017, the circuit court summarily denied

Hurst relief without a hearing, ruling that Appellant's waivers barred *Hurst* relief regardless of questions as to their validity. This appeal followed.

ARGUMENT

I. Appellant, who proffered evidence to the circuit court that previous mental-health examiners overlooked Appellant's severe mental illness that rendered his waivers invalid, is not precluded from *Hurst* relief and should be afforded an evidentiary hearing

A. Under *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), and *Wright v. State,* 213 So. 3d 881 (Fla. 2017), only valid waivers preclude *Hurst* relief

Appellant should have been afforded an evidentiary hearing after he proffered evidence challenging the validity of his waivers because, under this Court's decisions in *Mullens* and *Wright v. State*, 213 So. 3d 881 (Fla. 2017), only valid waivers preclude *Hurst* relief. This Court denies *Hurst* relief based on waivers only after the defendant is afforded the opportunity to present evidence in the circuit court showing that a waiver was not knowing and voluntary, and only after this Court concludes based on the record that the waivers were knowing and voluntary.

In *Wright*, the defendant alleged he was entitled to *Hurst* relief because his intellectual disability rendered his jury waiver invalid. *See Wright*, 213 So. 3d at 902-03. This Court did not summarily reject Wright's claim. *Id.* at 903. Rather, the Court denied relief only after concluding that Wright "was not intellectually disabled under Florida law." *Id.* The Court relied, in part, on *two evidentiary hearings* that the circuit court afforded Wright to present evidence of his intellectual disability. *Id.*

at 896. In *Mullens*, the Court noted that "neither party dispute[d] his competency." 197 So. 3d at 38. Further, the circuit court "conducted a thorough colloquy" prior to accepting his waiver and "was fully cognizant of Mullens's status and his background." *Id.* at 39. Based on the parties' concessions and the evidentiary record created below, this Court "conclude[d] that Mullens's waiver was knowing, voluntary, and intelligent." *Id.*

Here, unlike in *Wright* or *Mullens*, Appellant proffered evidence to the circuit court that his waivers were not knowing, voluntary, and intelligent, but Appellant was not afforded a hearing.

B. Appellant's gender dysphoria rendered his waivers invalid

Appellant proffered the following evidence to the circuit court in support of his argument that his waivers were not a valid basis to deny *Hurst* relief. This proffer shows that Appellant's gender dysphoria rendered his waivers invalid. Appellant should be afforded a hearing.

Gender dysphoria, previously known as gender identity disorder,[5] is a serious medical condition that requires medical care and causes an individual severe distress

[5] Gender dysphoria was previously known as "Gender Identity Disorder" in the earlier Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), which was published in 1994, but was overlooked by the earlier psychologists who assessed competency. The DSM-IV noted that cross-gender identification for males could be shown by a marked preoccupation with "traditionally feminine activities," including a preference for dressing in women's clothing, a strong attraction for the stereotypical games and activities of women, and pretending the individual does not

and, as with Appellant's "waivers", self-destructive actions.[6] *See Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987) (explaining that gender dysphoria is a serious medical condition and noting that "[t]here is no reason to treat transsexualism differently than any other psychiatric disorder"); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) ("psychological disorders may constitute a serious medical need . . . [w]e have also recognized that transsexualism is a very complex medical and psychological problem."). People with gender dysphoria typically suffer persistent anxiety, intense discomfort, and overwhelming depression over their assigned sex.[7]

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have a penis, often finding "their penis or testes disgusting, that they want to remove them, or that they have, or wish to have a vagina." DSM-IV at 533. Additionally, the DSM-IV noted that the diagnosis of gender identity disorder may be difficult because of the individual's guardedness, and that the individual will often be fearful of social isolation and rejection.

[6] In recent years, more attention has been given to gender dysphoria, particularly in notable cases like that of Chelsea Elizabeth Manning. Manning, who was a United States Army soldier convicted of various violations of the Espionage Act, was diagnosed with and later provided medical treatment for gender dysphoria. Such treatment included hormone therapy, the ability to wear female undergarments, use cosmetics in her daily life, and speech therapy. *See, e.g.*, Charlie Savage, *Chelsea Manning Describes Bleak Life in a Men's Prison*, The New York Times, https://www.nytimes.com/2017/01/13/us/chelsea-manning-sentence-obama.html?mcubz=2.

[7] A diagnosis of gender dysphoria under the DSM-V requires at least one of the following: (1) a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics; (2) a strong desire to be rid of one's primary and/or secondary sex characteristics; (3) a strong desire for the primary and/or secondary sex characteristics of the other gender; (4) a strong desire to be of the other gender; (5) a strong desire to be treated as the other gender; (6) a strong conviction that one has the typical feelings and reactions of the other gender.

Abuse and mistreatment makes the condition exponentially worse, leading to self-destructive behaviors.[8]

As was proffered in the circuit court, Appellant's medical history was recently assessed by two experts, Dr. George Brown, one of the foremost gender dysphoria experts in the country, and Dr. Julie Kessel, a medical doctor certified in psychiatry and neurology, who diagnosed Appellant with gender dysphoria. Dr. Kessel noted that Appellant's lifelong gender dysphoria has considerably impacted his mental state, including his thinking at the time of his waivers. Specifically, she concluded that there is "substantial doubt as to whether his waiver of his right to a jury at his second penalty phase" and "waiver of his right to seek initial post-conviction review" were "knowing and voluntary." ROA at 58. Dr. Kessel noted that Appellant has long been preoccupied by his desire to be a girl, a preoccupation that started in his preadolescent years and became more pronounced during his teenage years. ROA at 58. Dr. Kessel noted that Appellant's correctional institutional records reflect that Appellant previously *attempted to cut off his penis at the age of 14*; that

[8] Numerous surveys and studies show that gender non-conforming individuals experience a significantly elevated risk of suicide attempts. *See* Ann P. Haas et al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults*, American Foundation for Suicide Prevention (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf; *see also* Ann Hendershott, *Chelsea Manning and Transgender Suicide Rates*, The Washington Times, http://www.washingtontimes.com/news/2016/jul/12/chelsea-manning-and-transgender-suicide-rates/.

a mental health worker, during prior incarceration, diagnosed Appellant with "Gender Disorder NOS"; and that Appellant often attempted to commit suicide and self-mutilate. ROA at 59-60. It was Dr. Kessel who, for the first time in Appellant's life, actually gathered the information about Appellant's sexual identity and gender issues and diagnosed him with severe gender dysphoria.

Dr. Brown also noted the documentation of Appellant's sexual identity and gender issues, self-mutilation, suicidal actions, and horrific upbringing. Dr. Brown noted that it was not until Dr. Kessel's 2016 evaluation that Appellant was actually diagnosed with this detrimental psychiatric condition that occurs in people suffering from untreated gender dysphoria. Dr. Brown explained: "In spite of the documentation going back to at least 1995, the evaluators for competency at all stages of his case through 2011 do not appear to explore or consider the diagnosis of gender identity disorder as an important and relevant psychiatric disorder than can impact competent decision-making." ROA at 68

Dr. Brown agreed with Dr. Kessel that it is clear that there is a "high likelihood that [Appellant] has been suffering from, and has been deeply influenced by gender dysphoria, and associate life-permeating symptoms and relational problems emanating from this psychiatric diagnosis." ROA at 69-70. Further, Dr. Brown stated: "It is clear to me that Gender Identity Disorder should have been a consideration" in the earlier proceedings "but it is not until 2016 that Dr. Kessel . . .

reached the conclusion that the presence of previously undiagnosed, and untreated, gender identity disorder calls into question the voluntary and knowing nature of [Appellant]'s decision to waive his rights to further appeals." ROA at 70.

Dr. Brown explained that the environments that Appellant grew up in would be "expected to support nothing but shame, a sense of disgust and self-loathing, and self-destructive behaviors." ROA at 69. He noted that such environments and experiences would "in no way facilitate his ability to share, discuss, or act upon any transgender feelings without fear for his life." *Id.* As such, Dr. Brown explained that Appellant's internalized shame and self-destructiveness in the form of suicidal self-harming behaviors was consistent with the research about gender dysphoria. *Id.* Dr. Brown explained that the phenomena of "suicide by cop"—whereby individuals attempt to "make" the law enforcement officers engage in lethal force against them—applies here. It is the reason Appellant attempted to obtain a death sentence and waive his rights. ROA at 70. Dr. Brown noted that the presence of untreated gender dysphoria was associated with shame, self-hatred, and self-destructiveness that cumulated in waivers at the penalty phase and in post-conviction review. Dr. Brown highlighted that there is substantial doubt as to whether either of these waivers were voluntary or knowing on Appellant's behalf. ROA at 70-71.

Extensive documentation pre-dating the offense shows that Appellant has suffered significant gender issues. In 1995, Laura A. Parado, M.D., documented

Appellant's widespread self-mutilating behaviors, cutting behaviors, self-harm behaviors, his suicidal ideation, and his improper psychotic functioning as all "related to sexual identity/guilt issues." Dr. Parado also noted that, at the age of 18, Appellant attempted an autopenectomy (cutting off his penis) which required additional extensive medical and psychiatric care. This was not the first time Appellant had attempted an autopenectomy—he previously attempted one at the age of 14.

In 1996, J. Brennan, MS, noted that Appellant was suffering from gender identity disorder, impulse control, and borderline personality disorders. That same year, Dr. Valero noted that "[inmate] tends to self-lacerate over his sexual/gender identity issue." Again that year, another state-employed clinician, Dr. Norma Torres, a senior psychologist at Corrections Mental Health Institution, noted that Appellant brought up issues regarding his sexual and gender identity, which was likely to be the root of all his problems. The psychologists who evaluated Appellant for competency, Dr. Harry McClaren and Dr. Greg Pritchard, did not describe this evidence for the court at the time of the waivers.

In addition to such entries from mental health practitioners predating the offense in Appellant's case, all of which demonstrate that Appellant has historically suffered from severe gender and sexual issues, there is additional documentation regarding his immensely violent, impoverished, and abusive upbringing. Appellant

spent his developing years being beaten and raped by his mentally disturbed mother. At her behest, he was often emotionally debased, and lived in constant fear for his life. Appellant later went to live with his father, who was, like Appellant's mother, severely emotionally and physically abusive. He often berated Appellant, making him fearful of ever sharing his desires to be a girl and how out of place he felt in his own body. Appellant's later adolescent years were characterized by similar cruelty and violence as he spent many years in correctional institutions where he was raped and brutalized. Appellant's horrendous background created immense mental and emotional issues, leading to time spent in mental institutions. It was at one such state mental hospital, the Florida State Hospital, in Chattahoochee where Appellant became acquainted with his co-defendant in this case.

The entirety of Appellant's history, including the documentation of his gender and sexual issues, was never analyzed or adequately diagnosed prior to Dr. Kessel's diagnosis in 2016. As such, the underlying gender dysphoria diagnosis that has greatly affected Appellant throughout his life, and has thus impacted his competency and the validity of his "waivers," has never been presented to any court in the past.

C. The prior mental-health examiners rendered insufficient competency evaluations, in violation of Appellant's rights to equal protection and due process, and the substantial doubts about the validity of Appellant's waivers necessitate a hearing

In order to be afforded a post-conviction hearing on prior competency and whether waivers were knowing, intelligent, and voluntary, the defendant must

proffer that there is a substantial doubt about the prior determinations. *See, e.g.*, *Barnes v. State*, 124 So. 3d 904, 916 (Fla. 2013) ("real, substantial, and legitimate doubt"); *Nelson v. State*, 43 So. 3d 20, 33 (Fla. 2010) ("real, substantial and legitimate doubt"); *see also Drope v. Missouri*, 420 U.S. 162, 173 (1975) ("bona fide doubt"); *Wright v. Sec'y Dept. of Corrs.*, 278 F.3d 1245, 1259 (11th Cir. 2002) ("real, substantial, and legitimate doubt"); *Medina v. Singletary*, 59 F.3d 1095, 1106 (11th Cir. 1995) ("substantial doubt," "bona fide doubt," or "legitimate doubt"); *James v. Singletary*, 957 F.2d 1562, 1575 (11th Cir. 1992) ("substantial doubt"); *Bundy v. Dugger*, 816 F. 2d 564, 566 (11th Cir. 1987) ("real, substantial and legitimate doubt"). Appellant has proffered two psychiatric reports that provide conclusions establishing such a substantial doubt and has proffered evidence about a medical history consistent with the post-conviction diagnosis.

The prior mental health examiners, whose evaluations were considered in determining Appellant's competency, rendered insufficient evaluations in violations of Appellant's due process and equal protection rights. Under *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), defendants have due process and equal protection rights to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Mann v. State*, 770 So. 2d 1158, 1164 (Fla. 2000) (internal quotation marks omitted). An exception was carved out by this Court in *State v. Sireci*, 502 So. 2d 1221, 1223-24 (Fla. 1987), where this

Court recognized that a defendant can litigate a claim in post-conviction that a previous mental-health examiner rendered a grossly insufficient evaluation. Here, Appellant did not discover that an underlying serious medical condition rendering him incompetent was overlooked by previous medical professionals until he was evaluated by Dr. Kessel. His claim, which challenged the validity of the prior "waiver" evaluations, is properly raised in his motion for post-conviction relief.

The reasoning in *Mullens* and *Wright* that only valid waivers preclude *Hurst* relief is consistent with this Court's precedent in *Sireci* and *Mason v. State*, 489 So. 2d 734 (1986). According to *Sireci* and *Mason*, Appellant is entitled to an evidentiary hearing to present his claim that his prior competency evaluations were inadequate and in violation of his rights to due process and equal protection, and that he did not voluntarily "waive."

In *Mason*, this Court stayed the defendant's death warrant to consider whether the circuit court erred in refusing to grant him an evidentiary hearing on his claim that previous mental-health experts, on which the court relied to conclude that he was competent, rendered inadequate evaluations. *Mason*, 489 So. 2d at 735. Two previous mental-health examiners found Mason competent during proceedings on a prior charge. *Id.* Then, at his murder trial, one of the aforementioned psychiatrists and a third psychiatrist again found Mason competent. *Id.* at 736. In his post-conviction proceeding, Mason proffered evidence of a "history of mental retardation,

drug abuse and psychotic behavior" which were not previously uncovered. *Id.* The circuit court summarily denied Mason's motion for post-conviction relief.

Subsequently, this Court unanimously remanded for an evidentiary history stating that "too great a risk exist[ed] that these determinations of competency were flawed as neglecting a history indicative of organic brain damage." *Id.* at 736-37.

> Because Mason has since proffered significant evidence of an extensive history of mental retardation, drug abuse and psychotic behavior which were not uncovered by defense counsel, and because a possibility exists that this evidence was not considered by the evaluating psychiatrists, however, we must remand for a hearing on whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history.

Id. at 736.

In *Sireci*, after issuance of his death warrant, the defendant argued in his successive Rule 3.850 motion that two court-appointed mental-health examiners at trial failed to conduct adequate and competent evaluations. 502 So. 2d at 1223. During a subsequent post-conviction proceeding, another mental-health examiner considered Sireci's past medical history and reached "a vastly different conclusion" as to his competency. *Id.* In particular, "[t]he third psychiatrist concluded that Sireci suffered from a form of organic brain damage and paranoid psychosis." *Id.* Based on this evidence, the circuit court granted Sireci's application for a hearing to determine whether Sireci was competent to enter a waiver. *Id.*

The state argued on appeal that Sireci's claim was not cognizable in post-conviction review. *Id.* This Court concluded that "Sireci's claim regarding incompetent psychiatric evaluations is cognizable under a successive motion for post-conviction relief," and affirmed the trial court's order granting an evidentiary hearing. *Id.* at 1224.

Appellant, like Mason and Sireci, proffered significant evidence that his previous mental-health examiners rendered grossly insufficient evaluations. In particular, he proffered the expert reports of Drs. Kessel and Brown. Those reports conclude that Appellant suffered from severe gender dysphoria at the time of his "waivers," that Appellant's previous mental-health examiners overlooked clear signs of his severe gender dysphoria, and that Appellant was not competent at the time of his waivers—a conclusion vastly different than the previous examiners who found Appellant competent. In his filings and at oral argument in the circuit court, Appellant pointed to these expert reports and evidence of his gender dysphoria that the previous examiners did not consider. Given this evidence, the circuit court should have granted Appellant a hearing.

D. Even if Appellant's "waivers" were valid, his "waivers" do not preclude relief

Even if Appellant had validly waived, he could not have anticipated that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, and therefore could not have knowingly waived his right to ever

vindicate his Sixth and Eighth Amendment rights. Moreover, absent the trial court's unrelated constitutional errors during the first penalty phase, which obligated this Court to order re-sentencing, there never would have been a second penalty phase, and Appellant would be entitled to seek *Hurst* relief today. It would be fundamentally unfair to deny Appellant the benefit of *Hurst* for this reason as well.

This Court has explained that fundamental fairness is a consideration in *Hurst* cases. *See Mosley*, 209 So. 3d at 1274-75. Fundamental fairness favors relief under the *Hurst* decisions in Appellant's case.

II. In light of the invalidity of his waivers to bar *Hurst* relief, Appellant, whose first jury recommended death by a 9-3 vote and whose death sentence became final after *Ring*, should be granted *Hurst* relief

In light of the invalidity of his waivers, *Hurst* relief is appropriate under this Court's precedent, which establishes that a new penalty phase should be ordered where the defendant's death sentence became final after *Ring* and the State cannot establish harmlessness beyond a reasonable doubt. Appellant's death sentence became final in 2009, after *Ring*, and the State cannot establish harmlessness in his case became multiple jurors during Appellant's first penalty phase recommended that the death penalty not be imposed.

Appellant's death sentence became final in 2009. This Court's precedent establishes that *Hurst* applies retroactively to death sentences that became "final" after the 2002 decision in *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*,

209 So. 3d 1248, 1283 (Fla. 2016); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) ("We have also determined that most defendants sentenced to death after the *Ring* decision should receive the benefit of *Hurst*.").

This Court has uniformly held that *Hurst* errors are not harmless where the jury recommended the death penalty by a non-unanimous vote. Petitioner's first jury voted for death by a non-unanimous vote of 9-3. In numerous other cases with non-unanimous votes, this Court has granted relief, vacated the death sentence, and remanded for a new penalty phase that complies with the *Hurst* decisions.[9]

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[9] *See, e.g.*, *Johnson v. State*, 205 So. 3d 1285, 1288 (11-1 jury vote); *McGirth v. State*, 209 So. 3d 1146, 1164 (Fla. 2017) (11-1); *Durousseau v. State*, 218 So. 3d 405, 409 (Fla. 2017) (10-2); *Kopsho v. State*, 209 So. 3d 568, 569 (Fla. 2017) (10-2); *Hodges v. State*, 213 So. 3d 863, 868 (Fla. 2017) (10-2); *Smith v. State*, 213 So. 3d 722, 744 (Fla. 2017) (10-2 and 9-3); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (9-3); *Hojan v. State*, 212 So. 3d 982, 987 (Fla. 2017) (9-3); *Armstrong v. State*, 211 So. 3d 864, 865 (Fla. 2016) (9-3); *Williams v. State*, 209 So. 3d 543, 567 (Fla. 2017) (9-3); *Simmons v. State*, 207 So. 3d 860, 867 (Fla. 2016) (8-4); *Mosley*, 209 So. 3d at 1283-84 (8-4); *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017) (8-4); *Anderson v. State*, No. SC14-881, 2017 WL 930924, at *12 (Fla. Mar. 9, 2017) (8-4); *Calloway v. State*, 210 So. 3d 1160, 1166 (Fla. 2017) (7-5); *Hurst v. State*, 202 So. 3d at 69 (7-5); *Brooks v. Jones*, No. SC16-532, 2017 WL 944235 (Fla. Mar. 10, 2017) (9-3 and 11-1); *Ault* v. *State*, 213 So. 3d 670, 680 (Fla. 2017) (9-3 and 10-2); *Jackson v. State*, 213 So. 3d 754, 768 (Fla. 2017) (11-1); *Baker v. State*, 214 So. 3d 530, 534 (Fla. 2017) (9-3); *Deviney v. State*, 213 So. 3d 794, 795 (Fla. 2017) (8-4); *Orme v. State*, Nos. SC13-819, SC14-22, 2017 WL 1177611 (Fla. Mar. 30, 2017) (11-1); *Bradley v. State*, 214 So. 3d 648, 657 (Fla. 2017) (10-2); *White v. State*, 214 So. 3d 541, 543 (Fla. 2017) (8-4); *Guzman v. State*, 214 So. 3d 625, 628 (Fla. 2017) (7-5); *Abdool v. State*, Nos. SC14-582, SC14-2039, 2017 WL 1282105, at *8 (Fla. April 6, 2017) (10-2); *Newberry v. State*, 214 So. 3d 562, 567 (Fla. 2017) (8-4); *Heyne v. State*, 214 So. 3d 640, 647 (Fla. 2017) (10-2); *Robards v. State*, 214 So. 3d 568, 571 (Fla. 2017) (7-5 and 7-5); *McMillian v. State*, 214 So. 3d 1274, 1289 (Fla. 2017) (10-2); *Brookins v. State*, No. SC14-418,

III. Even if Appellant's waivers were valid, *Hurst* relief is appropriate under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), a case not considered in *Mullens*, that holds a defendant cannot waive a right not yet recognized by the courts

Even if Appellant's waivers were valid from a mental health perspective, the present appeal should not be summarily rejected. Appellant has arguments not presented in *Mullens* that demonstrate that *Mullens* should not control here. Given that Appellant could not have anticipated at the time of the waivers that Florida's capital sentencing statute would be ruled unconstitutional years later in the *Hurst* decisions, he could not have knowingly waived his Sixth and Eighth Amendment arguments under *Hurst*.

2017 WL 1409664, at *7 (Fla. April 20, 2017) (10-2); *Banks v. Jones*, Nos. SC14-979, SC15-297, 2017 WL 1409666, at *9 (Fla. April 20, 2017) (10-2); *Altersberger v. State*, Nos. SC15-628, SC15-1612, 2017 WL 1506855, at *7 (Fla. April 27, 2017) (9-3); *Hampton v. State*, Nos. SC15-1360, SC-16-6, 2017 WL 1739237, at *3 (Fla. May 4, 2017) (9-3); *Card v. Jones*, No. SC17-453, 2017 WL 1743835, at *1 (Fla. May 4, 2017) (11-1); *Pasha v. State*, No. SC13-1551, 2017 WL 1954975, at *3 (Fla. May 11, 2017) (11-1 and 11-1); *Serrano v. State*, Nos. SC15-258, SC15-2005, 2017 WL 1954980, at *15 (Fla. May 11, 2017) (9-3); *Snelgrove v. State*, Nos. SC15-1659, SC16-124, 2017 WL 1954978, at *3 (Fla. May 11, 2017) (8-4 and 8-4); *Davis v. State*, No. SC15-1794, 2017 WL 1954979, at *11 (Fla. May 11, 2017) (9-3 and 10-2); *Hernandez v. Jones*, No. SC17-440, 2017 WL 1954985, at *1 (Fla. May 11, 2017) (nonunanimous); *Caylor v. State*, Nos. SC15-1823, SC16-399, 2017 WL 2210386, at *1 (Fla. May 18, 2017) (8-4); *Hertz v. Jones*, No. SC17-456, 2017 WL 2210402, at *3 (Fla. May 18, 2017) (10-2); *Okafor v. State,* No. SC15-2136, 2017 WL 2481266, at *3 (Fla. June 8, 2017) (11-1); *Belcher v. Jones*, SC17-1144 (Fla. Jun 22, 2017) (9-3); *Taylor v. Jones*, SC17-1145 (Fla. Jun. 22, 2017) (10-2); *Bailey v. Jones*, SC17-433, 2017 WL 2874121, at *1 (Fla. Jul. 6, 2017) (11-1).

In particular, United States Supreme Court precedent establishes that Appellant could not have waived his right to jury factfinding or a unanimous penalty-phase jury because those rights were not yet recognized by the courts. Under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), a defendant cannot waive a right not yet recognized by the courts. *See also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege." (emphasis added)). Indeed, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights and [] do not presume acquiescence in the loss of fundamental rights." *Johnson*, 304 U.S. at 464 (internal quotation marks omitted). This Court did not discuss, or even cite, *Halbert* in *Mullens*.

In *Halbert*, the United States Supreme Court recognized that where the Michigan appellate courts considered the merits of the claim in ruling on a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Relevant here, Michigan argued that even if the defendant had a constitutional right to appointed counsel he had waived that right when he pleaded *nolo contendere*. *Id.* at 623. The Supreme Court disagreed, holding that the defendant did not waive his right to counsel because at the time he entered the plea he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

Under the reasoning of *Halbert*, a case not considered by this Court in *Mullens* or in *Wright*, Appellant is not precluded from *Hurst* relief. At the time Appellant entered his waivers, Florida courts could impose a death sentence without jury factfinding and without a unanimous jury vote. Appellant, therefore, could have waived only the right to a jury recommendation of life or death and a non-unanimous jury recommendation—not his later-recognized constitutional rights to jury factfinding and a unanimous jury.

Not only does *Mullens* not consider the reasoning of *Halbert*, it also cites to waiver cases that are inapposite to waivers in Florida's *Hurst* setting. For instance, the *Mullens* court noted that in *Blakely v. Washington*, 542 U.S. 296, 310 (2004), the United States Supreme Court stated that after *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a defendant could still waive his rights to jury factfinding—a right recognized first in *Apprendi*—and consent to judicial factfinding. *Blakely* does not hold, as suggested in *Mullens*, that a defendant could waive jury factfinding before that right was recognized by the courts. To interpret *Blakely's dicta* otherwise would be contrary to the clear holding of *Halbert*.

Mullens then cites to cases from other jurisdictions as persuasive, stating that "[o]ther states have reached similar conclusions in the context of capital sentencing. In 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." *Mullens*, 197 So. 3d at 38. But, in most of those cases, the defendants, unlike Appellant, already had state statutory rights to jury factfinding at sentencing that they explicitly waived.

For instance, the defendant in *State ex rel. Taylor v. Steele*, 341 S. W. 3d 634 (Mo. 2011), who waived jury sentencing before *Ring*, argued he was now entitled to relief under *Ring*. Taylor, however, already had a *statutory* right under Missouri law to jury factfinding at sentencing. The Missouri Supreme Court found Taylor's jury-sentencing waiver valid because "courts do not require a defendant to know if the source of the right being waived is the constitution or a statute." *Id.* at 647. The court then distinguished *Halbert*: "Unlike the defendant in *Halbert*, who was alleged to have impliedly waived a right to his detriment, Taylor clearly and unequivocally rejected his opportunity to have his case heard by a jury to obtain his desired judge sentencing." *Id.* at 648. Indeed, the court noted that the record demonstrated Taylor understood that "his guilty plea would lead to him being sentenced by a judge, whereas a not-guilty plea would lead to him being sentenced by a jury." *Id.* at 641.

Four other cases cited for support in *Mullens—State v. Piper*, 709 N.W. 2d 783, 805 (S.D. 2006); *State v. Downs*, 604 S.E.2d 377, 380 (2004); *Lewis v. Wheeler*, 609 F.3d 291 (4th Cir. 2010); and *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002)—similarly presented situations where the pre-*Ring* defendants already had a state statutory right to penalty-phase jury sentencing that they explicitly waived.

Mullens then cites to *State v. Murdaugh*, 97 P. 3d 844, 851 (Ariz. 2004), and *Moore v. State*, 771 N.E. 2d 46 (Ind. 2002)—cases involving fundamentally different circumstances than a waiver in Florida's pre-*Hurst* capital sentencing scheme. First, in *Murdaugh*, the defendant did not raise the *Halbert* argument. Second, in *Moore* the Indiana Supreme Court concluded that the defendant's guilty plea waived his right to a jury *recommendation* of life or death and did not consider whether his plea waived his right to jury factfinding or to juror unanimity. 771 N.E. 2d at 49. In fact, *Moore* considered neither the impact of *Apprendi* nor *Ring* on Indiana's death-sentencing scheme. *Id.* at 49 n.1 (the court did not even cite to *Ring*, decided two days before it issued *Moore*, and denied the defendant's request "to supplement his brief to further address the application of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to an Indiana death sentence").

IV. Under fundamental fairness considerations, this Court should grant Appellant *Hurst* relief.

In this particular case, this Court should grant Appellant *Hurst* relief under fundamental fairness principles. *See James*, 615 So. 2d at 669 (noting that the Court can afford relief where otherwise "it would not be fair"). At Appellant's first penalty-phase, three jurors voted for life. Under that vote, Appellant, like his co-defendant with an 11-1 jury vote, *Lawrence*, Case No. 1998-CF-270, No. 783 (Mar. 27, 2017), would be entitled to *Hurst* relief. The only reason Appellant proceeded to a second penalty-phase proceeding is because the trial court erred when it failed

to consider certain mitigation. *Rodgers*, 934 So. 2d at 1219-22. It would be fundamentally unfair to penalize Appellant by denying him relief that he otherwise would be entitled to absent the trial court's error and that his co-defendant with only one jury vote for life has already received.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court schedule full briefing, grant oral argument, and thereafter remand for an evidentiary hearing and/or grant relief under the *Hurst* decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy Nolas, hereby certify that on July 20, 2017, I served this filing by electronic transmission via the e-portal to Assistant Attorney General Charmaine Millsaps at capapp@myfloridalegal.com and charmaine.millsaps@myfloridalegal.com.

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