

No. SC17-1229

IN THE
Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**APPELLANT'S BRIEF
IN RESPONSE TO AUGUST 22, 2017
ORDER TO SHOW CAUSE**

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INTRODUCTION

This appeal seeks review of the circuit court’s failure to hold an evidentiary hearing and denial of Appellant Jeffrey Hutchinson’s claim for relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). There is no dispute that the *Hurst* decisions apply retroactively to Appellant, or that this Court’s current “harmless error” analysis does not apply in his case. The basis for the circuit court’s denial of *Hurst* relief was Appellant’s “jury waiver,” and a misunderstanding of this Court’s decision in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). *Mullens* precludes *Hurst* relief based on valid or unchallenged jury waivers. But here, unlike in *Mullens* or any other “jury waiver” *Hurst* case this Court has reviewed, Appellant challenged his waiver as *invalid* to bar *Hurst* relief and requested a hearing in the circuit court based on a substantial evidentiary proffer.

Appellant’s proffer alerted the circuit court, and a hearing would establish, that Appellant’s jury waiver is invalid because (1) his decision to waive was based solely on trial counsel’s advice, (2) counsel’s advice was grounded entirely on Florida’s pre-*Hurst* unconstitutional sentencing scheme, (3) counsel would not have advised Appellant to waive in a constitutional post-*Hurst* proceeding, (4) Appellant would not have waived absent counsel’s advice, and (5) at least one juror in a constitutional proceeding would have voted for life based on the substantial mitigation in the case.

In light of Appellant’s proffer, the circuit court should have held an evidentiary hearing on the validity of Appellant’s waiver as a barrier to *Hurst* relief. This Court should remand for a hearing. Allowing a hearing is consistent with *Mullens* and this Court’s other “jury waiver” cases. A remand for a hearing is also supported by this Court’s long-established precedent, grounded in principles of fairness and due process, encouraging evidentiary hearings to establish the impact of constitutional errors like *Hurst* in capital sentencing proceedings.

Even if this Court does not remand for a hearing, the circuit court’s ruling should be vacated and Appellant should be granted *Hurst* relief because this Court can conclude based on Appellant’s proffer that his waiver is not valid in the *Hurst* context, and because Appellant could not have waived rights that were not recognized at the time.¹

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

This appeal presents important issues of first impression regarding the need for evidentiary development where, unlike in *Mullens* and this Court’s other “jury waiver” *Hurst* cases, the defendant proffers evidence in the circuit court that his waiver of a penalty-phase jury is invalid because the waiver was the direct result of the unconstitutional pre-*Hurst* sentencing statute’s influence on counsel’s advice to

¹ All emphasis herein is supplied unless otherwise indicated. Parallel citations generally are omitted.

waive. Appellant respectfully requests oral argument on this and related issues pursuant to Fla. R. App. P. 9.320, and also requests that the Court allow him the opportunity to brief this case in accord with the normal, untruncated rules of appellate practice.

BACKGROUND

In 1998, Appellant was convicted of multiple counts of murder following a jury trial in Okaloosa County. *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004). After the guilt phase, Appellant’s counsel advised him to waive a jury for the penalty phase. Counsel’s advice to waive a jury was based on “the death-sentencing scheme in place in 2001,” and counsel’s determination that “we would not get a majority [of the jury] to vote for life.” Record on Appeal (“ROA”) at 88. This “convinced” Appellant, and he waived a jury based solely on counsel’s advice. *Id.* at 93.

Appellant’s counsel presented mitigation evidence to the court, including but not limited to Appellant’s lack of prior criminal history, his decorated service in Desert Storm, and his diagnosis of Gulf War Syndrome. As a result, the court found more than 20 mitigating factors applicable.²

² The mitigation the court found included that Appellant (1) had no criminal history; (2) was a decorated military veteran of the Gulf War; (3) is the father of a son for whom he has provided financial and emotional support; (4) has potential for rehabilitation and productivity in prison; (5) was intoxicated with a blood alcohol content of .21 to .26 on the night of the offense; (6) was a soldier for eight years and was honorably discharged; (7) provided financial and emotional support to his family; (8) has the ability to show compassion; (9) has a good employment history;

The court, not a jury, made the findings of fact required to sentence Appellant to death under Florida law. The court found beyond a reasonable doubt that three aggravating circumstances had been established,³ and that those aggravators were “sufficient” to impose the death penalty and not outweighed by the mitigation. Based upon this fact-finding, the court sentenced Appellant to death for three of the four murders of which he was convicted.

This Court affirmed on direct appeal. *Hutchinson*, 882 So. 2d at 948. Appellant’s sentences became final in 2004, when the time expired to seek a writ of certiorari in the United States Supreme Court. *See* Fla. R. Crim. P. 3.851(d)(1)(A).

In 2009, this Court affirmed the denial of Appellant’s initial Rule 3.851 motion. *See Hutchinson v. State*, 17 So. 3d 696 (Fla. 2009). Appellant did not receive federal habeas review because his attorneys failed to file a timely federal petition, despite their assurances to Appellant that they would do so. *See Hutchinson v. Florida*, 677 F.3d 1097, 1099 (11th Cir. 2012).

(10) has family who support him; (11) has ability as a mechanic; (12) sought motorcycle patents; (13) was diagnosed with Gulf War illness; (14) was recognized as security officer of the year; (15) never abused drugs; (16) is a high school graduate; (17) was active in disseminating information about Gulf War illness; (18) has religious faith; (19) was distressed during the 911 call; (20) has friends who testified on his behalf; and (21) was diagnosed with ADD. *Id.* at 959-60.

³ The aggravators found by the judge included that the offense involved (1) multiple victims; (2) victims less than twelve years of age; and (3) circumstances that were heinous, atrocious, or cruel. *Id.* at 959.

In January 2017, Appellant filed a Rule 3.851 motion in the circuit court seeking relief under *Hurst v. Florida* and *Hurst v. State*. ROA at 46-66. Appellant argued, and the State did not dispute, that the *Hurst* decisions applied retroactively because Appellant's sentences became final after *Ring*. With respect to the jury waiver, Appellant argued that the waiver is invalid to preclude *Hurst* relief, notwithstanding this Court's decision in *Mullens* and its progeny, because unlike in those cases, (1) Appellant's decision to waive was based solely on trial counsel's advice, (2) counsel's advice was grounded entirely on counsel's knowledge of Florida's unconstitutional pre-*Hurst* sentencing scheme, (3) counsel would not have advised Appellant to waive in a constitutional post-*Hurst* proceeding, (4) Appellant would not have waived absent counsel's advice, and (5) at least one juror in a constitutional proceeding would have voted for life based on the substantial mitigation in the case. Appellant requested a hearing on the validity of his waiver to preclude *Hurst* relief, and proffered evidence that he would present at a hearing, including declarations from trial counsel and himself.

The circuit court denied relief without addressing Appellant's proffer or his request for a hearing. This Court directed the parties to file briefs addressing why the circuit court's order should not be affirmed based on *Mullens*.⁴

⁴ Appellant has provided a condensed brief per this Court's August 22, 2017 order, but requests the opportunity to provide a standard initial brief, consistent with Fla. R. App. P. 9.210, so that he can fully present all of his issues on appeal.

ARGUMENT

I. This Court should remand for a hearing based on Appellant’s challenge to the validity of his waiver and evidentiary proffer in the circuit court

Appellant should have been afforded a hearing in the circuit court to establish that his jury waiver is invalid to preclude *Hurst* relief. Because Appellant argued below that his waiver is invalid and proffered evidence that he would not have waived absent the advice counsel provided in the context of the unconstitutional statute, the circuit court should not have summarily denied *Hurst* relief under *Mullens*. This Court should remand to afford Appellant the opportunity to present his evidence, a decision that would be consistent with *Mullens*, this Court’s other *Hurst* “waiver” decisions, and long-established precedent encouraging hearings to establish the impact of constitutional errors in capital sentencing proceedings, particularly with respect to the impact of a constitutional error on defense counsel.

A. Appellant’s proffer is sufficient to afford him the opportunity to establish at a hearing that his jury waiver is not a valid basis to deny *Hurst* relief

Appellant’s proffer in the circuit court is sufficient to afford him the opportunity to establish at a hearing that his jury waiver is invalid to bar *Hurst* relief. In the circuit court, Appellant specifically challenged the validity of his waiver. Appellant’s Rule 3.851 motion stated that his waiver “was based upon the advice of counsel, which was grounded in Florida’s law at the time, by which the judge sentenced after a bare majority of the jury was asked to make an advisory

recommendation,” ROA at 46-47, and that “counsel would *not* have advised [Appellant] to waive a jury vote, and [Appellant] *would not have waived* had the law been what [the *Hurst* decisions] now require: a *unanimous* finding by the jury, agreed to by every juror, that aggravation exists, that it is sufficient for death, that it outweighs the mitigation, and that death is the proper sentence,” *id.* at 47.

Appellant stated that at a hearing he would “show that the result of this proceeding would have been different had Florida’s scheme not been unconstitutional when [Appellant], on the advice of counsel, waived a jury.” ROA at 55; *see also* ROA at 59-60, 106. In support of his request for a hearing, Appellant proffered substantial evidence regarding the invalidity of his waiver. ROA at 84-95.

First, Appellant proffered a declaration from his trial counsel, Kimberly Ward, Esq.⁵ *Id.* at 88-91 (also attached here as Attachment A). Counsel confirmed in the declaration that all of counsel’s decisions and advice to Appellant “were affected by the Florida capital sentencing statute under which we operated.” *Id.* at 88. Counsel further explained that counsel’s “advice to Mr. Hutchinson to waive a penalty phase jury was based on that statute,” and that, “[h]ad this trial taken place under a sentencing scheme as required by *Hurst v. Florida* and *Hurst v. State*, we would have given different advice to Mr. Hutchinson.” *Id.* at 89-90. Critically, counsel stated that counsel “would not have advised him to waive a jury because the jury’s

⁵ At the time of trial, counsel’s surname was Cobb.

role is different when it is instructed that it is solely responsible for finding sufficient aggravating circumstances, considering mitigating factors and imposing a death sentence.” *Id.* at 90. And counsel noted, “[t]his different advice would have affected Mr. Hutchinson’s decision on whether to waive a penalty phase jury, and I believe that Mr. Hutchinson would not have waived a jury.” *Id.* at 90.

Appellant also submitted a declaration from himself regarding the effect of the pre-*Hurst* law on his decision to waive a jury. *Id.* at 93-95 (also attached here as Attachment B). Appellant confirmed in his declaration that counsel advised him to waive a penalty jury. *Id.* at 93. He stated that his decision to waive was based on the advice of counsel, and that counsel “convinced” him that he should waive. *Id.* Appellant made it clear to counsel that he did not wish to receive a death sentence, and “accepted their advice to waive a jury after their explanation that it was the judge who would be imposing sentence and the jury was essentially superfluous.” *Id.* at 94. Appellant would not have waived a jury with the knowledge that the jury’s role was to make unanimous, binding findings on aggravating circumstances, mitigating factors, and whether to impose a death sentence. *Id.* Appellant would not have agreed to waive his penalty jury if he had known that his defense only had to convince one juror for life instead of a majority of the jurors. *Id.*

Appellant’s proffered evidence alerted the circuit court, and a hearing would establish, that his jury waiver is not a valid basis to deny *Hurst* relief. Based on his

proffer, an evidentiary hearing will establish that, had the proceeding comported with the Sixth and Eighth Amendments by requiring unanimous jury fact-finding in death sentencing, counsel would not have advised Appellant to waive, Appellant would not have waived, and Appellant would not have been sentenced to death.

B. *Mullens* precludes *Hurst* relief based on valid or unchallenged jury waivers; not waivers, like Appellant's, that are challenged as invalid based on a substantial evidentiary proffer

The circuit court's failure to allow Appellant to present his proffered evidence undermining the validity of his jury waiver was premised on a misunderstanding of *Mullens*. See ROA at 160-61. In *Mullens*, this Court denied *Hurst* relief based on a valid, unchallenged jury waiver. See 197 So. 3d at 39-40. Neither *Mullens* nor this Court's other "waiver" cases preclude *Hurst* relief, at least without further evidentiary development, based on jury waivers that are challenged based on substantial evidentiary proffers.

The underlying facts of *Mullens*, as well as the *Hurst* litigation in that case, are readily distinguishable from those presented here. In *Mullens*, a jury was never empaneled for the guilt phase because Mr. Mullens pleaded guilty. *Id.* at 38-40. Appellant here did not plead guilty and had a jury at the guilt phase. Mr. Mullens did not, as Appellant did, accept counsel's advice to forego at the penalty phase the same jury that had convicted him at the guilt phase. Counsel's advice here was entirely based on counsel's belief that a majority of the jury could not be swayed for

life, and counsel has made it clear that the advice to Appellant would have been different post-*Hurst*. In contrast, Mr. Mullens did not challenge the validity of his jury waiver in his *Hurst* litigation, based on either the voluntariness of the waiver itself or on the detrimental effect of the unconstitutional statute on defense counsel's advice to waive a jury. Mr. Mullens did not allege that his waiver was invalid, that he waived a penalty jury based on the advice of counsel in the context of the unconstitutional statute, or that he would not have waived a penalty jury in a post-*Hurst* proceeding. Mr. Mullens did not request an evidentiary hearing or proffer evidence undermining the validity of his waiver. As such, this Court evaluated whether Mr. Mullens's waiver was valid to bar *Hurst* relief without considering arguments or evidence regarding the validity of the waiver itself.

In *Wright v. State*, 213 So. 3d 881 (Fla. 2017), this Court did confront a challenge to the validity of the penalty-phase jury waiver to bar *Hurst* relief and, importantly, the Court considered whether there was evidence that undermined the waiver. Mr. Wright alleged that he was entitled to *Hurst* relief because his intellectual disability rendered his jury waiver invalid. *See id.* at 902-03. But unlike in Appellant's case where significant evidence was proffered, Mr. Wright provided no mental health reports or other information specifically addressing the validity of his waiver, relying exclusively on the intellectual disability diagnosis. Still this Court denied relief only after concluding that Mr. Wright "was not intellectually

disabled under Florida law.” *Id.* The Court relied, in part, on *two evidentiary hearings* that the circuit court afforded Mr. Wright to present evidence of his intellectual disability. *Id.* at 896. Unlike the circumstances of this case, the Court did not examine the validity of Mr. Wright’s waiver in terms of counsel’s advice to waive, based on counsel’s understanding of Florida’s prior scheme, because Mr. Wright’s jury waiver was his own idea and preference. *See id.* at 903.

Here, Appellant’s case was tried before a jury at the guilt phase and, based solely on counsel’s advice, Appellant waived presenting his penalty-phase evidence to that same jury. In his *Hurst* claim, in contrast to what occurred in *Mullens* and *Wright*, Appellant challenged the validity of the waiver, requested a hearing on the validity of the waiver for *Hurst* purposes, and proffered evidence that he would develop at a hearing to establish that the waiver is invalid as a bar to relief. Indeed, counsel’s advice flowed directly from the unconstitutional pre-*Hurst* scheme.

It is true that *Mullens* supports the proposition that *Hurst* relief is precluded based on valid or unchallenged jury waivers, but *Mullens* does not bar a hearing and relief based on invalid waivers that are challenged based on substantial evidentiary proffers. And *Wright* suggests that a challenged waiver *should* be tested for validity in the course of *Hurst* analysis, and that the Court should look to all available evidence. In *Mullens*, there was no challenge to the waiver and therefore no reason for this Court to order a hearing. In *Wright*, the defendant’s challenge was not

supported by any proffer of evidence, leaving this Court with no option but to evaluate the waiver's validity for *Hurst* purposes based on the existing record. But here, Appellant challenged his waiver *and* proffered substantial evidence undermining the validity of his waiver to bar *Hurst* relief. This Court therefore has an opportunity that it did not have in *Mullens* or *Wright*. In light of Appellant's proffer, the Court can and should remand for a hearing.

C. A remand for a hearing is supported by this Court's long-established precedent, grounded in principles of fairness and due process, encouraging evidentiary hearings to establish the impact of constitutional errors in capital sentencing proceedings

A remand for a hearing is not only consistent with *Mullens* and *Wright*, but is also supported by this Court's long-established precedent, grounded in principles of fairness and due process, encouraging evidentiary hearings to establish the impact of constitutional errors in capital sentencing proceedings. Consistent with this precedent, Appellant should be afforded the opportunity to establish that trial counsel's advice to waive a penalty-phase jury, and Appellant's decision to waive a jury pursuant to that advice, would not have occurred in a constitutional proceeding where only one juror, rather than a majority of jurors, needed to be convinced that life was the appropriate sentence.

As a general matter, this Court maintains a presumption that Florida defendants be granted evidentiary hearings. *See Freeman v. State*, 761 So. 2d 1055, 1061 (Fla. 2000). A court should only find a defendant's presumed entitlement to

an evidentiary hearing overcome if the motion is legally insufficient or the alleged facts and claims are conclusively refuted by the record. *Ventura v. State*, 2 So. 3d 194, 197-98 (Fla. 2009). A circuit court’s decision to grant an evidentiary hearing on a Rule 3.851 motion is a pure question of law, and thus subject to de novo review. *Long v. State*, 183 So.3d 342, 344 (Fla. 2016). All allegations made by the defendant are accepted as true unless they are “conclusively refuted by the record.” *Ventura*, 2 So. 3d at 197-98.

This Court’s precedent also makes clear that the effect of an unconstitutional death penalty statute on defense counsel—like the impact of the *Hurst* error on Appellant’s counsel’s advice to waive a jury—must be considered as part of the analysis. That is how this Court proceeded after the United States Supreme Court held that a capital jury must be allowed to consider non-statutory mitigating circumstances in *Hitchcock v. Dugger*, 481 U.S. 393 (1987). In response to arguments from the State that *Hitchcock* errors did not impact the outcome of the sentencing, this Court did not confine the inquiry to the original record. Instead, it permitted defendants who proffered evidence about the impact of the constitutional error on the decisions of counsel and the defendant’s opportunity to present and develop that evidence at a hearing. For example, in *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), the defendant proffered evidence of how Florida’s pre-*Hitchcock* capital scheme affected his penalty-phase counsel’s approach to the

proceedings. This Court held that the defendant’s proffer warranted a hearing in the circuit court, ruling that “the merits of [Meeks’] claims can only be determined by an evidentiary hearing.” *Id.* Similarly, in *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), this Court granted relief on the basis of the extra record proffer concerning the effect of the constitutional error on defense counsel.

Appellant argued below that his waiver is invalid and requested a hearing based on an evidentiary proffer, including a declaration from trial counsel, indicating that he would not have waived a jury absent counsel’s advice. That advice resulted from Florida’s pre-*Hurst* scheme. As in the cases cited above, the effect of the *Hurst* error on counsel’s advice to Appellant to waive—and the validity of the waiver itself to preclude *Hurst* relief—are at the core of the constitutional analysis.⁶ Appellant should be afforded the opportunity to establish that his decision to waive was based on trial counsel’s advice, that counsel’s advice was grounded in counsel’s knowledge of Florida’s pre-*Hurst* unconstitutional sentencing scheme, that counsel would not have advised Appellant to waive in a constitutional post-*Hurst* proceeding, and that Appellant would not have waived absent counsel’s advice.

⁶ The circuit court’s construing of Appellant’s argument regarding the effect of the unconstitutional statute on counsel’s advice to waive as a claim of ineffective assistance of counsel is inaccurate. *See* ROA at 161. Appellant is not arguing a claim that counsel was ineffective, but instead that counsel’s advice to Appellant to waive a penalty jury would not have occurred in a constitutional proceeding where a single juror, as opposed to a majority of jurors, needed to be persuaded in order to result in a life-sentence recommendation.

Without a hearing, the circuit court could not reasonably conclude that Appellant's waiver was valid to preclude *Hurst* relief. The court should have at least addressed Appellant's proffer. Considerations of fairness and due process favor a remand for the circuit court respond appropriately to Appellant's proffer.

D. The *Hurst* decisions apply retroactively to Appellant, and the “harmless error” doctrine is not an impediment to relief

A hearing on Appellant's proffer is critical because the only issue in this *Hurst* case is whether Appellant's jury waiver is a valid basis to preclude *Hurst* relief. That is because the *Hurst* decisions apply retroactively to Appellant, and the “harmless error” doctrine is not an impediment to relief.

As the State has conceded, there is no dispute that the *Hurst* decisions apply retroactively to Appellant because his death sentences became final in 2004, after *Ring* was decided. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see also* ROA at 148 (counsel for the Attorney General acknowledging that “the State agrees that *Hurst* is retroactive as to Mr. Hutchinson.”).⁷

In addition, Appellant's *Hurst* claim is not impeded by the “harmless error” doctrine. Appellant's counsel advised him to waive a jury based on counsel's

⁷ As Appellant argued in the circuit court, the *Hurst* decisions are also retroactive as a matter of federal law. *See* ROA at 55-58 (Appellant's Rule 3.851 motion, filed Jan. 11, 2017) (discussing federal cases, including *Montgomery v. Louisiana*, 136 S. Ct. 718, 731-32 (2016) (holding that federal law requires states to make substantive rules retroactive on collateral review)).

knowledge of Florida's unconstitutional capital sentencing scheme in effect at the time. As a result, there is no jury recommendation that this Court can subject to its current harmless-error analysis, which looks to whether the jury was unanimous in recommending death. *See, e.g., Hurst v. State*, 202 So. 3d at 68; *Dubose v. State*, 210 So. 3d 641, 657 (Fla. 2017). Given the lack of any jury recommendation in this case, there is no reliable basis for this Court to conclude beyond a reasonable doubt whether a jury in a constitutional proceeding would have found all of the facts necessary to impose a death sentence. This Court has cautioned against finding *Hurst* errors harmless based upon "speculation" that a jury would have unanimously found beyond a reasonable doubt that death was the proper sentence. *See Hurst v. State*, 202 So. 3d at 69. Indeed, the Court has said that engaging in speculation "would be contrary to our clear precedent governing harmless error review." *Id.*

The prohibition against harmless-error speculation carries particular force in Appellant's case, which contains extensive mitigation that surely could have convinced at least one reasonable juror to vote for life. The trial judge found more than 20 mitigating circumstances in this case, including but not limited to Appellant's lack of prior criminal history, his decorated service in Desert Storm, and his diagnosis of Gulf War Syndrome. *See supra* at 3 & n.2. As detailed in Appellant's Rule 3.851 motion, the circumstances of his military service in particular would likely have persuaded at least some jurors in a post-*Hurst*

proceeding that a life sentence was more appropriate than death. *See* ROA at 61-65 (describing Appellant’s service in Airborne Rangers and Operation Desert Storm, during which he experienced combat trauma and chemical weapon exposure).

Because there is no dispute that *Hurst* applies retroactively to Appellant, and under this Court’s precedent it would be inappropriate to undertake what would necessarily be a purely speculative harmless-error analysis, the only issue is whether Appellant’s jury waiver is a valid basis to preclude *Hurst* relief. In order to make that determination, further evidentiary development is necessary.⁸

II. Even without a remand for a hearing, the circuit court’s ruling should be vacated and Appellant should be granted *Hurst* relief

As explained in Section I, a remand to the circuit court for an evidentiary hearing is consistent with *Mullens* and this Court’s other “jury waiver” *Hurst* cases, and is appropriate under this Court’s precedent addressing the need for hearings to assess constitutional errors in capital cases. However, even if this Court does not remand for a hearing, the circuit court’s ruling should be vacated and Appellant should be granted relief. This Court can conclude based on Appellant’s proffer that

⁸ As explained in Section II, while further evidentiary development is necessary to determine whether Appellant’s jury waiver *is* a valid basis to preclude *Hurst* relief, this Court can also conclude based on the present record, including Appellant’s proffer in the circuit court, that his waiver is *not* a valid basis to preclude *Hurst* relief.

his waiver is not valid in the *Hurst* context.⁹ And, even if the Court finds that Appellant's decision to waive a jury based on counsel's pre-*Hurst* advice does not by itself render his jury waiver invalid, United States Supreme Court precedent provides that Appellant could not have waived the rights afforded by the *Hurst* decisions because at the time of his jury waiver, he had no recognized right to unanimous jury fact-finding in capital sentencing. Because the current record and federal precedent are sufficient to conclude that Appellant's waiver is invalid, this Court can grant relief now because the *Hurst* decisions are retroactive to Appellant and harmless-error analysis in this case would be inappropriately speculative.

A. This Court can conclude based on Appellant's proffer that his jury waiver is not valid in the *Hurst* context and that *Mullens* therefore does not apply

Appellant's proffer is sufficient to allow this Court to conclude that his waiver is not valid in the *Hurst* context. Trial counsel verified in a declaration that counsel's advice to Appellant, including the advice to waive a penalty jury, was inextricably linked with counsel's knowledge of Florida's pre-*Hurst* unconstitutional sentencing scheme, and that had Appellant been afforded a constitutional sentencing proceeding, counsel would not have advised him to waive a jury. Counsel states that

⁹ As explained in Section I, the current record is *insufficient* to conclude that Appellant's waiver is *valid* to preclude *Hurst* relief. In light of Appellant's challenge to the waiver and evidentiary proffer, a hearing should precede a finding that the waiver can serve as the basis to deny *Hurst* relief. However, this Court can choose to accept Appellant's proffer and grant relief without a hearing.

counsel would not have advised him to waive a jury in a post-*Hurst* proceeding because understands that a jury's decision making is impacted by its knowledge that it is solely responsible for the fact-finding that leads to a death sentence. Counsel also states that her different advice would have affected Appellant's decision on whether to waive a penalty jury. And counsel notes that Appellant would not have waived a jury absent counsel's pre-*Hurst* advice. ROA at 89-90.

Appellant, in both his Rule 3.851 motion and his declaration, confirmed that it was counsel's advice that convinced him to waive a jury, and that he would not have waived a jury absent counsel's advice. *Id.* at 60, 93. Appellant made it clear to counsel that he did not wish to receive a death sentence, and accepted counsel's advice to waive a jury after hearing the explanation that it was the judge who would be imposing sentence, and that the "advisory" jury was essentially superfluous in the pre-*Hurst* sentencing scheme. *Id.* at 94. Had the penalty phase taken place in a proceeding comporting with *Hurst*, Appellant would not have agreed to waive a jury with the knowledge that the jury's role was to make unanimous, binding findings on aggravating circumstances, mitigating factors, and whether to impose a death sentence. *Id.* Appellant would not have agreed to waive his penalty jury if he had known that his defense only had to convince one juror for life, instead of a majority of the jurors, as Florida's unconstitutional scheme required. *Id.*

In light of this evidence, this Court can conclude that Appellant's waiver is not valid in the *Hurst* context. Because Appellant's jury waiver was solely the result of counsel's advice, and counsel's advice was entirely the product of counsel's knowledge of Florida's unconstitutional sentencing scheme, it would violate Appellant's due process rights to preclude him from seeking relief under the *Hurst* decisions, which invalidated the very scheme that gave rise to his waiver.

Mullens therefore loses all relevance to this case. As explained above, the Court's opinions in *Mullens* and its progeny make clear that *Hurst* relief is only precluded in cases where the jury waiver is valid, and that is not the case here.

B. Under United States Supreme Court precedent, Appellant could not have waived the rights afforded by *Hurst* because at the time of his jury waiver, he had no recognized right to unanimous jury fact-finding in capital sentencing

Even if the Court finds that Appellant's decision to waive a jury based on counsel's pre-*Hurst* advice does not by itself render his jury waiver invalid, Appellant could not have waived the rights afforded by the *Hurst* decisions because at the time of his jury waiver, he had no recognized right to unanimous jury fact-finding in capital sentencing. In *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), the United States Supreme Court reaffirmed that defendants cannot waive rights that are not recognized by the courts at the time of the waiver. In *Halbert*, the Court rejected the State's contention that the defendant waived his right to appointed appellate counsel, despite the fact that at the time of the alleged waiver, the right to appointed

appellate counsel had not yet been recognized. *Id.* The Supreme Court’s ruling in *Halbert* is consistent with earlier decisions explaining that “[a] waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege,” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added), and that waivers of “constitutional rights in the criminal process generally must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances,” *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)) (internal quotation marks omitted). When in doubt, “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).

As in *Halbert*, Appellant could not have waived a right that had not yet been recognized at the time of the jury waiver. At the time of Appellant’s jury waiver, the right to unanimous jury fact-finding in Florida capital sentencing had not yet been recognized. A pre-*Hurst* jury waiver involved giving up only the right to a jury that would make an advisory, generalized recommendation to the judge by a bare majority vote. So, at the time of his jury waiver, Appellant could only waive his right to a generalized, majority-vote jury recommendation, not the right to binding unanimous jury fact-finding. Today, the right to binding unanimous jury fact-finding in Florida capital sentencing has been recognized, as the decisions in *Hurst*

v. Florida and *Hurst v. State* make clear, and the right is retroactively applicable to those, like Appellant, whose death sentences became final after *Ring*. And under *Halbert*, Appellant did not knowingly waive that right. To the extent *Mullens* conflicts with *Halbert* by approving the denial of *Hurst* relief to defendants who waived a penalty jury without knowledge of the right that would be recognized in the *Hurst* decisions, *Halbert* and federal law should control.¹⁰

C. Because the current record and federal precedent provide a sufficient basis to conclude that Appellant’s waiver is invalid, and because the *Hurst* decisions are retroactive to Appellant and harmless-error analysis in this case would be impermissibly speculative, Appellant should be granted *Hurst* relief

Because the current record is sufficient for this Court to conclude that Appellant’s jury waiver is invalid in the *Hurst* context, Appellant should be granted relief. As explained in Section I, the State conceded below that the *Hurst* decisions

¹⁰ There are other reasons to doubt the continuing validity of *Mullens* that are evident from the Court’s opinion itself. For example, *Mullens* cites to cases from other jurisdictions to show 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 and other Florida defendants, already had state statutory rights to jury factfinding at sentencing that they had explicitly waived. See, e.g., *State ex rel. Taylor v. Steele*, 341 S. W. 3d 634 (Mo. 2011); *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); *Colwell v. State*, 59 P.3d 463, 473 (Nev. 2002) (waivers by defendants who already had state statutory right to penalty-phase jury sentencing).

apply retroactively to Appellant because his death sentences became final in 2004, after *Ring*. See *Mosley*, 209 So. 3d 1248; see also ROA at 148.

In addition, Appellant's *Hurst* claim is not impeded by the "harmless error" doctrine. Because the unconstitutional statute caused Appellant's counsel to advise him to waive a jury, there is no jury recommendation this Court can subject to its current harmless-error analysis, which looks to whether the jury was unanimous in recommending death. See, e.g., *Hurst v. State*, 202 So. 3d at 68; *Dubose*, 210 So. 3d at 657. Without a jury recommendation, there is no reliable basis for this Court to conclude beyond a reasonable doubt whether a jury in a constitutional proceeding would have found all of the facts necessary to impose a death sentence. This Court's precedent does not permit speculation as to whether a hypothetical jury would unanimously find beyond a reasonable doubt that (1) specific aggravating factors were proven, (2) the aggravators were sufficient to impose the death penalty, and (3) the aggravators were not outweighed by the mitigation. See *Hurst v. State*, 202 So. 3d at 69. Engaging in such speculation "would be contrary to [the Court's] clear precedent governing harmless error review." *Id.* This is particularly true in Appellant's case, which contains extensive mitigation that surely could have convinced at least one reasonable juror to vote for life. After all, the trial judge found more than 20 mitigating circumstances, including Appellant's lack of prior criminal history, his decorated service in Desert Storm, and his diagnosis of Gulf War

Syndrome. *See supra* at 3 & n.2. As detailed in Appellant's Rule 3.851 motion, the mitigating circumstances arising from Appellant's military service certainly would have persuaded at least some jurors in a post-*Hurst* proceeding that a life sentence was more appropriate than a death sentence. *See* ROA at 61-65.

Because there is no dispute that *Hurst* applies retroactively to Appellant, and under this Court's precedent it would be inappropriate to undertake what would necessarily be a purely speculative harmless-error analysis, relief should be granted.

CONCLUSION

Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing on the validity of his jury waiver to preclude *Hurst* relief, or allow a new penalty phase proceeding that complies with the *Hurst* decisions. Appellant also requests the opportunity for full briefing under the normal rules and for oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2017, the foregoing was electronically served via the e-portal to Clyde Taylor at ct@taylor-taylor-law.com, and Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

/s/ Billy H. Nolas
Billy H. Nolas

ATTACHMENTS

ATTACHMENT A

STATE OF FLORIDA)

)

COUNTY OF LEON)

Declaration of Kimberly Sisko Ward

I, Kimberly Ward, declare on this 10th day of February, 2017, and pursuant to 28

U.S.C. §1746, that the following is true and correct.

1. My name is Kimberly Sisko Ward. I am an attorney licensed to practice in the State of Florida. My husband at the time and I represented Jeffrey Glenn Hutchinson at his 2001 trial in which Mr. Hutchinson was convicted in Okaloosa County of four counts of first-degree murder and sentenced to death on three counts. In particular, I was responsible for the penalty-phase. All of our decisions and advice to Mr. Hutchinson were affected by the Florida capital sentencing statute under which we operated.

2. At the time of trial, Mr. Hutchinson was subjected to an unconstitutional sentencing statute that had a majority of jurors provide an advisory

recommendation to the judge, who made the sentencing decision. The jurors were to be told that their recommendation was advisory and the judge alone would be responsible for sentencing Mr. Hutchinson to death or life. My advice to Mr. Hutchinson to waive a penalty phase jury was based on that statute: i.e., on Florida's standard jury instructions and the death-sentencing scheme in place in 2001. The unconstitutional law had an effect on our investigation, how we prepared our defense and on our advice to Mr. Hutchinson to waive the jury. We anticipated that Judge Barron would instruct the jury with the unconstitutional statutory language as is evident by the pre-trial motions we filed challenging the constitutionality of Florida's death sentencing statutes, which were all denied.

3. After seeing the jury at the guilt phase, we concluded we would not get a majority to vote for life; so, we advised our client to waive a jury. Our

thinking and advice to our client would have been different if we were in a post-*Hurst* situation requiring findings be made by the jury unanimously.

4. Had this trial taken place under a sentencing scheme as required by *Hurst v.*

Florida and *Hurst v. State*, we would have given different advice to Mr.

Hutchinson. We would not have advised him to waive a jury because the

jury's role is different when it is instructed that it is solely responsible for

finding sufficient aggravating circumstances, considering mitigating factors

and imposing a death sentence. This different advice would have affected

Mr. Hutchinson's decision on whether to waive a penalty phase jury, and I

believe that Mr. Hutchinson would not have waived a jury.

5. Mr. Hutchinson did not want to receive a death sentence. He accepted our

advice to waive a jury after we explained that it was the judge who would be

imposing the sentence and, thus, a non-unanimous jury recommendation

would be pointless. Our advice was based on the scheme then in effect, pre-
Hurst, in Florida.

6. Similarly, our investigation and preparation would have been different had
we been trying the penalty case in a unanimous jury setting, as we would
have done post-*Hurst*.

7. I understand that my co-counsel is providing a similar affidavit describing
this matter.

8. I hereby certify that the facts set forth are true and correct to the best of my
personal knowledge, information and belief, subject to the penalty of
perjury, pursuant to 28 U.S.C. §1746.

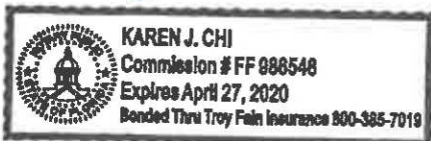


Kimberly Sisko Ward (formerly Kimberly
Sisko Cobb)

Date: February 10, 2017

Signed before me by
person known to me,
today, Friday, February 10,
2017.

Karen Janet Chi



Karen J. Chi

4 Expiration April 27, 2020

ATTACHMENT B

STATE OF FLORIDA)

)

COUNTY OF UNION)

Declaration of Jeffrey Glenn Hutchinson

I, Jeffrey Glenn Hutchinson, declare on this 13th day of February, 2017, and pursuant to 28 U.S.C. §1746, that the following is true and correct.

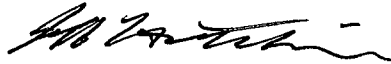
1. My name is Jeffrey Glenn Hutchinson. In 2001, I was convicted in Okaloosa County of four counts of first-degree murder and sentenced to death on three counts. I was represented at trial by Stephen and Kimberly Cobb. I had a jury trial for guilt phase, but my attorneys convinced me that I should waive a jury for penalty phase. All of my decisions were based on the advice of counsel. Counsel told me that under Florida law in effect at the time, the jury could only give an advisory “majority-vote” recommendation to the judge. They would not be responsible for the sentencing findings. These findings about the aggravators would be made by the judge. I understood this from my counsel and it was on their advice, based on the law at the time that I decided to waive a jury and have the judge, who would make the ultimate decision anyway, decide my sentence.
2. After watching the jury at guilt phase, my attorneys told me our ability to get a majority of jurors in our favor was impossible, so they advised me to

waive a penalty phase jury. This was because of Florida's standard jury instructions and the death-sentencing scheme in place in 2001.

3. I made it clear to my attorneys that I did not want to receive a death sentence. I accepted their advice to waive a jury after their explanation that it was the judge who would be imposing the sentence and the jury was essentially superfluous. I discussed the matter with my family and we decided to take their advice.
4. Had this trial taken place under a sentencing scheme as required by *Hurst v. Florida* and *Hurst v. State*, I would not have agreed to waive a jury if I knew the jury's role was to make unanimous, binding findings on aggravating circumstances, mitigating factors and whether to impose a death sentence.
5. I would not have agreed to waive my penalty phase jury if I had known that we only had to convince one juror for life instead of a majority. In a unanimous jury setting, I would not have waived my constitutional right to have a penalty phase jury find the sufficiency of the aggravators or make a unanimous recommendation for death. I would have asked my lawyers to present all of my mitigating evidence if it was a setting where a unanimous jury decides.


6. I hereby certify that the facts set forth are true and correct to the best of my personal knowledge, information and belief, subject to the penalty of perjury, pursuant to 28 U.S.C. §1746.

FURTHER AFFIANT SAYETH NAUGHT.



Jeffrey Glenn Hutchinson

Sworn and subscribed before me this ^{13th} day of February, 2017, by Jeffrey Glenn Hutchinson, who is personally known to me or has produced the following identification _____.



Notary Public, State of Florida

My Commission Expires:

