No. _____

IN THE

Supreme Court of the United States

JEFFREY GLENN HUTCHINSON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

BILLY H. NOLAS
Counsel of Record
SEAN T. GUNN
Office of the Federal Public Defender
Northern District of Florida
Capital Habeas Unit
227 North Bronough St., Suite 4200
Tallahassee, Florida 32301
(850) 942-8818
billy_nolas@fd.org
sean_gunn@fd.org

INDEX TO APPENDIX

EXHIBIT 1

Supreme Court of Florida

No. SC17-1229

JEFFREY GLENN HUTCHINSON,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[March 15, 2018]

PER CURIAM.

Jeffrey Glenn Hutchinson appeals an order of the circuit court summarily denying a motion to vacate a judgment of conviction of first-degree murder and a sentence of death under Florida Rule of Criminal Procedure 3.851. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. We affirm the circuit court's summary denial of Hutchinson's postconviction claim in light of our decisions in *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016), and *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016).

Hutchinson murdered Renee Flaherty and her three children, Logan, Amanda, and Geoffrey. *Hutchinson v. State*, 882 So. 2d 943, 948-49 (Fla. 2004).

A jury convicted him of four counts of first-degree murder with a firearm. *Id.* at 948. Hutchinson waived his right to a penalty phase jury and presented mitigation to the trial judge. *Id.* On January 21, 2001, the trial court conducted a colloquy, found his waiver voluntary, and excused the jury. *Id.* at 949. Hutchinson was sentenced to life imprisonment for the murder of Renee Flaherty and to a death sentence for each child's murder. *Id.* at 948. The trial court found two aggravators for the murders of Logan and Amanda: (1) previously convicted of another capital felony for the murders of the other children; and (2) victim under 12 years of age. The trial court found three aggravators for Geoffrey's murder: (1) previously convicted of another capital felony for the murders of the other children; (2) victim under 12 years of age; and (3) heinous, atrocious, or cruel (HAC). Hutchinson raised ten issues in his direct appeal, and this Court affirmed the four convictions and three death sentences. *Id.* at 961.[1]

---

1. Hutchinson raised the following issues:

> (1) whether the trial court improperly instructed the jury; (2) whether the trial court erred in admitting certain testimony as an excited utterance; (3) whether the trial court erred in repeatedly overruling objections to the State's closing argument; (4) whether the trial court erred in denying Hutchinson's motion for mistrial; (5) whether the trial court erred in denying Hutchinson's motion for judgment of acquittal; (6) whether the trial court erred in denying Hutchinson's motion for a new trial; (7) whether the trial court erred in considering section 921.141(5)(1), Florida Statutes (2000), as an aggravating circumstance; (8) whether the trial court erred in finding that Hutchinson committed the murder of the children during the course of

In 2005, Hutchinson filed his initial postconviction motion and an amended motion following the withdrawal of counsel and appointment of new counsel. *Hutchinson v. State*, 17 So. 3d 696, 699 (Fla. 2009). The circuit court denied the motion following an evidentiary hearing on some of the claims. Hutchinson raised three issues in his appeal of the circuit court's denial. *Id.* at 700.[2] This Court affirmed the denial of relief. *Id.* at 704.

Hutchinson filed a federal habeas petition pro se on July 24, 2009, and Hutchinson's habeas counsel filed an amended habeas petition on November 23, 2009. The district court dismissed the amended petition as untimely. *Hutchinson v. Florida*, No. 5:09-CV-261-R5, 2010 WL 3833921 (N.D. Fla. Sept. 28, 2010).

> an act of aggravated child abuse; (9) whether the trial court erred in finding heinous, atrocious, or cruel (HAC) as an aggravating circumstance in the murder of Geoffrey Flaherty; and (10) whether death is a proportional sentence.

Hutchinson, 882 So. 2d at 949-50.

2. Hutchinson raised the following claims before this Court on appeal:

> (1) trial counsel rendered ineffective assistance during the guilt phase by failing to present evidence that Hutchinson's voice was not on the 911 audio tape; (2) trial counsel rendered ineffective assistance during the guilt phase by failing to introduce into evidence the nylon stocking found at the crime scene; and (3) the trial court erred in summarily denying Hutchinson's claims of actual innocence and conflict of interest.

Hutchinson, 17 So. 3d at 700.

The Eleventh Circuit Court of Appeals affirmed. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir.), *cert. denied*, 568 U.S. 947 (2012). Hutchinson filed a rule 60(b) motion to reopen his federal habeas case pro se. The federal district court assigned the capital habeas unit (CHU) as federal habeas counsel of record. This motion remains pending in federal court and is stayed pending the outcome of this appeal.

On January 11, 2017, Hutchinson's CHU counsel filed a successive postconviction motion in state court seeking relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). The State filed its answer on January 27, 2017, asserting that the motion should be summarily denied because Hutchinson waived any right to *Hurst* relief when he waived his penalty phase jury. Hutchinson filed a reply on March 29, 2017. The circuit court summarily denied Hutchinson's motion on May 30, 2017. This appeal followed.

A circuit court's decision on whether to grant an evidentiary hearing on a postconviction motion is a pure question of law, reviewed de novo. *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). When determining whether an evidentiary hearing is required on a successive rule 3.851 motion, this Court considers the entire record. "If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Fla. R. Crim. P. 3.851(f)(5)(B). Although evidentiary hearings on

factually based claims raised in successive rule 3.851 motions are not automatically required, courts are encouraged to liberally allow such hearings on timely raised claims. *See Amends. to Fla. Rules of Crim. Pro. 3.851*, 797 So. 2d 1213, 1219-20 (Fla. 2001).

To the extent that Hutchinson asserts that his penalty phase jury waiver was invalid because counsel was ineffective, the circuit court properly found that Hutchinson is not entitled to relief. This Court has determined that in order to succeed on a claim for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), the claimant must identify counsel's deficient performance and demonstrate that counsel's deficiency so affected the proceeding that it undermined confidence in the outcome. *Occhicone v. State*, 768 So. 2d 1037, 1045 (Fla. 2000). In *Occhicone*, this Court held that "strategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel's decision was reasonable under the norms of professional conduct." *Id.* at 1048. Counsel's properly advising Hutchinson of the law at the time and recommending jury waiver was not deficient performance. Hutchinson is not entitled to relief on an ineffective assistance claim.

While *Hurst* is retroactive to defendants whose sentences became final after *Ring*[3] was decided, *Hurst* relief is not available for defendants who have waived a penalty phase jury. *See Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016); *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016). In consideration of a penalty phase jury waiver in the context of a guilty plea on direct appeal, this Court opined:

> If a defendant remains free to waive his or her right to a jury trial, even if such a waiver under the previous law of a different jurisdiction automatically imposed judicial factfinding and sentencing, we fail to see how [the defendant], *who was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right*, can claim error. As our sister courts have recognized, accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. [*State v.*]*Piper*, 709 N.W.2d [783,] 808 [(S.D. 2006)] (citing *People v. Rhoades*, 753 N.E.2d 537, 544 (2001)). This we refuse to permit.

Mullens v. State, 197 So. 3d 16, 39-40 (Fla. 2016). This Court has also held that "[a] similar claim in postconviction proceedings is necessarily precluded." *Brant*, 197 So. 3d at 1079.

Although *Mullens* is distinguishable from this case because the defendant in that case pled guilty, this Court's determination that his jury waiver precluded *Hurst* relief is applicable to this case. Here, the circuit court properly found that Hutchinson's colloquy supported the conclusion that his waiver was knowing,

---

3. *Ring v. Arizona*, 536 U.S. 584 (2002).

intelligent, and voluntary. Hutchinson maintains that his waiver became invalid as a result of the change in the law after *Hurst*.

Hutchinson contends that his case is distinguishable from *Mullens* and *Brant* because he challenges the validity of his waiver. Contrary to Hutchinson's assertion, the defendant in *Brant* also challenged the validity of his waiver, arguing that counsel was ineffective in light of the change in *Hurst* just as Hutchinson argues in this case. In both *Mullens* and *Brant*, this Court found that the defendants' waivers were knowingly, intelligently, and voluntarily made based on their colloquies, even though those waivers were made with the advice of counsel based on pre-*Hurst* law. *See Brant*, 197 So. 3d at 1066; *Mullens*, 197 So. 3d at 39-40. Hutchinson's waiver is no different.

Hutchinson also argues that he is entitled to an evidentiary hearing on this claim because this Court granted evidentiary hearings in *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), and *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), to determine the effect of constitutional error on defense counsel. Following the United States Supreme Court's decision in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), providing that jurors must be instructed on and the defendant allowed to present nonstatutory mitigation, this Court considered Meeks' *Hitchcock* claim. The affidavits in Meeks' case demonstrated that counsel did not seek to develop nonstatutory mitigation because of the then-prevailing statutory construction which

only provided for mitigation enumerated in the statute. *Meeks*, 576 So. 2d at 716. This Court granted an evidentiary hearing. *Id.* In *Hall*, this Court granted an evidentiary hearing on the defendant's *Hitchcock* claim based on the affidavits of numerous mental health experts regarding nonstatutory mitigation which would have been available had counsel believed nonstatutory mitigation was available under the law. *Hall*, 541 So. 2d at 1127.

A defendant's ability to waive a penalty phase jury did not change after *Hurst*. Unlike Hutchinson, the defendants in *Meeks* and *Hall* did not waive any rights. Had they waived their rights to present evidence during the penalty phase, they would not have been eligible for relief on their *Hitchcock* claims. *See Tafero v. Dugger*, 520 So. 2d 287, 289 (Fla. 1988) (denying relief on a *Hitchcock* claim where the defendant validly waived his right to present evidence at his penalty phase). Similarly, Hutchinson is not entitled to relief on this *Hurst* claim where he waived his right to a jury trial. Unlike the change of law in *Hitchcock*, the change of law under *Hurst* does not have any bearing on the evidence that a lawyer might choose to develop or that expert witnesses may present. *Hurst* relief is not available to individuals who waived their right to a penalty phase jury.

Hutchinson also contends that under *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), he could not have waived a post-*Hurst* right to a unanimous jury recommendation before the imposition of death because the courts did not

recognize the right at the time. The United States Supreme Court held in *Halbert* that the Due Process and Equal Protection Clauses require appointment of first-tier postconviction counsel for indigent defendants and that the defendant's plea of nolo contendere did not preclude the court from granting him relief. Hutchinson contends that this Court should follow *Halbert* in finding that *Hurst* created a new right to a jury trial distinct from the pre-*Hurst* right, and further find that his jury waiver does not preclude *Hurst* relief. The United States Supreme Court rejected an argument similar to Hutchinson's in *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), holding that a change in the law regarding coerced confessions did not liberate a defendant from a plea entered under the old law.

Unlike the right to first-tier postconviction counsel in *Halbert*, the right to a jury trial was well recognized before *Hurst*. Although Hutchinson contends that *Halbert* affected postconviction proceedings and therefore should be followed here, *Halbert* did not establish any rights related to successive postconviction proceedings like this one. As previously stated, this Court has explicitly rejected Hutchinson's argument, opining that "accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. This we refuse to permit." *Mullens*, 197 So. 3d at 40 (citations omitted).

Based on the foregoing, we affirm the decision of the circuit court and deny relief on Hutchinson's claim.

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, and LAWSON, JJ., concur.
CANADY and POLSTON, JJ., concur in result.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Okaloosa County,
John T. Brown, Judge - Case No. 461998CF001382XXXACX

Billy H. Nolas, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, Tallahassee, Florida; and Clyde M. Taylor, Jr. of Taylor & Taylor, LLC, St. Augustine, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, and Charmaine M. Millsaps, Senior Assistant Attorney General, Tallahassee, Florida,

for Appellee

EXHIBIT 2

Supreme Court of Florida

THURSDAY, APRIL 26, 2018

CASE NO.: SC17-1229
Lower Tribunal No(s).:
461998CF001382XXXACX

JEFFREY GLENN HUTCHINSON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing and Clarification is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and LAWSON, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

BILLY H. NOLAS
CHARMAINE M. MILLSAPS
CLYDE M. TAYLOR, JR.
HON. JOHN T. BROWN, JUDGE
HON. J.D. PEACOCK, II, CLERK
HON. LINDA LEE NOBLES, CHIEF JUDGE
JOHN A. MOLCHAN

EXHIBIT 3

Supreme Court of Florida

TUESDAY, AUGUST 22, 2017

CASE NO.: SC17-1229
Lower Tribunal No(s).:
461998CF001382XXXACX

JEFFREY GLENN HUTCHINSON vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

The parties in the above case are directed to file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in Mullens v. State, 197 So. 3d 16 (Fla. 2016). Parties may include a brief statement to preserve arguments as to the merits of this Court's previously decided cases, as deemed necessary, without additional argument.

Appellant's initial brief, which is not to exceed twenty-five pages, is to be filed by September 11, 2017. Appellee's answer brief, which shall not exceed fifteen pages, shall be filed ten days after filing of appellant's initial brief. Appellant's reply brief, which shall not exceed ten pages, shall be filed five days after filing of Appellee's answer brief.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

cd
Served:

BILLY H. NOLAS
CHARMAINE M. MILLSAPS
CLYDE M. TAYLOR, JR.

EXHIBIT 4

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **Case No. 98-CF-1382**
Div. 001

JEFFREY G. HUTCHINSON,

Defendant.

ORDER DENYING "DEFENDANT'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*"

THIS CAUSE is before the Court on "Defendant's Successive Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*," filed through counsel on January 11, 2017, pursuant to Florida Rule of Criminal Procedure 3.851. The State filed an answer to the motion on January 27, 2017. Defendant filed through counsel affidavits from Defendant's trial counsel and Defendant to support the defense argument for an evidentiary hearing on the motion. A case management conference was scheduled to occur on February 16, 2017. At that hearing, the Court granted defense counsel's request to file a reply to the State's answer and continued the case management conference. On March 29, 2017, Defendant filed through counsel a reply to the State's answer. On May 10, 2017, the Court conducted a case management conference, at which the Court heard arguments from the State and defense counsel regarding the motion. Having reviewed the motion, answer, affidavits, reply, record, and applicable law, and having considered the arguments presented at the case management conference, the Court finds as follows:

Background

Following a jury trial, Defendant was found guilty of four counts of first-degree murder with a firearm. Defendant waived his right to a jury at the penalty phase of his trial. Defendant presented mitigation to the Court, and on February 6, 2001, Defendant was sentenced to life on count one and death on counts two, three, and four. On July 1, 2004, the Florida Supreme Court issued an opinion affirming Defendant's convictions and sentences.[1]

On October 20, 2005, Defendant filed a motion for postconviction relief, and on August 15, 2007, Defendant filed an amended motion for postconviction relief. On January 3, 2008, Defendant's motions for postconviction relief were denied. On September 29, 2009, the Florida Supreme Court issued a mandate affirming the denial of Defendant's motions for postconviction relief.[2]

Defendant's Present Successive Motion

Defendant argues that his death sentence is unconstitutional under the Sixth and Eighth Amendments in light of Hurst v. Florida[3] and Hurst v. State.[4] Specifically, Defendant argues that (1) he is entitled to retroactive application of Hurst v. Florida and Hurst v. State, (2) the State cannot establish that the Hurst errors were harmless beyond a reasonable doubt absent his waiver, and (3) an evidentiary hearing is appropriate due to the effect of the Hurst errors on trial counsel's advice to Defendant and his decision to waive a jury at the penalty phase of his trial based on that advice.

Legal Authority

In Hurst v. Florida, the Supreme Court of the United States held that Florida's capital sentencing scheme violated the Sixth Amendment in light of Ring v. Arizona, 536 U.S. 584 (2002), because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a

---

[1] Hutchinson v. State, 882 So. 2d 943, 948 (Fla. 2004), abrogated by Deparvine v. State, 995 So. 2d 351 (Fla. 2008).
[2] Hutchinson v. State, 17 So. 3d 696, 698 (Fla. 2009).
[3] Hurst v. Florida, 136 S. Ct. 616, 619 (2016).
[4] Hurst v. State, 202 So. 3d 40, 43 (Fla. 2016), cert. denied, 16-998, 2017 WL 635999 (U.S. May 22, 2017).

sentence of death."[5] Subsequently, in Hurst v. State, the Florida Supreme Court held that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death."[6]

In Mullens v. State,[7] the Supreme Court of Florida "held that a defendant who has waived the right to a penalty phase jury is not entitled to relief under *Hurst v. Florida.*"[8] Indeed, the Court stated that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence."[9] In Brant v. State, the Supreme Court of Florida, referring to Mullens, stated that it had "previously held in a direct appeal that a defendant who has waived the right to a penalty-phase jury is not entitled to relief under *Hurst*" and that a "similar claim in postconviction proceedings is necessarily precluded."[10]

Analysis

As stated above, Defendant waived his right to a jury at the penalty phase of his trial.[11] The record shows that Defendant affirmed that he understood and discussed with counsel that he was giving up the right to appeal his waiver "or to appeal the fact that there was not a jury determination in the penalty phase for any reason whatsoever" if the death penalty was imposed.[12] After

[5] 136 S. Ct. 616, 619, 621 (2016).
[6] 202 So. 3d 40, 57 (Fla. 2016).
[7] 197 So. 3d 16 (Fla. 2016), reh'g denied, SC13-1824, 2016 WL 4377112 (Fla. Aug. 9, 2016), and cert. denied, 137 S. Ct. 672 (2017).
[8] Davis v. State, 207 So. 3d 177, 212 (Fla. 2016), reh'g denied, SC13-1, 2017 WL 57010 (Fla. Jan. 5, 2017).
[9] Mullens, 197 So. 3d at 40.
[10] 197 So. 3d 1051, 1079 (Fla. 2016), reh'g denied, SC14-2278, 2016 WL 4446453 (Fla. Aug. 23, 2016) (internal citation omitted).
[11] Exhibit A: Transcript (in relevant part).
[12] Exhibit A, page 2313.

questioning Defendant, the Court found that Defendant freely and voluntarily waived his right to a penalty-phase jury.[13]

Based on Mullens, and in particular, considering that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence," the Court finds that Defendant is not entitled to Hurst relief. To any extent Defendant's claim could be construed as an ineffective assistance of counsel claim, he would not be entitled to relief. See Strickland v. Washington, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."); Walton v. State, 847 So. 2d 438, 445 (Fla. 2003) ("This Court has consistently held that trial and appellate counsel cannot be held ineffective for failing to anticipate changes in the law.").

Consequently, the Court finds it appropriate to deny Defendant's motion.

Therefore, it is **ORDERED AND ADJUDGED** that "Defendant's Successive Motion for Post-Conviction Relief in Light of *Hurst v. Florida* and *Hurst v. State*" is **DENIED**. Defendant has the right to appeal within 30 days of the rendition of this Order.

DONE AND ORDERED in Fort Walton Beach, Okaloosa County, Florida.

eSigned by CIRCUIT COURT JUDGE JOHN T BROWN in 01 JUDGE BROWN
on 05/26/2017 17:04:53 s4ejxlyt

JTB/adh

[13] Exhibit A, pages 2316.

Copies of the foregoing Order to be served by the Clerk of the Court on the following:

John Molchan, Assistant State Attorney
Office of the State Attorney
jmolchan@sa01.org

Charmaine Millsaps, Assistant Attorney General
Office of the Attorney General
capapp@myfloridalegal.com; charmaine.millsaps@myfloridalegal.com

Billy Nolas, Assistant Federal Public Defender
Office of the Federal Public Defender
billy_nolas@fd.org

Clyde Taylor, Jr., Counsel for Defendant
ct@taylor-taylor-law.com

Jeffrey Hutchinson, DC# 124849
Union Correctional Institution
7819 N.W. 228th Street
Raiford, Florida 32026-4000

Exhibit A

IN THE CIRCUIT COURT IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 98-1382

JEFFREY G. HUTCHINSON,

Defendant.

The above-entitled cause came on for penalty phase proceeding before the Honorable G. Robert Barron, Circuit Judge, First Judicial Circuit of Florida, at the Okaloosa County Courthouse Annex, Shalimar, Florida, on the 25th day of January, 2001. Robert C. Elmore, Assistant State Attorney, and Albert Grinsted III, Assistant State Attorney, appeared on behalf of the plaintiff, and Stephen G. Cobb, Esquire, and Kimberly S. Cobb, Esquire, appeared on behalf of the defendant, and the following proceedings took place:

COURT: Thank you, be seated, please. Good morning. I'm Judge Barron, and we're scheduled this morning for a penalty phase proceeding reference the case of State of Florida versus Jeffrey Glenn Hutchinson. Let the record reflect that the defendant, Mr. Hutchinson, is present along with counsel and counsel for the state. The record should also reflect that the trial -- guilt phase jury is also present in the jury room. They are not present in the

courtroom, but I have been advised by the bailiff that they are all present and ready to proceed with the penalty phase evidence -- presentation of penalty phase evidence; however, upon arriving at the courthouse this morning, the Court was furnished a written motion from the defendant. Counsel had indicated to the Court yesterday that they were considering filing such a motion, and then this morning this motion was filed. Basically the motion is a matter of record, and would the clerk hand me a copy of the file. The motion is titled Notice of Defendant's Waiver of Trial Jury for Penalty Phase which, basically, requests the Court to waive the jury in the penalty phase proceeding. The motion is signed by the penalty phase attorney, Kimberly Cobb, and accompanied by an affidavit from Mr. Hutchinson, the defendant, and the affidavit indicates that he is also joining in this motion and understands the sentencing alternatives available to the Court. First of all, I would first like to find out -- since I was furnished the written motion and affidavit approximately ten minutes ago, I would like to find out if you wish -- if it's your position at this moment that we proceed with this matter by the judge alone without the intervention of a jury. Is that the defense's position at this moment, Mr. Cobb, Miss Cobb?

MRS. COBB: Yes, Your Honor.

MR. COBB: Yes, sir.

COURT: First of all, I need to inquire as to the state on this issue at this time. Do you wish to present a position on the motion at this time, Mr. Elmore?

MR. ELMORE: Your Honor, the state is not in opposition to the motion as long as it is fully determined that the defendant's waiver is free, voluntary and competent.

COURT: Thank you. As I indicated, there is an affidavit filed by Mr. Hutchinson, and I would ask Mr. Hutchinson if he would, please, to stand and let me discuss this with you.

MR. HUTCHINSON: It's okay if I get up, right?

COURT: Yes, sir, certainly. Mr. Hutchinson, your attorneys filed with this motion an affidavit which apparently bears your signature. It's signed Jeffrey G. Hutchinson. Is that your signature?

MR. HUTCHINSON: It looks like it, Your Honor, yes. Yes, Your Honor, that's my signature.

COURT: So you did sign the affidavit that accompanied this motion?

MR. HUTCHINSON: Yes, sir, Your Honor.

COURT: And then I'm assuming that you are joining in the motion to waive the jury in the penalty phase proceeding, is that correct?

MR. HUTCHINSON: That's affirmative, Your Honor.

COURT: Mr. Hutchinson, do you understand that you do have an absolute right to have the jury -- the same jury that heard this case in the guilt phase hear the penalty phase evidence and then to render to the Court an advisory opinion as to whether to impose a life sentence -- life imprisonment or death sentence in this case? Do you understand that you have an absolute right to have the jury hear that evidence and render that advisory opinion?

MR. HUTCHINSON: I understand those rights, Your Honor.

COURT: Do you also understand that the Court -- while the Court is not bound to accept that recommendation of the jury, the Court is bound to give it great weight in making a determination as to sentence in this case? Do you understand that?

MR. HUTCHINSON: Yes, I do, Your Honor.

COURT: Have you made this decision freely and voluntarily and after full discussion with your attorneys?

MR. HUTCHINSON: Yes, I have, Your Honor.

COURT: Is there anything that you would like to ask me at this time concerning your rights in this matter and anything that you feel at this time that perhaps you don't understand about the penalty phase proceeding that you would like me to explain to you further?

MR. HUTCHINSON: Mrs. Cobb has gone over it thoroughly

with me, Mr. Cobb has gone over it with me, and I've thoroughly discussed it with my family too, and we've all come to the same conclusion.

COURT: Well, I primarily want to make absolutely sure that you understand you do have the right to the jury recommendation and the jury participation in this case and that you understand that whatever recommendation they would render would have to be given great weight by this Court in making my ultimate determination in the sentencing process.

MR. HUTCHINSON: I understand that, Your Honor.

COURT: With that understanding, Mr. Elmore, do you have any further matter at this time?

MR. ELMORE: Judge, I'd like to inquire also.

MR. COBB: We object to the state inquiring of my client, Your Honor.

COURT: Well, if you would just tell me what you wish to ask him, I would probably --

MR. ELMORE: Judge, the first question I would like to ask is whether the defendant fully understands that he has two opportunities to obtain a life recommendation in this case. One is from the jury, and then, of course, one is from the Court if the jury is involved, and that he is giving up one of those opportunities by waiving the jury in this case.

COURT: Okay, well, Mr. Cobb, you've objected to Mr.

Elmore directly asking Mr. Hutchinson questions, but obviously Mr. Hutchinson heard what Mr. Elmore said. Do you understand as Mr. Elmore explained to the Court, Mr. Hutchinson, on the record? Do you understand that you do have two opportunities in this case for a life recommendation, one from the jury and then the Court's ultimate determination?

MR. HUTCHINSON: I understand that, Your Honor.

COURT: All right, sir. Did you have one other question, Mr. Elmore, or one other matter you wished me to discuss with him?

MR. ELMORE: Judge, I want to know whether the defendant has been informed that if the matter was tried before a jury, that is the penalty phase hearing, that there are certain appellate challenges that might could be raised to the jury hearing either inappropriate evidence or the jury hearing -- or the state being allowed to ask questions of defense witnesses that the defense deems inappropriate, and that by waiving the jury, he waives any appellate challenge to those matters in effect, that he could certainly object to you considering those matters, but as the trial judge, you must hear all matters before you decide what is appropriate and inappropriate, whereas the trial jury would not necessarily, and he's waiving those appellate challenges.

COURT: I'm not going to ask the question in that particular manner simply because it would be a difficult question, really, for the Court to reiterate to the defendant in that particular --

MR. ELMORE: Would you inquire of counsel whether they've fully discussed the appellate challenges?

COURT: Hold just a moment. Let me say this. I will ask Mr. Hutchinson if he fully realizes and understands and has discussed with counsel that by waiving the jury recommendation in this case, he gives up his right to appeal that waiver or to appeal the fact that there was not a jury determination in the penalty phase for any reason whatsoever if, in fact, a death penalty is involved in the case, is finally imposed. Do you realize that, Mr. Hutchinson?

MR. HUTCHINSON: I understand that, Your Honor.

COURT: Thank you. The defendant has indicated that he does fully understand that. The affidavit is self-explanatory.

MR. ELMORE: Judge, I have one other inquiry if the Court doesn't mind, and it's the last one, but one other inquiry that goes to the free and voluntary nature of the waiver. You haven't really asked him whether anyone has -- and I realize it appears from the answers he's given already that it's obvious that he has not been coerced or

--

COURT: Mr. Elmore, let me ask you something. Have you read the affidavit?

MR. ELMORE: Yes, sir, I have.

COURT: I'm not sure what else you want me to do. I'm not going to harass the defendant into making any decision that is not his free and voluntary choice.

MR. ELMORE: Judge, I'm not attempting to harass him either. I'm attempting to protect the record two years from now.

COURT: I understand that; however, he has indicated in the affidavit that he's indicated that he signed and that this is his signature, that no one has made any promise or threat or coercion in any way, and no one has promised him anything. I think that's what you're asking me to ask him again.

MR. ELMORE: My last question would be, Judge, and you may find it irrelevant, but my last question would be whether this was his initial idea or whether someone else suggested it to him.

MR. COBB: It sounds like what he wants to do, Your Honor, is go into attorney/client privilege beyond what is necessary for the protection of the record in this matter.

COURT: The Court will ask Mr. Hutchinson simply whether he has discussed this matter fully with his counsel

and whether he and his counsel are in agreement -- in total agreement with this decision. That will be the question the Court will pose to him. Mr. Hutchinson, is this your decision based upon full discussion with counsel?

MR. HUTCHINSON: That's affirmative, Your Honor, we've discussed it fully, and I've discussed it with my family too.

COURT: All right, sir.

MR. ELMORE: I'm satisfied, Your Honor.

COURT: Thank you.

MR. ELMORE: Your Honor, for the purposes of the Court's ruling, I'd ask that the Court not only rule on the voluntariness of the waiver, but also ask for the Court's findings as to the defendant's competency in making a free and voluntary waiver. The Court has previously, at a pretrial competency hearing, found the defendant to be competent to stand trial. I'd ask the Court to find that he is, indeed, competent at this time to make this waiver and to include the Court's observations of the defendant throughout the trial as a basis for that waiver as well as the Court's earlier ruling.

COURT: The Court finds that the defendant is competent at this time to understand all conversation and dialogue that has taken place on the record this morning. The Court finds that the Court has earlier specifically

found that the defendant is competent to proceed to trial and to participate in the trial procedures, and based upon the Court's observations of this defendant throughout the course of the trial, the Court finds that this defendant is totally competent to understand and appreciate the nature and consequences of these proceedings and of the decision which he and his counsel have made on the waiver regarding the penalty phase proceeding, waiver of the jury. The Court finds that there is no question in the Court's mind as to Mr. Hutchinson's competency. The Court further finds that the waiver of the jury in this penalty phase proceeding has been made freely and voluntarily by the defendant after full consultation and advice of counsel and after consultation with the defendant's family members, and the Court further finds that based upon my understanding of the present case law in the state of Florida, the defendant has the absolute right to request such a waiver in the penalty phase proceeding, and that if the Court finds that it is freely, voluntarily and knowingly made, that it is within the sound discretion of the Court to grant that request. The Court hereby grants the motion of the defendant to waive the jury recommendation in the penalty phase proceeding, and with those findings on the record, defendant and counsel may be seated, and it would be my intention at this time to bring the jury back in and to

explain to them, basically, what has occurred and to release them from further service in this case. Before doing that, however, I would like to inquire from either counsel as to whether you would have -- either one of you would have any requested discussion or instructions to this jury before I release them from their service in this matter.

MR. ELMORE: Judge, the only discourse I think we need to have with them is to just advise them that the defendant has chosen to waive their consideration of the penalty phase matter, and then to advise them that they are either free to leave or free to stay and spectate if they wish. I can't think of anything else you need to tell them.

MR. COBB: That's the standard litany, Your Honor.

MR. ELMORE: And perhaps the standard litany concerning whether they are required to discuss their verdict with any persons.

COURT: Would you please bring the jury in, bailiff?

(JURY IN)

COURT: Let the record reflect that the jury has returned to the courtroom. Ladies and gentlemen of the jury, I know that you have come prepared today to proceed with the presentation of evidence in the penalty phase of this case; however, the Court would advise you that it's not going to be necessary for you to participate in that

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA CASE #(S) 1998 CF 001382 AC

-VS-

HUTCHINSON, JEFFREY GLENN

CERTIFICATE OF SERVICE

Pursuant to FRCP 3.851(5)(F), this is to certify that a copy of the preceding order in the above styled cause to the following:

☐ John Molchan, jmolchan@sa01.org
Charmaine Millsaps, capapp@myfloridalegal.com; Charmaine.millsaps@myfloridalegal.com
Billy Nolas, billy_nolas@fd.org
Jeffrey Hutchinson, DC# 124849, Union Correctional Institutution, 7819 NW 228th St., Raiford, FL 32026-4000

Dated this 30 day of May, 20 17.

JD Peacock II
Clerk of Circuit Court and Comptroller

Tanishia Childres

By:
Deputy Clerk

EXHIBIT 5

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

Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

Counsel for Appellant

TABLE OF CONTENTS

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 in 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. Mullins did not allege that his wavier 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. Mullins 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 fact-finding 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,

/s/ Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

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 16, 2017

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

Karen Janet Chi

KAREN J. CHI
Commission # FF 988548
Expires April 27, 2020
Bonded Thru Troy Fain Insurance 800-385-7019

Karen J. Chi

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 17th 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:

Notary Public State of Florida
Terri L Backhus
My Commission FF 228221
Expires 06/18/2019

EXHIBIT 6

In the Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v. CASE NO. SC17-1229

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

PAMELA JO BONDI
ATTORNEY GENERAL

CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL, PL-01
TALLAHASSEE, FL 32399-1050
(850) 414-3300
COUNSEL FOR THE STATE
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

TABLE OF CONTENTS

PAGE(S)

TABLE OF CITATIONS

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant, JEFFREY GLENN HUTCHINSON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Hutchinson murdered his live-in girlfriend, Renee Flaherty, and her three young children: Logan, Amanda, and Geoffrey. *Hutchinson v. State*, 882 So.2d 943, 948-49 (Fla. 2004). The jury convicted him of four counts of first-degree murder with a firearm. *Id.* at 948. Hutchinson waived his right to a penalty phase jury but presented mitigation to the trial judge at the bench penalty phase. *Id.* On January 21, 2001, the trial court conducted a colloquy, found the waiver voluntary, and excused the jury. *Id.* at 949. He was sentenced to life imprisonment for the murder of Renee Flaherty and to death for the murder of each of the three children. *Id.* The trial court found two aggravating circumstances for the murders of Logan and Amanda: 1) previously convicted of another capital felony for the murders of the other children and 2) the victim was less than 12 years of age, but found three aggravating circumstances for the murder of Geoffrey Flaherty: 1) previously convicted of another capital felony for the murders of the other

children; 2) the victim was less than 12 years of age; and 3) heinous, atrocious, or cruel (HAC).

On appeal to the Florida Supreme Court, Hutchinson raised 10 issues. *Hutchinson*, 882 So.2d at 949-50. The Florida Supreme Court affirmed the four convictions of first-degree murder and affirmed the three death sentences for the murders of the three children. *Id.* at 961.

In October of 2005, Hutchinson filed a 3.851 motion for postconviction relief in state trial court. *Hutchinson v. State*, 17 So.3d 696, 699 (Fla. 2009). A second amended postconviction motion was filed after Hutchinson's original postconviction counsel withdrew and the trial court appointed new postconviction counsel. Id. at 699. Following an evidentiary hearing on some of the claims, the trial court denied the motion for postconviction relief. *State v. Hutchinson*, 2008 WL 8948638 (Fla. Cir. Ct. Jan. 3, 2008).

In his postconviction appeal to the Florida Supreme Court, Hutchinson raised three issues. *Hutchinson v. State*, 17 So.3d 696, 700 (Fla. 2009). The Florida Supreme Court affirmed the denial of postconviction relief. *Id.* at 704.

On July 24, 2009, Hutchinson filed a *pro se* federal habeas petition in district court. (Doc. #1). On November 23, 2009, habeas counsel Todd Doss, filed an amended habeas petition. (Doc. #19). The amended petition raised five grounds. On December 13, 2009, Respondents filed a motion to dismiss the petition as untimely. The district court granted the motion and dismissed the amended petition as untimely. *Hutchinson v. Florida*, 2010 WL 3833921 (N.D. Fla. Sept. 28, 2010).

The Eleventh Circuit affirmed the dismissal of Hutchinson's original habeas petition as being untimely, finding that equitable tolling did not apply. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012). Hutchinson then filed a petition for writ of certiorari in the United States Supreme Court raising three issues related

to equitable tolling. On October 9, 2012, the United States Supreme Court denied the petition. *Hutchinson v. Florida*, 568 U.S. 947 (2012) (No. 12-5582).

In 2014, Hutchinson filed a *pro se* rule 60(b) motion to reopen his capital federal habeas case based on *Martinez v. Ryan*, 566 U.S. 1 (2012). The federal district court then appointed the capital habeas unit (CHU) as federal habeas counsel of record. The 60(b)(6) motion is still pending in federal court and is being stayed pending the outcome of this appeal. (Doc. #70).

On January 11, 2017, Hutchinson, represented by registry counsel Clyde M. Taylor and Billy Nolas of the Capital Habeas Unit (CHU) of the Federal Defender's Office, filed a successive 3.851 motion for postconviction relief in this capital case raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), in the state court. (Succ. PC at 46-66). On January 27, 2017, the State filed an answer to the successive motion asserting the motion should be summarily denied because Hutchinson waived any right to *Hurst* relief by waiving his penalty phase jury. (Succ. PC at 67-81). On March 29, 2017, Hutchinson filed a reply. (Succ. PC at 115-138). On May 10, 2017, the trial court held a case management conference on the successive motion. (Succ. PC at 140-157). On May 30, 2017, the trial court summarily denied the successive motion. (Succ. PC at 158-174).

This appeal follows.

SUMMARY OF ARGUMENT

Hutchinson asserts that his death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). But he waived any right to *Hurst* relief by waiving his penalty phase jury. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). In this Court's words, a defendant may not "subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens*, 197 So.3d at 40. The *Hurst* claim was waived.

Contrary to opposing counsel's attack on the validity of the waiver, subsequent changes in the law do not render prior waivers invalid. As the United States Supreme Court has explained, a defendant who waives a proceeding or right does so under the current law. And those waivers remain valid regardless of later developments in the law. So, the waiver of the penalty phase jury remains valid in the wake of *Hurst*. The trial court properly summarily denied the successive postconviction motion based on the waiver and this Court's precedent.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING A SIXTH AMENDMENT RIGHT TO A JURY TRIAL CLAIM BASED ON *HURST V. FLORIDA*, 136 S.CT. 616 (2016), AND *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), IN A CASE INVOLVING A WAIVER OF THE PENALTY PHASE JURY? (Restated)

Hutchinson asserts that his death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). But Hutchinson waived any right to *Hurst* relief by waiving his right to a jury at the penalty phase. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). In this Court's words, a defendant may not "subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens*, 197 So.3d at 40. Contrary to opposing counsel's attack on the validity of the waivers, subsequent changes in the law do not render prior waivers invalid. A waiver remains valid regardless of later developments in the law. The trial court properly summarily denied the successive postconviction motion based on the waiver and this Court's precedent.

Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Furthermore, the scope of a waiver is a question of law and questions of law are reviewed *de novo*. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016)

(stating that the validity and scope of appellate waivers are reviewed *de novo*). The standard of review, therefore, is *de novo*.

The postconviction court's ruling

On January 11, 2017, Hutchinson file a 3.851 successive postconviction motion raising a claim based on *Hurst v. Florida* and *Hurst II* in the state trial court. (Succ. PC at 46-66). On January 27, 2017, the State filed an answer to the successive *Hurst* postconviction motion asserting that the successive motion should be summarily denied because Hutchinson waived any right to *Hurst* relief by waiving his penalty phase jury. (Succ. PC at 67-81). The State cited *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), and *Wright v. State*, 213 So.3d 881, 903 (Fla. 2017), in support of its argument. (Succ. PC at 74-75). On March 29, 2017, Hutchinson filed a reply arguing that the waiver was not knowing, intelligent, and voluntary due to ineffectiveness of counsel in advising him to waive the jury at the penalty phase. (Succ. PC at 115-138). Hutchinson relied on an affidavit from penalty phase counsel, Kimberly Ward, claiming her advice to waive the penalty phase was based on the law at the time. (Succ. PC at 131-134).

On May 10, 2017, the trial court held a case management conference on the successive motion at which the Court heard the arguments of counsel regarding the *Hurst* motion. (Succ. PC at 140-157). Billy Nolas of the CHU presented the argument for Hutchinson. (Succ. PC at 141). The State emphasized the waiver of the penalty phase jury during its presentation. (Succ. PC at 147-148). The State also noted, that in a waiver case, a court cannot perform a harmless error analysis on the *Hurst* error because there was no jury recommendation. (Succ. PC at 148-149).

On May 30, 2017, the trial court summarily denied the *Hurst* claim based on the waiver. (Succ. PC at 158-174). The trial court noted that Hutchinson had

waived his penalty phase jury attaching the waiver colloquy at trial to its order. (Succ. PC at 160 citing Exhibit A of the trial transcript including page 2313-2316). The trial court cited and quoted *Mullens* and *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016), in support of its ruling that a defendant who waives a penalty phase jury is not entitled to *Hurst* relief. (Succ. PC at 160). The trial court found that the "Defendant is not entitled to *Hurst* relief." (Succ. PC at 161). Alternatively, the trial court rejected any ineffectiveness claim for epnalty phase counsel advising Hutchinson to waive the penalty phase jury because counsel is not ineffective for failing to anticipate changes in the law, such as *Hurst*. (Succ. PC at 161 citing *Walton v. State*, 847 So.2d 438, 445 (Fla. 2003)).[1] The trial court summarily denied the successive motion. (Succ. PC at 161).

Merits

Hutchinson waived his *Hurst* claim by waiving his right to a penalty phase jury. At the penalty phase, Hutchinson waived the jury. *Hutchinson*, 882 So.2d at 948. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief.

[1] The trial court accurately characterized the claim that penalty phase counsel should not have advised Hutchinson to waive the penalty phase jury as a claim of ineffective assistance of counsel, opposing counsel's protests to the contrary notwithstanding. This Court has never remanded a *Hurst* claim for factual development at an evidentiary hearing in any of the dozens of such cases where the issue was raised despite repeated invitations by the defense bar to do so. Nor has this Court remanded cases raising *Hurst* claims involving waivers for evidentiary hearings and certainly did not do so in *Covington v. State*, 2017 WL 3764377, *14 (Fla. Aug. 31, 2017) (No. SC15-1252). The interaction between *Hurst* and *Mullens* is a pure issue of law that does not require any factual development.

Waiver of the right to a penalty phase jury

In *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), the Florida Supreme Court rejected a *Hurst* claim in a case where the defendant had waived his penalty phase jury. Mullens pleaded guilty to two counts of first-degree murder and one count of attempted first-degree murder and waived his right to a penalty phase jury. The Florida Supreme Court observed that, regardless of the exact scope and nature of the rights established in *Hurst v. Florida*, the defendant was entitled to no relief because he waived the penalty phase jury. *Mullens*, 197 So.3d at 38. The Florida Supreme Court observed that the United States Supreme Court in *Hurst v. Florida* "said nothing" about waiving the rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), but the United States Supreme Court, in the non-capital context, had stated that "nothing prevents a defendant from waiving his *Apprendi* rights" and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id.* at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). The Florida Supreme Court observed that "accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. *Id.* at 40. The Florida Supreme Court wrote that "Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Id*. at 40. The Florida Supreme Court denied any *Hurst* relief. *See also Covington v. State*, 2017 WL 3764377, *14 (Fla. Aug. 31, 2017) (No. SC15-1252) (stating that a defendant "who has waived the right to a penalty phase jury is not entitled to relief under *Hurst*" citing *Mullens*); *Wright v. State*, 213 So.3d 881, 903 (Fla. 2017) (rejecting a *Hurst* claim because the defendant waived his penalty phase jury citing *Mullens*); *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016) (rejecting a *Hurst*

claim in the postconviction context due to defendant's waiver of his right to a penalty phase jury citing and quoting *Mullens*).

Opposing counsel is ignoring this Court's statement in *Mullens* that a defendant "cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Mullens*, 197 So.3d at 40. It is this logic that is at the core of this Court's decision in *Mullens* and it is this logic that opposing counsel does not address in his brief.

A defendant who waives a jury trial has waived his Sixth Amendment right to a jury trial, which is the basis for *Hurst v. Florida* and *Hurst II* in the first place. *Cf. Shepard v. United States*, 544 U.S. 13, 16 (2005) (noting that sentencing a defendant based on facts that the defendant assented to during the plea colloquy does not violate *Apprendi*). This claim is akin to a defendant insisting on a bench trial after a waiver colloquy and then asserting on appeal that the bench trial violated his right to a jury trial. A defendant may not waive a penalty phase jury and then insist on his rights to jury findings.

Furthermore, due to the waiver, this Court cannot conduct a harmless error analysis. Under this Court's current precedent, this Court looks to whether the jury's final recommendation of death was unanimous to determine if the *Hurst* error is harmless. *Davis v. State*, 207 So.3d 142 (Fla. 2016). But, in a case where the defendant has waived a penalty phase jury, obviously, there is no jury vote. This Court cannot conduct its standard harmless error analysis in this case and that inability is due to the defendant's own conduct of waiving the penalty phase jury. The result of adopting opposing counsel's position would be that a defendant who waived the penalty phase jury would automatically obtain *Hurst* relief without any harmless error review. IB at 15. Such a defendant would be in

a better position than a defendant who did not waive his jury but whose jury recommended death.

Hutchinson's claim that he is entitled to *Hurst* relief regardless of his waiver of the penalty phase jury is contrary to this Court's controlling precedent. *Mullens* controls and mandates denial of this claim.

Validity of the waiver

Hutchinson's waiver of the penalty phase jury was knowing, intelligent, and voluntary. Under the pre-*Hurst* law, a jury's recommendation was not some sort of empty formality. It was nearly impossible for a trial judge to override a jury's recommendation of life under *Tedder v. State*, 322 So.2d 908 (Fla. 1975). As the Eleventh Circuit observed, this Court's "stringent application" of the *Tedder* standard meant that the last override affirmed on appeal was over 20 years ago. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1258 (11th Cir. 2012). But a trial court could, as a practical matter, totally ignore a jury's recommendation of death because the State could not appeal such a ruling under double jeopardy principles.[2] The law in Florida at the time of Hutchinson's waiver in 2001 was well established — a jury recommendation mattered a great deal. And all this was true even before *Ring* was decided in 2002, much less before *Hurst* was decided

[2] *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *Arizona v. Rumsey*, 467 U.S. 203 (1984) (concluding that the Double Jeopardy Clause barred a new penalty phase where trial judge had found no aggravating circumstances and sentenced the defendant to life at the first penalty phase because a life sentence constitutes an "acquittal of the death penalty"); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting that it is only a judge's decision to override a jury's recommendation of life that is appealable; conversely, a decision to override a jury's recommendation of death is not appealable).

in 2016. Hutchinson waived his right to a penalty phase jury despite the clear importance of the jury's recommendation in Florida's capital jurisprudence at the time of his waiver.

Waivers and subsequent changes in the law

Opposing counsel asserts that the waiver of the jury trial in this case was involuntary because Hutchinson could not have anticipated the change in the law that *Hurst* wrought. Opposing counsel is actually making the same arguments that this Court rejected in *Mullens* and *Covington*. Indeed, Covington in his reply brief cited to, and relied heavily, on *Halbert v. Michigan*, 545 U.S. 605 (2005), just as opposing counsel does in this case. *See Covington*, SC15-1252, RB at 26. And Covington distinguished the other state cases relied on by this Court in *Mullens* in his reply brief as well, just as opposing counsel does in his brief. *Covington*, SC15-1252, RB at 26-31.

Not only did this Court reject this argument but the United States Supreme Court has rejected it as well. The United States Supreme Court has held that pleas are not rendered involuntary due to later changes in the law. *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970). Richardson argued his plea was involuntary when a new decision regarding coerced confessions was issued by the United States Supreme Court. Richardson argued that he could now challenge his confession under the new decision instead of having to plead guilty. The United States Supreme Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary. The Supreme Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Richardson*, 397 U.S. at 774. The High Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided cases been the law at the time of the plea, "he is bound by his plea." *Id.* The Court

noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis for claiming a plea was involuntary. *See also Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not anticipate a change in the law "does not impugn the truth or reliability of his plea"); *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (stating that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor including a defendant's failure "to anticipate a change in the law regarding relevant punishments").

The federal appellate courts have followed the logic of *Richardson* regarding pleas.[3] As the Seventh Circuit explained, if the law allowed the defendant to get off scot free in the event the argument later is shown to be a winner, then every plea would become a conditional plea, with the (unstated) condition that the defendant obtains the benefit of favorable legal developments, while the prosecutor is stuck with the original bargain no matter what happens later. *Young v. United States*, 124 F.3d 794, 798 (7th Cir. 1997). And the reasoning of the *Richardson* Court applies to all types of waivers, not merely pleas, which are really a type of

[3] *United States v. Lockett*, 406 F.3d 207, 214 (3rd Cir. 2005) (observing that "the possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea"); *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) (stating the possibility of a favorable change in the law occurring after a plea agreement is "one of the normal risks that accompanies a guilty plea").

waiver — the waiver of a jury trial. Several federal circuits have followed the logic of *Richardson* regarding appellate waivers including the Eleventh Circuit.[4]

The same rationale expressed by the United States Supreme Court in *Richardson, Brady*, and *Ruiz* applies to Hutchinson's waiver of a jury trial as well. He was not required to foresee *Hurst* for his waiver of the penalty phase jury to be valid. The validity of a waiver is not dependent on subsequent changes in the law.[5]

Opposing counsel mistakenly asserts that the holding of *Halbert v. Michigan*, 545 U.S. 605 (2005), was a defendant cannot waive a right that has not yet been

---

[4] *United States v. Vela*, 740 F.3d 1150 (7th Cir. 2014) (holding a defendant's waiver of his right to appeal was not rendered involuntary by subsequent Supreme Court ruling citing *Brady* and *Richardson*); *United States v. Copeland*, 707 F.3d 522, 529 (4th Cir. 2013) (stating that a criminal defendant "cannot invalidate his appeal waiver now to claim the benefit of subsequently issued caselaw"); *United States v. Grinard-Henry*, 399 F.3d 1294, 1295 (11th Cir. 2005) (refusing to reconsider the dismissal of an appeal based on an appellate waiver in a plea in light of a later decision being issued in *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Green*, 405 F.3d 1180, 1190 (10th Cir. 2005) (rejecting a claim that an appellate waiver was involuntary because the Supreme Court has made it clear that a defendant's decision to give up some of his rights "remains voluntary and intelligent or knowing despite subsequent developments in the law" citing *Brady* and *Ruiz*).

[5] Nor is it even likely that Hutchinson actually relied on pre-*Hurst* law as a basis of his decision to waive a penalty phase jury. It is much more likely that the desire to keep a jury from hearing in greater detail the gruesome facts of the crime which included killing three young children with a Mossberg pump shotgun which literally tore them apart was the basis of the decision to waive a penalty phase jury rather than any real reliance on *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). Even if this Court was willing to entertain a claim that subsequent developments rendered a prior waiver involuntary, contrary to United States Supreme Court precedent, the Court should not do so automatically but only in those rare cases where the particular caselaw that changed was actually a critical part of the decision to waive. Opposing counsel makes no real argument attempting to show why he believes that *Bottoson* was a critical part of the decision to waive in this particular case.

recognized by the Courts. IB at 20. But that was not the holding of *Halbert*. The Court in *Halbert* held that the Equal Protection and Due Process clauses required the appointment of counsel for defendants seeking first-tier review of a conviction based on a plea or *nolo contendere*. The State of Michigan did contend that Halbert had waived the newly-created right to appellate counsel by entering a plea of *nolo contendere* and the Court rejected that waiver argument. *Id.* at 623. The *Halbert* Court observed, at the time he entered his plea, Halbert "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.* In a footnote to that observation, the Supreme Court stated that a "conditional waiver," which it defined, as one in which a defendant agrees that, if he has a right, he waives it was not at issue in the case because nothing in the plea colloquy indicated that Halbert waived an "unsettled" right to appellate counsel. *Id.* at n.7. The Court noted that the trial court, during the plea colloquy, did not tell Halbert, simply and directly, that there would be no access to appointed counsel. *Id.* at 624. The Court wrote that a waiver must be a "knowing, intelligent act done with sufficient awareness of the relevant circumstances." *Id.* (quoting *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), and citing *Brady v. United States*, 397 U.S. 742, 748 (1970)).

The *Halbert* Court did not overrule *Richardson*, *Brady*, or *Ruiz*. Moreover, the waiver logic of *Halbert* does not apply to this case. *Halbert* involved a totally unknown right. The right to a jury at the penalty phase in Florida was not unknown at the time of the waiver. There was no doubt that a capital defendant in 2001 was entitled to a jury at the penalty phase under the explicit text of Florida's death penalty statute. While *Hurst v. Florida* and *Hurst II* expanded those rights, the right to a jury existed prior to either decision. While the full extent of the constitutional right was unsettled prior to *Hurst*, the existence of that right was not. The law in Florida at the time of Hutchinson's waiver in 2001 regarding

the right to a jury at penalty phase was well established. Hutchinson knew that he had a right to a jury trial at the penalty phase but he waived that known right.

Opposing counsel's reliance on *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011), and *United States v. Palacios-Casquete*, 55 F.3d 557, 561 (11th Cir. 1995), is equally misplaced. The Eleventh Circuit in *Saac* stated that "a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted" citing *Palacioss-Casquete*, and *Haynes v. United States*, 390 U.S. 85, 87 & n.2 (1968). *Saac*, 632 F.3d at 1208. But this simply is not the Eleventh Circuit's position regarding whether waivers are rendered involuntary due to subsequent changes in the law. Regarding that issue, which is the real issue in this case, the Eleventh Circuit, not surprisingly, follows the United States Supreme Court's decisions in *Richardson*, *Brady*, and *Ruiz*.[6] Opposing counsel is mischaracterizing the issue and then citing caselaw that is totally inapplicable to the real issue in this case.

A defendant may not claim a waiver is "unknowing" based on future changes in the law under both Florida Supreme Court and United States Supreme Court precedent. Voluntariness of the waiver is determined under the law and knowledge that exists at the time. The waiver was not rendered involuntary due to the subsequent decision in *Hurst*. Hutchinson is not entitled to any *Hurst* relief due to his waiver.

---

[6] *United States v. Cardenas*, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (stating "a guilty plea is not invalidated by a later change in the law" citing *United States v. Sanchez*, 269 F.3d 1250, 1283-85 (11th Cir. 2001) (en banc) (applying *Brady* to reject argument that defendants' guilty pleas had been rendered involuntary and unknowing in the light of the later decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *United States v. Grinard-Henry*, 399 F.3d 1294, 1295 (11th Cir. 2005) (refusing to reconsider the dismissal of an appeal based on an appellate waiver in a plea in light of a later decision being issued in *United States v. Booker*, 543 U.S. 220 (2005)).

Accordingly, the trial court properly summarily denied the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Charmaine Millsaps
CHARMAINE M. MILLSAPS
SENIOR ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134
OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300
primary email:
capapp@myfloridalegal.com
secondary email:
charmaine.millsaps@myfloridalegal.com

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by e-portal to CLYDE M. TAYLOR, JR. of Taylor & Taylor, LLC, 2303 N. Ponce De Leon Blvd., Suite L, St. Augustine, FL 32084; Phone (904) 687-1630; email ct@talyor-taylor-law.com and BILLY H. NOLAS, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: billy_nolas@fd.org this 14th day of September, 2017.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

/s/ *Charmaine Millsaps*
Charmaine M. Millsaps
Attorney for the State of Florida

EXHIBIT 7

No. SC17-1229

IN THE

Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

Counsel for Appellant

TABLE OF CONTENTS

RENEWED REQUESTS FOR FULL BRIEFING AND ORAL ARGUMENT

Appellant respectfully renews his requests to allow oral argument pursuant to Fla. R. App. P. 9.320, and for the opportunity to file a full, untruncated brief pursuant to the standard Florida Rules of Appellate Procedure. 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 indicating 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 waive. These issues are more complex than the State's brief suggests and warrant full briefing and argument.

ARGUMENT[1]

I. The State fails to address Appellant's argument that a remand is appropriate for a hearing based on his challenge to the validity of his waiver and evidentiary proffer in the circuit court

The State's brief fails to address Appellant's argument that a remand is appropriate for a hearing based on his challenge to the validity of his waiver and evidentiary proffer in the circuit court. The State acknowledges that Appellant proffered a declaration from trial counsel in the circuit court indicating that Appellant's decision to waive an "advisory" penalty-phase jury was based solely on

[1] The State is correct that the correct standard of review is de novo. *See* Answer Br. at 5-6. The circuit court's order denying relief is entitled to no appellate deference.

trial counsel's advice, and that trial counsel's advice was grounded entirely on Florida's pre-*Hurst* unconstitutional sentencing scheme. *See* Answer Br. at 6. But the State fails to recognize the significance of this proffer as creating a mixed question of law and fact that should trigger an evidentiary hearing under this Court's precedent. Brushing aside the arguments spanning the bulk of Appellant's initial brief in a single paragraph, the State mischaracterizes the issue of Appellant's waiver in the *Hurst* context as a "pure question of law that does not require any factual development." Answer Br. at 7 n.1. The State ignores the cases Appellant cited in his initial brief, including *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), and *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), establishing the opposite. Those cases make clear that a hearing should be held when evidence is proffered regarding the effect of an unconstitutional death-sentencing law on defense counsel. Initial Br. at 12-15. And the State's own brief highlights the need for factual development in this case by disputing facts in Appellant's evidentiary proffer concerning the reason he waived. *See* Answer Br. at 13 n.5 (speculating that, in contrast to the declarations Appellant proffered in the circuit court, it is not "likely that Hutchinson relied on pre-*Hurst* law as a basis of his decision to waive a penalty phase jury.").[2]

[2] The State elsewhere continues to mischaracterize Appellant's *Hurst* claim as a claim of ineffective assistance of counsel. *See id.* As explained in Appellant's initial brief, he 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

The only case the State cites in support of its assertion that this case "does not require any factual development" is this Court's recent opinion in *Covington v. State*, No. SC15-1252, 2017 WL 3764377 (Fla. Aug. 31, 2017). But *Covington* is inapposite because, unlike Appellant, the defendant in that case did not challenge the validity of his waiver based on an evidentiary proffer in the circuit court. In fact, the defendant in *Covington* could not have sought such evidentiary development because *Covington*, like *Mullens*, is a direct appeal case. As the *Covington* defendant noted in his initial brief, challenges to a waiver of a penalty-phase jury "should be fleshed out in a post-conviction motion." *See id.*, Initial Brief of Appellant at 101 & n.25 (filed June 27, 2016). Here, unlike in *Convington*, Appellant sought evidentiary development in a Rule 3.851 proceeding and proffered evidence in support of his request for a hearing. For the reasons discussed in Appellant's initial brief, which are largely unaddressed by the State, this Court should remand for a hearing.

II. The State misunderstands *Mullens*, which only precludes *Hurst* relief based on valid or unchallenged jury waivers and does not address waivers, like Appellant's, that are challenged as invalid based on a substantial evidentiary proffer

The State misunderstands *Mullens* as requiring summary denial of *Hurst* relief in all cases in which the defendant waived a penalty-phase jury, regardless of whether the waiver is challenged as invalid based on a substantial evidentiary

---

constitutional proceeding where a single juror, as opposed to a majority of jurors, needed to be persuaded to recommend a life sentence. *See* Initial Br. at 14 n.6.

proffer. *See* Answer Br. at 4-5, 8. On the contrary, nothing in *Mullens* or this Court's other "jury waiver" cases suggests that a circuit court should ignore a defendant's evidentiary proffer challenging the validity of his waiver to preclude *Hurst* relief.

As explained in Appellant's brief, the facts of *Mullens* are not present in this case. 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. Mr. Mullens did not, as Appellant did, challenge the validity of his jury waiver in his *Hurst* litigation, based on either the voluntariness of the waiver itself or the detrimental effect of the unconstitutional statute on counsel's advice to waive. Mr. Mullins did not, as Appellant did, allege that his wavier was invalid, that he waived a penalty jury based on the advice of counsel, that counsel's advice was grounded entirely on pre-*Hurst* law, or that he would not have waived in a post-*Hurst* proceeding. And Mr. Mullins did not, as Appellant did, request an evidentiary hearing or proffer evidence undermining the validity of his waiver. 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.

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 case to that same jury. In his *Hurst* claim, unlike in *Mullens*, Appellant challenged the validity of the waiver, requested a hearing on the validity of the waiver as a basis to deny

Hurst relief, and proffered evidence that he would develop at a hearing to establish that the waiver is invalid as a bar to relief. Those circumstances were not present in *Mullens* or in any of the other cases cited in the State's brief, including *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (no evidence proffered undermining the validity of the jury-waiver to preclude *Hurst* relief); *Covington*, 2017 WL 3764377, at *14 (same); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016) (same). Appellant is not "ignoring" the ruling in *Mullens*, as the State asserts. *See* Answer Br. at 9. The State is overextending *Mullens* by applying it to Appellant's distinguishable case.

The State's concern that distinguishing Appellant's case from *Mullens* would encourage capital defendants to "abuse the judicial process" is unfounded. Answer Br. at 8. Indeed, Appellant's challenge to the validity of his pre-*Hurst* jury waiver and his request for an evidentiary hearing are entirely consistent with this Court's decisions following *Hitchcock v. Dugger*, 481 U.S. 393 (1987). As noted above, in cases such as *Meeks*, 576 So. 2d at 716, and *Hall*, 541 So. 2d at 1128, this Court approved of evidentiary hearings based on the defendants' extra-record proffer concerning the effect of the constitutional error on defense counsel.

III. The State does not recognize that Appellant waived only his pre-*Hurst* right to a generalized, majority-vote jury recommendation, not his post-*Hurst* right to binding, unanimous jury fact-finding

The State's brief does not recognize that Appellant's waived only his pre-*Hurst* right to a generalized, majority-vote jury recommendation, not his post-*Hurst*

right to binding, unanimous jury fact-finding that is consistent with the Sixth Amendment. The State wrongly asserts that Appellant "waive[d] his Sixth Amendment right to a jury trial, which is the basis for *Hurst v. Florida* and *Hurst II* in the first place." Answer Br. at 9. In fact, Appellant's pre-*Hurst* jury waiver did not constitute *any* surrender of his Sixth Amendment rights because Florida's pre-*Hurst* scheme did not allocate fact-finding to juries. A pre-*Hurst* jury recommendation, which is the only right Appellant could have waived at the time, was not grounded in the beyond-a-reasonable-doubt standard and therefore does not comport with the Sixth Amendment's definition of a jury verdict. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). This reveals the fallacy of the State's analogy to "a defendant insisting on a bench trial after a waiver colloquy and then asserting on appeal that the bench trial violated his right to a jury trial." Answer Br. at 9. That analogy would only make sense here if the right to jury fact-finding *at the guilt phase* was not recognized at the time the defendant opted for a bench trial.

The State places undue emphasis on the fact that Florida's unconstitutional scheme was considered valid by this Court before *Hurst*. *See* Answer Br. at 10-11, 15. The *Hurst* decisions make clear that Florida's capital sentencing scheme was unconstitutional because defendants were not afforded their right to binding, unanimous jury fact-finding at the penalty phase. It makes no difference in this case that, in the State's view, "[u]nder pre-*Hurst* law, a jury's recommendation was not

some sort of empty formality," or that the State believes that a pre-*Hurst* jury recommendation "mattered a great deal" despite being unconstitutional. *Id.* at 10, 11. What matters here is that a pre-*Hurst* jury recommendation did not implicate the right to binding, unanimous jury fact-finding, and therefore Appellant's pre-*Hurst* jury waiver could not have validly surrendered that right.

IV. The State's argument that defendants can waive constitutional rights that are not yet recognized by the courts cannot be squared with United States Supreme Court precedent or federal principles of due process

The State's argument that defendants can waive constitutional rights that are not yet recognized by the courts cannot be squared with United States Supreme Court precedent or federal principles of due process. As explained in Appellant's brief, the United States Supreme Court reaffirmed in *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), that defendants cannot waive rights that are not recognized by the courts at the time of the waiver. *See* Initial Br. at 20-22. *Halbert* is consistent with earlier precedent 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). These federal principles, grounded in due process, apply to Appellant's pre-

Hurst jury waiver, which occurred before the right to binding, unanimous jury fact-finding in Florida capital sentencing proceedings was recognized.

The State misunderstands Appellant's arguments under *Halbert*. Most fundamentally, Appellant does not argue, as the State incorrectly asserts, that his pre-*Hurst* jury waiver is now invalid "due to later changes in the law." Answer Br. at 11. Rather, as explained in his brief, Appellant's argument is that his pre-*Hurst* jury waiver is not a valid basis to preclude *Hurst* relief 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. *See* Initial Br. at 1. Thus, the cases cited by the State's brief purportedly establishing that changes in law do not by themselves render waivers invalid are not persuasive here. *See* Answer Br. at 11-13 & nn. 3-5.

Contrary to the State's selective reading, the plain language of *Halbert* reveals its holding. By its terms, *Halbert* held exactly what Appellant described in his initial brief: a defendant cannot waive rights not yet recognized by the courts. *Halbert*, 545 U.S. at 624. Although the State is correct that *Halbert* also stands for the proposition that the Constitution requires appellate counsel following a no contest

plea, Answer Br. at 13, *Halbert's* related holding, which prevents Florida from making the same argument here that Michigan did in *Halbert*, cannot be ignored.[3]

And the State erroneously argues that "the waiver logic of *Halbert* does not apply to this case" because *Halbert* "involved a totally unknown right." Answer Br. at 14. The State reasons that "[t]he right to a jury at the penalty phase in Florida was now unknown at the time of the waiver." *Id.* The State fails to recognize that the right to a jury before *Hurst* is not the same right to a jury after *Hurst*. Before *Hurst*, Appellant waived his right to a generalized, majority-vote jury recommendation. The post-*Hurst* right to binding, unanimous jury fact-finding was not yet recognized.

V. The State does not dispute that *Hurst* applies retroactively to Appellant, and the State correctly concedes that the "harmless error" doctrine is not an impediment to relief in this case

The State's brief does not dispute, and the State conceded below, that *Hurst* applies retroactively to Appellant because his death sentences became final in 2004, after *Ring v. Arizona*, 536 U.S. 584 (2002). *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."). The State's brief also correctly concedes, as the State did below, that the "harmless error"

[3] The State's brief at points asserts that Appellant cited certain cases and made arguments that he never did, and then engages with those cases and arguments. *See* Answer Br. at 13, 15 & nn.5-6. Because Appellant never cited to those cases or made those arguments in his initial brief, they are not addressed in this reply.

doctrine is not an impediment to relief in this case. *See* Answer Br. at 6 ("The State also noted, that in a waiver case, a court cannot perform harmless error analysis on the *Hurst* error because there was no jury recommendation"); *id.* at 9-10 ("Under this Court's current precedent, this Court looks to whether the jury's final recommendation of death was unanimous to determine if the *Hurst* error is harmless. But, in a case where the defendant has waived a penalty phase jury, obviously there is no jury vote.") (internal citation omitted).[4]

Given these concessions, remanding for a hearing on Appellant's proffer is critical because the only issue that remains is whether Appellant's jury waiver is a valid basis to preclude *Hurst* relief.

CONCLUSION

For the reasons above and in Appellant's initial brief in response to this Court's August 22, 2017 order, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing the validity of Appellant's pre-*Hurst* jury waiver to bar *Hurst* relief, or allow a new penalty phase proceeding that comports with *Hurst*. Appellant also requests the opportunity for full briefing under the ordinary appellate rules and for oral argument.

[4] Contrary to the State's assertion, Appellant has never argued that defendants who waived a pre-*Hurst* jury should automatically receive *Hurst* relief. *See* Answer Br. at 9-10. Rather, Appellant has argued, and the State has conceded, that this Court cannot apply its *current* harmless-error analysis to his *Hurst* claim because that analysis relies entirely on the vote by which the jury voted to recommend death.

Respectfully submitted,

/s/ Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 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

EXHIBIT 8

IN THE SUPREME COURT OF FLORIDA

JEFFREY GLENN HUTCHINSON,

Appellant,

v. **Case No. SC17-1229**

STATE OF FLORIDA,

Appellee.
_____/

MOTION FOR REHEARING AND CLARIFICATION

Appellant, through counsel, moves for rehearing and clarification of this Court's March 15, 2018, opinion affirming the denial of relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Court's March 15 decision was objectively unreasonable as a matter of federal law and state law. Under Fla. R. App. P. 9.300(a), rehearing is appropriate because the Court overlooked and misapprehended points of fact and law establishing that Appellant's waiver of a penalty jury was not a valid basis for the circuit court to summarily deny *Hurst* relief, particularly in light of his evidentiary proffer below in support of a request for a hearing. Clarification is also appropriate regarding significant matters in Appellant's briefs not addressed by the March 15 opinion.

I. The Court failed to address or even acknowledge the significant evidence Appellant proffered below in support of his request for a hearing, including the critical declaration of trial counsel

This Court's March 15 opinion recognized that, "[a]lthough evidentiary

hearings on factually based claims raised in successive rule 3.851 motions are not automatically required, *courts are encouraged to liberally allow such hearings* on timely raised claims." *Hutchinson v. State*, No. SC17-1229, 2018 WL 1324791, at *2 (Fla. Mar. 15, 2018) (emphasis added). Despite acknowledging Florida's "liberal" policy regarding hearings in capital cases, the Court unreasonably affirmed the denial of Appellant's request for a hearing—which he had sought on the question of whether his pre-*Hurst* waiver of a penalty jury should preclude *Hurst* relief—despite Appellant's proffer of significant relevant evidence below. The Court did not address or even acknowledge Appellant's proffered evidence in its decision.

Appellant's proffer in the circuit court included a declaration by trial counsel indicating that (1) Appellant waived a jury based solely on counsel's advice, (2) counsel's advice was grounded entirely on Florida's pre-*Hurst* scheme, (3) counsel would not have advised Appellant to waive in a post-*Hurst* proceeding, and (4) Appellant would not have waived absent counsel's advice. Even under a more stringent standard, Appellant should have been allowed to develop this evidence at a hearing. Certainly in a state court system like Florida's, where hearings are "liberally allow[ed]," the circuit court's summary denial was inappropriate. In affirming the circuit court's ruling, this Court's March 15 decision failed to address or even acknowledge the evidence Appellant proffered in support of his request for a hearing, including trial counsel's declaration.

The Court's failure to grapple with the significance of Appellant's proffer is particularly striking in light of the Court's attempt to distinguish this case from *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), and *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989). The Court's March 15 opinion recounts how the defendants in *Meeks* and *Hall* were granted hearings after proffering affidavits regarding the effect of the constitutional error described in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), on their defense counsel's approach to the penalty phase. *Hutchinson*, 2018 WL 1324791, at *3. The Court does not reasonably explain why Appellant should not have been granted a similar hearing after proffering affidavits regarding the effect of the unconstitutional Florida scheme described on defense counsel's advice to waive a penalty jury and Appellant's decision to follow that advice. Instead, the Court distinguished *Meeks* and *Hall* on the grounds that "[u]nlike Hutchinson, the defendants in *Meeks* and *Hall* did not waive any rights," and a "defendant's ability to waive a penalty phase jury did not change after *Hurst*." *Id.*

In addition to sidestepping the issue of Appellant's facially valid proffer, this Court's reasoning ignores that before *Hurst*, a waiver of a penalty jury meant something very different than such a waiver means post-*Hurst*. Appellant waived an advisory jury, *but Appellant did not waive the right to penalty-jury fact-finding*, which did not exist in Florida at the time. When a defendant knowingly and voluntarily waives a penalty jury under current law, he does so with the

understanding that he is waiving jury fact-finding on the elements for a death sentence. Appellant's pre-*Hurst* waiver meant only that he was waiving an advisory jury in a judge-fact-finding scheme.

The circuit court and this Court were presented with compelling evidence that the *Hurst* error was the only reason that Appellant waived a penalty jury. In light of this evidence, the appropriate course for this Court was to vacate the circuit court's summary affirmance and either hold that Appellant should be granted *Hurst* relief based on his proffer or, at a minimum, remand for the circuit court to allow Appellant to present his evidence at a hearing. Instead, this Court's March 15 ignored Appellant's proffer and affirmed based on a faulty bright-line analysis holding that no defendants who waived a penalty jury are entitled to review of their *Hurst* claims, no matter what evidence they might provide to show that the *Hurst* error was the only reason for the waiver. The Court's decision resulted in a denial of Appellant's due process rights and undermines the reliability of Florida's death sentences. The Court should grant rehearing to correct these state and federal constitutional errors.

II. The Court misapprehended Appellant's arguments for *Hurst* relief by wrongly construing them as an ineffective-assistance-of-counsel claim

The Court's ineffective-assistance-of-counsel analysis is inapposite and reflects a failure by the Court to engage Appellant's briefs, which explicitly disclaimed an ineffectiveness claim. *See Hutchinson*, 2018 WL 1324791, at *2. As Appellant repeated explained in both the circuit court and this Court in response to

mischaracterizations by the State, "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." Appellant's Initial Br. at 14 n.6; *see also* Appellant's Reply Br. at 2 n.2 ("The State elsewhere continues to mischaracterize Appellant's *Hurst* claim as a claim of ineffective assistance of counsel.").

In fact, Appellant's argument is the opposite of an ineffectiveness claim. As the proffered declarations ignored by this Court indicate, Appellant's counsel made a strategic decision in the context of Florida's unconstitutional capital sentencing scheme when advising Appellant to waive a penalty jury. Knowing that Florida law required a majority of advisory jurors to vote for a life sentence in order to avoid the death penalty, counsel reasonably advised Appellant that, in light of the circumstances of the case heard by the jury at the guilt phase, he had a greater chance of avoiding death by allowing the trial judge—who would conduct the fact-finding anyway under Florida's prior scheme—to preside over the penalty phase without the added layer of an advisory jury. If the proceeding had been conducted under the current post-*Hurst* law, counsel states in her declaration, she would not have advised Appellant to waive because after *Hurst* he would need only one juror to find that just one element was not proven beyond a reasonable doubt in order to be given a life

sentence. The proffered declarations also establish that Appellant relied totally on counsel's advice in deciding to waive a penalty jury, and that Appellant would not waive a jury in a post-*Hurst* proceeding absent such advice.

In light of that evidence, Appellant argued to this Court that it is constitutionally perverse to hold that his waiver, which flowed directly from the unconstitutional statute invalidated by *Hurst*, totally bars any court's consideration of his *Hurst* claim. If this Court had read the declarations and Appellant's briefs, the inapplicability of an ineffectiveness analysis would have been clear. In taking the State's lead in miscasting Appellant's *Hurst* arguments as an ineffectiveness claim, this Court demonstrated a failure to grapple with the arguments and evidence presented. Under these circumstances, rehearing is warranted.

III. The Court overlooked or misread Appellant's explanation of why his case is distinguishable from *Mullens* and the Court's other jury-waiver precedent, but even if those state-law cases applied here, their holdings conflict with the United States Constitution and should be abandoned

The March 15 opinion reflects that the Court either overlooked or misread Appellant's explanation of why his case is distinguishable from *Mullens v. State*, 197 So. 3d 16, 39-40 (Fla. 2016), and the Court's other jury-waiver precedent. As an initial matter, the Court erroneously stated that "Hutchinson maintains that his waiver became invalid as a result of the change in the law after *Hurst*." *Id.* As the briefing in this Court made clear, Appellant has never argued that his waiver became invalid as a result of the change in law after *Hurst*. Appellant has consistently argued

a narrower point: because his waiver of a penalty jury was the product of counsel's advice, and that advice was the result of the Florida scheme that was later ruled unconstitutional in *Hurst*, Appellant's waiver is not a valid basis *to deny him access to Hurst relief*. Contrary to the Court's assumption, Appellant did not contend in any filing that the change in law brought about by *Hurst* invalidated his jury waiver as a general matter. The difference between Appellant's case and this Court's other jury-waiver precedents, including *Mullens*, is that in those other cases the validity of the jury waiver was either not challenged at all, or challenged on grounds that were not directly linked to Florida's prior unconstitutional scheme.

The Court wrongly characterized the only relevant distinguishing characteristic between this case and *Mullens* as the decision to plead guilty in *Mullens* versus Appellant's decision to proceed to trial. *Hutchinson*, 2018 WL 1324791, at *3. The Court then concluded that the guilty-plea distinction is irrelevant because "the circuit court properly found that Hutchinson's colloquy supported the conclusion that his waiver was knowing, intelligent, and voluntary." *Id.* Again, this Court demonstrated a misunderstanding of the issue in this appeal. It is irrelevant whether Appellant's colloquy supported the conclusion that his waiver was knowing, intelligent, and voluntary at the time. The issue is whether that waiver should serve as a complete bar to consideration of his *Hurst* claim in light of the evidence he proffered indicating that no waiver would have occurred without the

Hurst error. None of this Court's jury-waiver *Hurst* cases, including *Mullens* and *Brant v. State*, 197 So. 3d 1051 (Fla. 2016), have involved such a proffer.

Even if this case were not readily distinguishable from *Mullens* and the Court's other jury-waiver *Hurst* precedents, those cases violate the United States Constitution to the extent they erect a categorical bar on *Hurst* relief to all defendants who waived a penalty jury before *Hurst*, regardless of any other facts or circumstances. This Court should abandon such a rule as contrary to federal law, which provides that defendants cannot be held to have waived rights that were not recognized to exist at the time of the waiver. *See Halbert v. Michigan*, 545 U.S. 605, 623 (2005). As explained below, this Court's March 15 opinion conflicts with federal precedents by holding that all Florida defendants who waived a pre-*Hurst* advisory jury at the penalty phase thereby waived the right to penalty-jury fact-finding, even though the right to jury fact-finding was non-existent before *Hurst*. The Court grant rehearing to correct this federal constitutional error.

IV. This Court unreasonably applied the United States Supreme Court's decision in *Halbert v. Michigan*, which precludes Florida's state courts from ruling that Appellant waived a right to penalty jury fact-finding that did not exist in Florida at the time of the waiver

This Court unreasonably applied the United States Supreme Court's decision in *Halbert v. Michigan*, which precludes Florida's state courts from ruling that Appellant waived the right to penalty-jury fact-finding that did not exist in Florida at the time of his waiver. The Court's March 15 decision states that "Hutchinson

contends that this Court should follow *Halbert* in finding that *Hurst* created a new right to a jury trial distinct from the pre-*Hurst* right, and further find that his jury waiver does not preclude *Hurst* relief." *Hutchinson*, 2018 WL 1324791, at *4. But Appellant did not contend that *Hurst* created a "new" right to a jury trial distinct from the pre-*Hurst* right—it was the United States Supreme Court that held in *Hurst* that Florida's scheme systematically denied defendants their Sixth Amendment jury-trial rights by allocating the fact-finding decision-making at the penalty phase to the judge, rather than to the jury. As *Hurst* makes clear, at the time of Appellant's waiver, Florida law did not recognize the right to jury fact-finding at the penalty phase. At that time, Appellant could only waive the right to an advisory jury that would make a generalized recommendation to the judge. Under *Halbert*, Appellant could not have waived a right to jury fact-finding that was not recognized at the time.

The Court's March 15 decision insists that "[u]nlike the right to first-tier postconviction counsel in *Halbert*, the right to a jury trial was well recognized before *Hurst*." *Id.* That conclusion is belied by *Hurst* itself, which held that Florida's scheme did not correctly recognize the right to a jury trial in failing to allow for jury-fact-finding at the penalty phase.

In fact, the Court made the same mistake in *Mullens* when it explained that allow defendants who waived a penalty jury to press *Hurst* claims "would encourage capital defendants to abuse the judicial process by waiving the right to jury

sentencing and claiming reversible error upon a judicial sentence of death." *Mullens*, 197 So. 3d at 40 (citations omitted). It is inconsistent with *Hurst* for this Court to equate a pre-*Hurst* waiver of an advisory jury with "waiving the right to jury sentencing." *Hurst* makes clear that Florida's advisory jury scheme was anathema to the Sixth Amendment right to a jury at a death sentencing proceeding.

In addition to insisting that the same jury trial right that exists in Florida's death sentencing scheme today also existed before *Hurst*, this Court's March 15 opinion attempted to cast aside *Halbert*'s relevance in this case by citing *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), a case decided 35 years earlier in which the Court said "an argument similar to Hutchinson's" was rejected by the United States Supreme Court. *Hutchinson*, 2018 WL 1324791, at *4. But *McMann* presented different circumstances than those presented here. In *McMann*, the United States Supreme Court held "that a defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus." *McMann*, 397 U.S. at 771. In that case, the defendant argued that his guilty plea was not intelligent because counsel misjudged the admissibility of his confession. *Id.* at 770. Here, Appellant does not seek invalidation of his penalty jury waiver on the ground that counsel gave him faulty advice, but simply asks for his *Hurst* claim to be considered notwithstanding his pre-*Hurst* jury waiver because that waiver was entirely the result of counsel's reasonable

advice within the context of a proceeding governed by the scheme invalidated by *Hurst*. Moreover, unlike in *McMann*, where the defendant sought a hearing on his allegation "without more," Appellant proffered much more in requesting a hearing, including a declaration from trial counsel that fully supports his argument.

A recent decision of the United States Supreme Court, issued after the briefing in this appeal, buttresses Appellant's argument. In *Class v. United States*, 138 S. Ct. 798, 2018 WL 987347 (Feb. 21, 2018), the Court held that a guilty plea and related "waivers" do not, by themselves, bar a criminal defendant "from challenging the constitutionality of the statute of conviction on direct appeal." *Id.* at *4. *Class* rejected the argument that the defendant had "expressly waived" his right to appeal "constitutional" issues because the judge informed the defendant that he "was giving up his right to appeal his conviction." *Id.* at *7 (internal brackets and quotation marks omitted). The Court noted that the plea agreement did "not expressly refer to a waiver of the appeal right here at issue." *Id.* Absent an express waiver of prospective constitutional challenges, the Court explained, the defendant cannot be said to have waived those rights. *Id.* at *4. Similarly, Appellant's waiver of a penalty jury does not forever bar him from raising constitutional claims arising under this Court's decision in *Hurst*, which found the advisory jury scheme that Appellant decided to forego unconstitutional. Appellant is no less entitled to assert his

constitutional right to jury fact-finding at a penalty phase than defendants who elected to present their case to an advisory jury in the prior unconstitutional scheme.

V. Conclusion

Rehearing should be granted and the Court should hold that *Hurst* applies to Appellant in light of his proffered evidence, or remand for the circuit court to make that determination following a hearing.

Respectfully submitted,

/s/ Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630
Florida Bar No. 129747

/s/ Billy H. Nolas
Billy H. Nolas
Chief, Capital Habeas Unit
Office of the Federal Public Defender
Northern District of Florida
227 N. Bronough Street, Suite 4200
Tallahassee, FL 32301-1300
billy_nolas@fd.org
(850) 942-8818
Florida Bar No. 806821

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2018, 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

EXHIBIT 9

Filing # 52462321 E-Filed 02/14/2017 11:38:38 AM

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT IN AND FOR OKALOOSA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. **Case No.: 98-1382 CFCA**

JEFFREY GLENN HUTCHINSON,

Defendant.
_____/

DEFENDANT'S NOTICE OF FILING OF AFFIDAVIT AND DECLARATION IN SUPPORT OF SUCCESSIVE RULE 3.851 MOTION

Defendant, through counsel, respectfully provides notice of filing of the attached affidavit of Kimberly Ward, Esq., and declaration of Defendant Jeffrey Hutchinson, in support of his January 11, 2017 successive Rule 3.851 motion.

Respectfully submitted,

/s/ Clyde M. Taylor, Jr.
Clyde M. Taylor, Jr.
Fla. Bar No. 129747
Taylor & Taylor, LLC
2303 N. Ponce De Leon Blvd., Ste. L
St. Augustine, FL 32084
ct@taylor-taylor-law.com
(904) 687-1630

Certificate of Service

I, Clyde M. Taylor, hereby certify that on February 14, 2017, I served this filing by electronic transmission via the e-portal to Billy Nolas at billy_nolas@fd.org, Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com, and Assistant State Attorney Cliffton Drake at cdrake@sa01.org.

/s/ Clyde M. Taylor
Clyde M. Taylor

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 16, 2017

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

Karen Janet Chi

KAREN J. CHI
Commission # FF 888548
Expires April 27, 2020
Bonded Thru Troy Fain Insurance 800-385-7019

Karen J. Chi

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:

Notary Public State of Florida
Terri L Backhus
My Commission FF 228221
Expires 06/18/2019

EXHIBIT 10

Florida Death-Penalty Appeals Decided in Light of Hurst

Last updated: May 15, 2018

Total number of prisoners whose cases have been reviewed by Florida Supreme Court (or, if relief is granted, by a Circuit Court) in light of *Hurst*: 259

Number of prisoners who have obtained relief under *Hurst*: 128 (49.42%)

Number of prisoners who have been denied relief under *Hurst*: 131 (50.58%)

The Florida Supreme Court has declared that it will apply its decisions in *Hurst v. State* and *Asay v. State*—which held that non-unanimous jury recommendations of death violate the Florida state constitution and the Sixth Amendment of the U.S. Constitution—to new death penalty cases and to older cases in which the direct appeal process was final on or before the U.S. Supreme Court decided *Ring v. Arizona* in June 2002.

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Abdool, Dane	Orange	N	N	10-2	Y	4/6/17
Allred, Andrew	Seminole	N	WAIVED JURY		N	11/16/17
Alston, Pressley Bernard	Duval	Y	N	9-3	N	1/22/18
Altersberger, Joshua Lee	Highlands	N	N	9-3	Y	4/27/17
Anderson, Charles L.	Broward	N	N	8-4	Y	3/9/17
Anderson, Richard	Hillsborough	Y	N	11-1	N	1/26/18
Archer, Robin Lee	Escambia	Y	N	7-5	N	3/17/17
Armstrong, Lancelot Uriley	Broward	N	N	9-3	Y	1/19/17
Asay, Marc	Duval	Y	N	9-3, 9-3	N (**EXECUTED**)	12/22/16
Atwater, Jeffrey Lee	Pinellas	Y	N	11-1	N	1/23/18
Ault, Howard Steven	Broward	N	N	9-3, 10-2	Y	3/9/17
Bailey, Robert J.	Bay	N	N	11-1	Y	7/6/17
Baker, Cornelius	Flagler	N	N	9-3	Y	3/23/17
Banks, Donald	Duval	N	N	10-2	Y	4/20/17
Bargo, Michael Shane	Marion	N	N	10-2	Y	6/29/17
Barnhill, Arthur	Seminole	N	N	9-3	Y	2/20/17
Barwick, Darryl Brian	Bay	Y	Y	12-0	N	2/28/18
Bates, Kayle Barrington	Bay	Y	N	9-3	N	1/22/18
Beasley, Curtis W.	Polk	Y	N	10-2	N	1/23/18
Belcher, James	Duval	N	N	9-3	Y	11/2/17
Bell, Michael	Duval	Y	Y	12-0, 12-0	N	1/29/18
Bevel, Thomas	Duval	N	N	8-4, 12-0	Y*	6/15/17
Booker, Stephen Todd	Duval	Y	N	8-4	N	1/30/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Bowles, Gary Ray	Duval	Y	Y	12-0	N	1/29/18
Braddy, Harrel	Miami-Dade	N	N	11-1	Y	6/15/17
Bradley, Brandon Lee	Brevard	N	N	10-2	Y	3/30/17
Bradley, Donald	Clay	Y	N	10-2	N	1/22/18
Branch, Eric Scott	Escambia	Y	N	10-2	N **(EXECUTED)**	1/22/18
Brookins, Elijah	Gadsden	N	N	10-2	Y	4/20/17
Brooks, Lamar	Okaloosa	N	N	9-3, 11-1	Y	3/10/17
Brown, Paul Alfred	Hillsborough	Y	N	7-5	N	1/29/18
Brown, Paul Anthony	Volusia	Y	Y	12-0	N	2/28/18
Burns, Daniel Jr.	Manatee	Y	Y	12-0	N	1/23/18
Buzia, John	Seminole	N	N	8-4	Y	4/6/17
Byrd, Milford Wade	Hillsborough	Y	Unknown	Unknown	N	2/28/18
Calloway, Tavares David	Miami-Dade	N	N	7-5, 7-5, 7-5, 7-5, 7-5	Y	1/26/17
Campbell, John	Citrus	N	N	8-4	Y	8/30/17
Card, James	Bay	N	N	11-1	Y	5/4/17
Carr, Emilia	Marion	N	N	7-5	Y	2/7/17
Carter, Pinkney	Duval	N	N	9-3, 8-4	Y	10/4//17
Caylor, Matthew	Bay	N	N	8-4	Y	5/18/17
Clark, Ronald Wayne Jr.	Duval	Y	N	11-1	N	1/23/18
Cole, Loran	Marion	Y	Y	12-0	N	1/23/18
Cole, Tiffany Ann	Duval	N	N	9-3, 9-3	Y	6/29/17
Conde, Rory	Miami-Dade	N	N	9-3	Y	8/31/17
Consalvo, Robert	Broward	Y	N	11-1	N	1/31/18
Cox, Allen	Lake	N	N	10-2	Y	7/23/17
Cozzie, Steven Anthony	Walton	N	Y	12-0	N	5/11/17
Crain, Willie Seth	Hillsborough	N	Y	12-0	N	4/5/18
Damren, Floyd William	Clay	Y	Y	12-0	N	2/2/18
Darling, Dolan a/k/a Sean Smith	Orange	N	N	11-1	Y	3/29/17
Davis, Adam W.	Hillsborough	N	N	7-5	Y	5/2/17
Davis, Barry T.	Walton	N	N	9-3, 10-2	Y	5/11/17
Davis, Jr., Leon	Polk	N	Y	12-0, 12-0, 8-4	N	11/10/16
Davis, Jr., Leon	Polk	N	WAIVED JURY		N	11/10/16
Davis, Mark Allen	Pinellas	Y	N	8-4	N	1/29/18
Davis, Toney D.	Duval	Y	N	11-1	N	2/17/17
Dennis, Labrant	Miami-Dade	N	N	11-1, 11-1	Y	7/7/17
Deparvine, Williams James	Hillsborough	N	N	8-4, 8-4	Y	4/6/17
Derrick, Samuel Jason	Pasco	Y	N	7-5	N	2/2/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Dessaure, Kenneth	Pinellas	N	WAIVED JURY		N	11/16/17
Deviney, Randall	Duval	N	N	8-4	Y	3/23/17
Diaz, Joel	Lee	N	N	9-3	Y	6/15/17
Dillbeck, Donald David	Leon	Y	N	8-4	N	1/24/18
Doorbal, Noel	Miami-Dade	N	N	8-4, 8-4	Y	9/20/17
Doty, Wayne	Bradford	N	N	10-2	Y	8/7/17
Douglas, Luther	Duval	N	N	11-1	Y	6/29/17
Dubose, Rasheem	Duval	N	N	8-4	Y	2/9/17
Durousseau, Paul	Duval	N	N	10-2	Y	1/31/17
Eaglin, Dwight	Charlotte	N	N	8-4, 8-4	Y	4/3/17
England, Richard	Volusia	N	N	8-4	Y	5/22/17
Evans, Paul H.	Indian River	N	N	9-3	Y	3/20/17
Evans, Steven Maurice	Orange	Y	N	11-1	N	1/24/18
Evans, Wydell Jody	Brevard	N	N	10-2	Y	
Finney, Charles	Hillsborough	Y	N	9-3	N	1/26/18
Floyd, Maurice Lamar	Putnam	N	N	11-1	Y	5/17/17
Ford, James D.	Charlotte	Y	N	11-1, 11-1	N	1/23/18
Foster, Charles	Bay	Y	N	8-4	N	1/29/18
Foster, Kevin Don	Lee	Y	N	9-3	N	1/29/18
Fotopoulos, Konstantinos	Volusia	Y	N	8-4, 8-4	N	1/29/18
Frances, David	Orange	N	N	9-3, 10-2	Y	3/29/17
Franklin, Richard P.	Columbia	N	N	9-3	Y	11/23/16
Gamble, Guy R.	Lake	Y	N	10-2	N	1/29/18
Gaskin, Louis	Flagler	Y	N	8-4, 8-4	N	2/28/18
Geralds, Mark Allen	Bay	Y	Y	12-0	N	2/28/18
Glover, Dennis T.	Duval	N	N	10-2	Y	9/14/17
Gonzalez, Leonard	Escambia	N	N	10-2	Y	5/23/17
Gonzalez, Ricardo	Miami-Dade	Y	N	8-4	N	3/23/18
Gordon, Robert R.	Pinellas	Y	N	9-3	N	1/31/18
Gregory, William	Volusia	N	N	7-5, 7-5	Y	8/31/17
Griffin, Michael Allen	Miami-Dade	Y	N	10-2	N	2/2/18
Grim, Norman	Santa Rosa	N	Y	12-0	N	3/29/18
Guardado, Jesse	Walton	N	Y	12-0	N	5/11/17
Gudinas, Thomas Lee	Collier	Y	N	10-2	N	1/30/18
Guzman, James	Volusia	N	N	11-1	Y	2/22/18
Guzman, Victor	Miami-Dade	N	N	7-5	Y	4/6/17
Hall, Donte Jermaine	Lake	N	N	8-4	Y	6/15/17
Hall, Enoch D.	Volusia	N	Y	12-0	N	2/9/17
Hamilton, Richard	Hamilton	Y	N	10-2	N	2/18/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Hampton, John	Pinellas	N	N	9-3	Y	5/4/17
Hannon, Patrick	Hillsborough	Y	Y	12-0	N **(EXECUTED)**	11/1/17
Hartley, Kenneth	Duval	Y	N	9-3	N	1/26/18
Hayward, Steven	St. Lucie	N	N	8-4	Y	3/24/17
Heath, Ronald Palmer	Alachua	Y	N	10-2	N	2/28/18
Hernandez, Michael	Santa Rosa	N	N	11-1	Y	5/11/17
Hernandez-Alberto, Pedro	Hillsborough	N	N	10-2, 10-2	Y	5/9/17
Hertz, Gerry	Wakulla	N	N	10-2, 10-2	Y	5/18/17
Heyne, Justin	Brevard	N	N	10-2, 8-4	Y	4/6/17
Hitchcock, James	Orange	Y	N	10-2	N	8/10/17
Hobart, Robert	Santa Rosa	N	N	7-5	Y	2/21/18
Hodges, George Michael	Hillsborough	Y	N	10-2	N	2/2/18
Hodges, Willie James	Escambia	N	N	10-2	Y	3/16/17
Hojan, Gerhard	Broward	N	N	9-3, 9-3	Y	1/31/17
Huggins, John	Orange	N	N	9-3	Y	5/23/17
Hunter, Jerone	Volusia	N	N	10-2, 10-2, 9-3, 9-3	Y	6/16/17
Hurst, Timothy	Escambia	N	N	7-5	Y	10/14/16
Hutchinson, Jeffrey	Okaloosa	N	WAIVED JURY	WAIVED JURY	N	3/15/18
Israel, Connie Ray	Duval	N	N	7-5	Y	3/21/17
Jackson, Etheria Verdell	Duval	Y	N	7-5	N	1/24/18
Jackson, Kenneth R.	Hillsborough	N	N	11-1	Y	3/23/17
Jackson, Michael James	Duval	N	N	8-4, 8-4	Y	6/9/17
Jackson, Ray	Volusia	N	N	9-3	Y	4/24/17
Jeffries, Kevin G.	Bay	N	N	10-2	Y	7/13/17
Jeffries, Sonny Ray	Orange	Y	N	11-1	N	1/26/18
Jennings, Brandy Bain	Collier	Y	N	10-2, 10-2, 10-2	N	1/29/18
Johnson, Emanuel	Sarasota	Y	N	8-4, 10-2	N	2/2/18
Johnson, Paul Beasley	Polk	N	N	11-1, 11-1, 11-1	Y	12/1/16
Johnson, Richard Allen	St. Lucie	N	N	11-1	Y	3/24/17
Johnson, Ronnie	Miami-Dade	Y	N	7-5, 9-3	N	3/27/18
Johnston, Ray	Hillsborough	N	N	11-1	Y	7/21/17
Johnston, Ray	Hillsborough	N	Y	12-0	N	7/21/17
Jones, Henry Lee	Brevard	N	Y	12-0	N	3/2/17
Jones, Marvin Burnett	Duval	Y	N	9-3	N	1/22/18
Jones, Victor	Miami-Dade	Y	Y/N	10-2, 12-0	N	9/28/17
Jordan, Joseph	Volusia	N	N	10-2	Y	8/22/17

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Kaczmar, III, Leo L.	Clay	N	Y	12-0	N	1/31/17
Kelley, William H.	Highlands	Y	N	8-3 [not a typo]	N	1/26/18
King, Cecil	Duval	N	N	8-4	Y	7/12/17
King, Michael L.	Sarasota	N	Y	12-0	N	1/26/17
Kirkman, Vahtiece	Brevard	N	Y	10-2	Y	1/11/18
Knight, Richard	Broward	N	Y	12-0, 12-0	N	1/31/17
Kocaker, Genghis	Pinellas	N	N	11-1	Y	10/6/17
Kokal, Gregory Alan	Duval	Y	Y	12-0	N	1/24/18
Kopsho, William M.	Marion	N	N	10-2	Y	1/19/17
Krawczuk, Anton	Duval	Y	Y	12-0	N	1/31/18
Lamarca, Anthony	Pinellas	Y	N	11-1	N	1/30/18
Lambrix, Cary Michael	Glades	Y	N	8-4, 10-2	N **(EXECUTED)**	9/29/17
Lawrence, Gary	Santa Rosa	Y	N	9-3	N	2/2/18
Lebron, Joel	Osceola	N	N	7-5	Y	4/20/17
Lightbourne, Ian	Marion	Y	N	Unrecorded	N	1/26/18
Long, Robert Joe	Hillsborough	Y	Y	12-0	N	1/29/18
Lucas, Harold Gene	Lee	Y	N	11-1	N	1/24/18
Marquard, John	St. Johns	Y	Y	12-0	N	1/24/18
Martin, David	Clay	N	N	9-3	Y	7/13/17
Matthews, Douglas	Volusia	N	N	10-2	Y	12/5/17
McCoy, Richard (aka Jamil Rashid)	Duval	N	N	7-5	Y	9/6/17
McCoy, Thomas	Walton	N	N	11-1	Y	11/8/17
McGirth, Renaldo Devon	Marion	N	N	11-1	Y	1/26/17
McKenzie, Norman Blake	St. Johns	N	N	10-2, 10-2	Y	6/19/17
McLean, Derrick	Orange	N	N	9-3	Y	4/24/17
McMillian, Justin	Duval	N	N	10-2	Y	4/13/17
Melton, Antonio Lebaron	Escambia	Y	N	8-4	N	2/2/18
Mendoza, Marbel	Miami-Dade	Y	N	7-5	N	1/30/18
Merck, Jr., Troy	Pinellas	N	N	9-3	Y	5/5/17
Middleton, Dale	Okeechobee	N	Y	12-0	N	3/9/17
Miller, David Jr.	Duval	Y	N	7-5	N	1/31/18
Miller, Lionel Michael	Orange	N	N	11-1	Y	5/8/17
Morton, Alvin	Pasco	Y	N	11-1, 11-1	N	2/2/18
Morris, Dontae	Hillsborough	N	Y	12-0, 12-0	N	4/27/17
Morris, Dontae	Hillsborough	N	N	10-2	Y	1/11/18
Morris, Robert D.	Polk	Y	N	8-4	N	1/26/18
Mosley, John F.	Duval	N	N	8-4	Y	12/22/16
Mullens, Khadafy	Pinellas	N	WAIVED JURY		N	6/16/16

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Murray, Gerald Delane	Duval	N	N	11-1	Y	4/4/17
Nelson, Joshua D.	Lee	Y	Y	12-0	N	1/31/18
Nelson, Micah	Polk	N	N	9-3	Y	3/8/17
Newberry, Rodney	Duval	N	N	8-4	Y	4/6/17
Oats, Jr. Sonny Boy	Marion	Y	UNKNOWN		N	5/25/17
Occhicone, Dominick A.	Pasco	Y	N	7-5	N	1/30/18
Okafor, Bessman	Orange	N	N	11-1	Y	6/8/17
Oliver, Terence Tabius	Brevard	N	Y	12-0, 12-0	N	4/6/17
Orme, Roderick	Bay	N	N	11-1	Y	3/30/17
Overton, Thomas M.	Monroe	Y	N	8-4, 9-3	N	2/2/18
Pace, Bruce Douglas	Santa Rosa	Y	N	7-5	N	1/30/18
Pagan, Alex	Broward	N	N	7-5, 7-5	Y	2/1/18
Parker, J.B.	Martin	N	N	11-1	Y	4/20/17
Partin, Phillup Alan	Pasco	N	N	9-3	Y	3/27/17
Pasha, Khalid	Hillsborough	N	N	11-1, 11-1	Y	5/11/17
Peterka, Daniel Jon	Okaloosa	Y	N	8-4	N	1/22/18
Peterson, Robert Earl	Duval	N	N	7-5	Y	7/6/17
Pham, Tai	Seminole	N	N	10-2	Y	3/22/17
Phillips, Galante	Duval	N	N	7-5	Y	4/20/17
Phillips, Harry Franklin	Miami-Dade	Y	N	7-5	N	1/22/18
Philmore, Lenard James	Martin	N	Y	12-0	N	1/25/18
Pietri, Norberto	Palm Beach	Y	N	8-4	N	2/2/18
Poole, Mark	Polk	N	N	11-1	Y	3/31/17
Pope, Thomas Dewey	Broward	Y	N	9-3	N	2/28/18
Puiatti, Carl	Pasco	Y	N	11-1	N	1/23/18
Quince, Kenneth Darcell	Volusia	Y	WAIVED JURY		N	1/18/18
Raleigh, Bobby Allen	Volusia	Y	Y	12-0, 12-0	N	2/28/18
Reaves, William	Indian River	Y	N	10-2	N	5/2/18
Reynolds, Michael	Seminole	N	Y	12-0, 12-0	N	4/5/18
Rhodes, Richard Wallace	Pinellas	Y	N	10-2	N	1/23/18
Rigterink, Thomas William	Polk	N	N	7-5, 7-5	Y	4/6/17
Rimmer, Robert	Broward	N	N	9-3, 9-3	Y	6/29/17
Robards, Richard	Pinellas	N	N	7-5, 7-5	Y	4/6/17
Rodgers, Jeremiah	Santa Rosa	N	WAIVED JURY		N	2/8/18
Rodgers, Theodore	Orange	N	N	8-4	Y	4/3/17
Rogers, Glen Edward	Hillsborough	Y	Y	12-0	N	1/30/18
Rodriguez, Manuel Antonio	Miami-Dade	Y	Y	12-0, 12-0, 12-0	N	1/31/18
San Martin, Pablo	Miami-Dade	Y	N	9-3	N	2/28/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Schoenwetter, Randy	Brevard	N	N	10-2, 9-3	Y	4/7/17
Seibert, Michael	Broward	N	N	9-3	Y	6/22/17
Serrano, Nelson	Polk	N	N	9-3, 9-3, 9-3, 9-3	Y	5/11/17
Sexton, John	Pasco	N	N	10-2	Y	6/29/17
Silvia, William	Seminole	N	N	11-1	Y	2/20/17
Simmons, Eric Lee	Lake	N	N	8-4	Y	12/22/16
Sireci, Henry Perry	Orange	Y	N	11-1	N	1/31/18
Sliney, Jack R.	Charlotte	Y	N	7-5	N	1/31/18
Smith, Corey	Miami-Dade	N	N	9-3, 10-2	Y	3/16/17
Smith, Joseph	Sarasota	N	N	10-2	Y	7/13/17
Smith, Stephen V.	Charlotte	N	Y	9-3	Y	4/21/17
Smithers, Samuel	Hillsborough	N	Y	12-0, 12-0	N	3/29/18
Snelgrove, David B.	Flagler	N	N	8-4, 8-4	Y	5/11/17
Sochor, Dennis	Broward	Y	N	10-2	N	1/30/18
Stein, Steven Edward	Duval	Y	N	10-2	N	1/31/18
Stephens, Jason Demetrius	Duval	Y	N	9-3	N	1/22/18
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	Y	4/25/17
Stewart, Kenneth Allen	Hillsborough	Y	N	10-2	N	1/26/18
Sweet, William Earl	Duval	Y	N	10-2	N	1/24/18
Suggs, Ernest	Walton	Y	N	7-5	N	3/17/17
Tanzi, Michael	Monroe	N	Y	12-0	N	4/5/18
Taylor, John Calvin	Clay	N	N	10-2	Y	10/12/17
Taylor, Perry	Hillsborough	Y	N	8-4	N	5/3/18
Taylor, Steven Richard	Duval	Y	N	10-2	N	1/24/18
Taylor, William Kenneth	Hillsborough	N	Y	12-0	N	4/5/18
Thomas, William Gregory	Duval	Y	N	11-1	N	1/24/18
Trease, Robert J.	Sarasota	Y	N	11-1	N	1/24/18
Trepal, George	Polk	Y	N	9-3	N	1/26/18
Trotter, Melvin	Manatee	Y	N	11-1	N	1/26/18
Troy, John	Sarasota	N	N	11-1	Y	6/13/17
Truehill, Quentin	St. Johns	N	Y	12-0	N	2/23/17
Tundidor, Randy W.	Broward	N	Y	12-0	N	4/27/17
Turner, James Daniel	St. Johns	N	N	10-2	Y	6/19/17
Twilegar, Mark	Lee	Y	WAIVED JURY		N	11/2/17
Victorino, Troy	Volusia	N	N	10-2, 10-2, 9-3, 7-5	Y	6/14/17
Wade, Alan L.	Duval	N	N	11-1, 11-1	Y	5/1/17
Walls, Frank	Okaloosa	Y	Y	12-0	N	1/22/18

Prisoner Name	County of Conviction	Conviction Final Before Ring?	Jury Recommendation Unanimous?	Jury Vote(s)	Death Sentence Reversed?	Date of Court Order
Wheeler, Jason	Lake	N	N	10-2	Y	5/23/17
White, Dwayne	Seminole	N	N	8-4	Y	3/30/17
Whitfield, Ernest	Sarasota	Y	N	7-5	Y	1/30/18
White, William Melvin	Orange	N	N	10-2	Y	4/20/17
Whitton, Gary Richard	Walton	Y	Y	12-0	N	1/31/18
Willacy, Chadwick	Brevard	Y	N	11-1	N	1/23/18
Williams, Donald Otis	Lake	N	N	9-3	Y	1/19/17
Williams , Ronnie Keith	Broward	N	N	10-2	Y	6/29/17
Windom, Curtis	Orange	Y	Y	12-0, 12-0, 12-0	N	1/23/18
Wood, Zachary Taylor	Washington	N	Y	12-0	Y**	1/31/17
Woodel, Thomas	Polk	N	N	7-5	Y	8/18/17
Zack, Michael Duane	Escambia	Y	N	11-1	N	6/15/17
Zakrzewski, Edward	Okaloosa	Y	N	7-5, 7-5, 6-6	N	5/25/17
Zommer, Todd	Osceola	N	N	10-2	Y	4/13/17

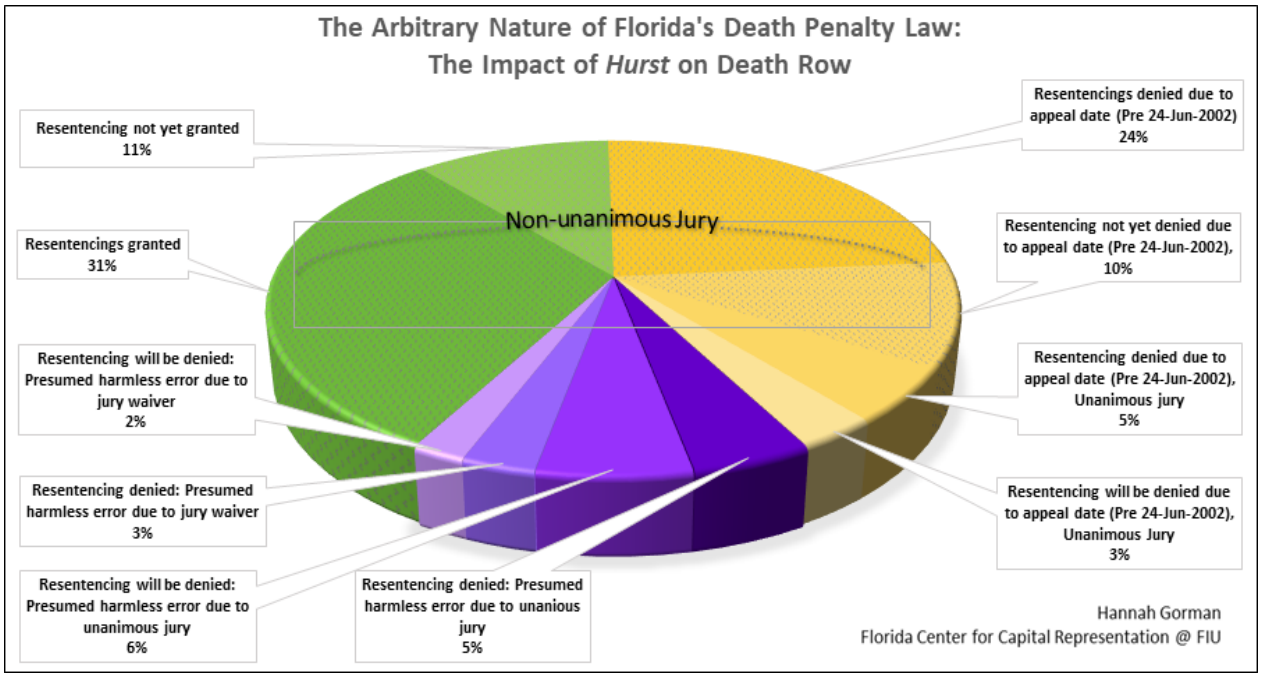
* The Florida Supreme Court granted relief under *Hurst* on Bevel's non-unanimous death sentence, but granted relief based on ineffective assistance of counsel on Bevel's unanimous death sentence.

** The Florida Supreme Court noted that Wood's sentence would not have been harmless under *Hurst* because it struck two of the three aggravating circumstances found by the trial court; however, the court vacated the death sentence and imposed a life sentence under its statutory review for proportionality. Not counted in total.

For more background on the Florida legislative and court actions related to the jury unanimity issue, see ***Hurst v. Florida* Background**.

To check on the status of cases involving Florida death-row prisoners with non-unanimous jury recommendations for death whose sentences became final after the U.S. Supreme Court's June 2002 decision in *Ring v. Arizona*, see **this chart**.

Hannah Gorman, with the Florida Center for Capital Representation at Florida International University, created the pie chart below (November 16, 2017) based on her analysis of Florida death sentences that have been or will be overturned based on *Hurst*, as well as sentences that have been or will be affirmed because they either (A) became final before *Ring* (i.e., based on the date of their appeal) or (B) were presumed harmless based on a unanimous jury verdict or the defendant's waiver of a jury sentence. This chart includes prisoners who have had their death sentences affirmed by Circuit Courts. According to this information, there are a total of 377 prisoners who were sentenced under the unconstitutional sentencing scheme, but only 42% (157) of Florida death-row prisoners who were sentenced under that scheme will be entitled to relief.


The Arbitrary Nature of Florida's Death Penalty Law:
The Impact of *Hurst* on Death Row
Resentencing not yet granted
11%
Resentencings denied due to appeal date (Pre 24-Jun-2002)
24%
Non-unanimous Jury
Resentencings granted
31%
Resentencing not yet denied due to appeal date (Pre 24-Jun-2002),
10%
Resentencing will be denied: Presumed harmless error due to jury waiver
2%
Resentencing denied due to appeal date (Pre 24-Jun-2002), Unanimous jury
5%
Resentencing denied: Presumed harmless error due to jury waiver
3%
Resentencing will be denied due to appeal date (Pre 24-Jun-2002), Unanimous Jury
3%
Resentencing will be denied: Presumed harmless error due to unanimous jury
6%
Resentencing denied: Presumed harmless error due to unanious jury
5%
Hannah Gorman
Florida Center for Capital Representation @ FIU