DOCKET NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

MARK TWILEGAR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

SUZANNE MYERS KEFFER
Chief Assistant CCRC-South
Florida Bar No. 0150177

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL
COUNSEL - SOUTH
1 East Broward Blvd., Suite 444
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court struck down Florida's capital sentencing procedures because those procedures authorized a judge, rather than a jury, to make the factual findings necessary for a death sentence. In *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), issued on October 14, 2016, the Florida Supreme Court found that these fact findings are necessarily elements of capital first degree murder that a jury must find to essentially "convict" someone of capital murder:

> We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, **all these findings necessary for the jury to essentially convict a defendant of capital murder**—thus allowing imposition of the death penalty—**are also elements that must be found unanimously by the jury**. Thus, we hold that in addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge.

Hurst v. State, 202 So. 3d at 53-54. The Court further recognized that these elements of the substantive crime of capital murder were **longstanding and appeared in the statute**. *See id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh the mitigating circumstances.' *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (**1985**)).''). (emphasis added). Absent a unanimous jury determination of each element of capital first degree murder beyond a reasonable doubt, the defendant cannot be sentenced to death. The jury verdict, however it is labeled in the statute, is

functionally a determination of the defendant's guilt of that higher criminal offense: capital first degree murder. *See Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant received—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury beyond a reasonable doubt.").

"In requiring jury unanimity in [the statutorily required fact] findings and in [the jury's] final recommendation if death is to be imposed, [the Florida Supreme Court was] cognizant of significant benefits that will further the administration of justice." 202 So. 3d at 58. The Florida Supreme Court found that unanimity was necessary to insure a reliable penalty phase proceeding. *Bevel v. State*, 221 So. 3d 1168, 1179 (Fla. 2017) (quoting *Hurst v. State*, 202 So. 3d 58) ("a reliable penalty phase proceeding requires that "the penalty phase jury must be unanimous""). It is not only a unanimous recommendation that the Court recognized provided heightened reliability, but also the unanimous findings required by the jury as well.

Following *Hurst v. State*, the Florida Supreme Court issued a series of cases holding that while the unanimity requirement in *Hurst v. State* was retroactively applicable to cases in which death sentences were not final on June 24, 2002, when *Ring v. Arizona*, 536 U.S. 584 (2002) issued, it was not retroactively applicable to cases in which death sentences were final prior to June 24, 2002. Mr. Twilegar clearly falls into the first category, as *Ring* was issued on June 24, 2002 and Mr. Twilegar's conviction did not become final until February 22, 2011, when this Court denied

certiorari in *Twilegar v. Florida*, 131 S. Ct. 1476 (2011). *See Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) (finality occurs when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). However, the Florida Supreme Court has also drawn the line at those cases where an advisory jury recommended death unanimously and those cases where the advisory jury was waived for the penalty phase despite falling into the post-*Ring* category and without any individualized appellate review of case specific issues.

Although Mr. Twilegar falls squarely within the post-*Ring* category, he has been denied the benefit of *Hurst v. State* and *Hurst v. Florida* due to his waiver of the recommendation by an advisory jury at the penalty phase.

From these circumstances, Petitioner presents the following question:

> Was Mr. Twilegar's waiver of his right to a jury's "advisory recommendation" knowing and intelligent where he was given no notice or advice that he was waiving his right to jury findings of fact that are essentially elements of the crime of capital first degree murder that must be found unanimously and beyond a reasonable doubt by the jury?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, **MARK TWILEGAR,** is a condemned prisoner in the State of Florida. Petitioner respectfully urges that this Honorable Court issue its writ of certiorari to review the decision of the Florida Supreme Court. *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017).

CITATION TO OPINIONS AND ORDERS BELOW

This proceeding was instituted as a successive motion for postconviction relief under Florida Rule Crim. Pro. 3.851. The Florida Supreme Court affirmed on November 2, 2017 in *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017) and is attached to this petition as Appendix A. The opinion of the Circuit Court in and for Lee County denying Mr. Twilegar's successive motion is unreported. It is reproduced in Appendix B. Numerous earlier opinions in the case do not bear upon the questions now presented. For the convenience of the Court, they are set out in Appendix C.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. § 1257. The Florida Supreme Court issued an opinion denying collateral relief on November 2, 2017, no rehearing was filed and the mandate issued on November 27, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment to the Constitution of the United States provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

STATEMENT OF THE CASE

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

Prior to trial, Twilegar waived presentation of mitigating evidence (R. 339-42) and waived the penalty phase jury. (R. 679, 1247-1251, T. 41-44). However, prior to waiving his penalty phase jury, Mr. Twilegar filed three separate motions challenging the constitutionality of Florida's capital sentencing statute pursuant to *Ring v. Arizona*, requesting a unanimous jury in the penalty phase and requesting special verdict forms in the penalty phase. (R. 280, 292, 318). The State objected to Twilegar's waiver of the jury indicating "that if the defendant is requesting a jury to determine his guilt, that same jury should have some say in providing an advisory opinion to the Court." (R. 31). The State further submitted that its position was supported by the statute," arguing this isn't Wendy's, it's not a la carte, you can't pick and choose what you want to do." (R. 32). The State made clear that the statute only provided for waiver of the jury in "circumstances when a defendant has pled guilty or there has been a bench trial, a defendant may then request to have a jury to provide an advisory opinion with regard to the penalty phase. And then it indicates, unless the defendant waives it. But that's in the statutory scheme, and understanding that the defendant didn't have a jury the first time." (R. 32).

The penalty phase was conducted on February 16, 2007. At the instruction of Twilegar, the defense remained silent. On February 19, 2007 the *Spencer*[1] hearing was held. On August 14, 2007 the court sentenced Twilegar to death, finding two aggravating circumstances: (1) the capital felony was committed for pecuniary gain (great weight); (2) the capital felony was committed in a cold, calculated and premeditated manner (CCP) (great weight). The judge found no statutory mitigating circumstances and four non-statutory mitigating circumstances (1) the defendant had a disadvantaged and dysfunctional family background and childhood (little weight); (2) the defendant had received a limited formal education in that he had completed only the seventh grade (little weight); (3) the defendant had abused drugs as a teenager (very little weight); (4) the alternative punishment to death is life in prison without parole (significant weight).

Twilegar timely appealed his convictions and sentences to the Florida Supreme Court. (R. 1926-27). The Florida Supreme Court affirmed Twilegar's convictions and sentences on January 7, 2010. *Twilegar v. State*, 42 So. 3d 177 (Fla. 2010). Twilegar's motion for rehearing was denied on August 9, 2010 and the mandate was issued August 25, 2010. On November 8, 2010 Twilegar filed a Petition for Writ of Certiorari in this Court. The petition was denied on February 22, 2011.

On February 7, 2012, Twilegar timely filed his initial motion for postconviction relief. (PC-R. 1089-1202). After an evidentiary hearing, the circuit court denied Mr. Twilegar's Motion for Postconviction Relief on September 27, 2013. (PC-R. 2958-

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

2975). A timely notice of appeal was filed to the Florida Supreme Court on October 28, 2013. (PC-R. 3199-3200). On May 28, 2015 the Florida Supreme Court denied relief. *Twilegar v, State*, 175 So. 3d 242 (Fla. 2015). A motion for rehearing was timely filed and subsequently denied on September 17, 2015.

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

On January 11, 2017, Mr. Twilegar filed a successive Rule 3.851 motion raising three separate claims for relief challenging his sentence of death pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The circuit court summarily denied Mr. Twilegar's successive 3.851 motion on March 31, 2017.

On April 28, 2017 Mr. Twilegar timely appealed to the Florida Supreme Court. Thereafter, the Florida Supreme Court, in a truncated and unorthodox procedure which was essentially an order to show cause, directed counsel for both parties to address why the lower court's order should not be affirmed based upon its precedent established in *Mullens v. State*, 197 So. 3d 16 (2016). The court's order further indicated that counsel for both parties would be permitted to include a brief statement to "preserve arguments as to the merits of this Court's previously decided cases, as deemed necessary, without additional argument." (Id.). As a result of this

truncated process, no court has conducted an individualized review of Mr. Twilegar's constitutional claims. Rather, the Florida Supreme Court held:

> As the circuit court correctly recognized, the *Hurst* decisions do not apply to defendants like Twilegar who waived a penalty phase jury. *See Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016), cert. denied, 137 S. Ct. 672 (2017); *see also* Filing # 64573474 E-Filed 11/27/2017 08:52:29 AM *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016). Although Twilegar urges this Court to revisit, in light of the Hurst decisions, its prior holding in Twilegar's direct appeal that his waiver was knowing, intelligent, and voluntary, *see Twilegar v. State*, 42 So. 3d 177, 204 (Fla. 2010), cert. denied, 562 U.S. 1225 (2011), that argument is without merit. *See Mullens*, 197 So. 3d at 39-40 (explaining 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"). Accordingly, we affirm the circuit court's denial.

Twilegar v. State, 228 So. 3d 550, 551 (Fla. 2017). This Petition seeks certiorari review of the November 2, 2017 decision.

REASONS FOR GRANTING THE WRIT

> **Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration**, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt.

Jones v. United States, 526 U.S. 227, 232–33, 119 S. Ct. 1215, 1219, 143 L. Ed. 2d 311 (1999). Yet, the Florida Supreme Court has determined that the facts required to be found by a jury as set out by § 921.141, Fla. Stat.[2] are elements not mere

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[2] On March 13, 2017, Chapter 2017-1, Laws of Florida, was enacted. It revised Florida's capital sentencing statute, § 921.141, Fla. Stat., to confirm that a defendant convicted of first degree murder cannot receive a death sentence unless the State

sentencing considerations. *Hurst v. State* addressed and construed Florida's statute, § 921.141, Fla. Stat., and determined that it identified "**elements**" of "**capital murder**" that a jury must find to "**essentially convict**." The Florida Supreme Court further recognized that these "**elements**" of the substantive crime of "**capital murder**" were longstanding and appeared in the statute. *See id.* at 53 ("As the Supreme Court long ago recognized in *Parker v. Dugger*, 498 U.S. 308 (1991), under Florida law, 'The death penalty may be imposed only where **sufficient aggravating circumstances** exist that **outweigh** mitigating circumstances.' *Id.* at 313 (emphasis added) (quoting § 921.141(3), Fla. Stat. (1985)). (emphasis added as to the year of the statute cited). As recently as February 22, 2018, the Florida Supreme Court confirmed in *Williams v. State*, _ So. 3d _, 2018 WL 1007810 (Fla. Feb. 22, 2018) that "**any fact that increases the statutory maximum sentence is an 'element' of the offense** to be found by a jury." *Id.* at *4 (emphasis added). The Florida Supreme Court further explained that the decision in *Alleyne v. United States*, 570 U.S. 99, 108 (2013) required **elements** to "be submitted to a jury and **found beyond a reasonable doubt**." *Williams v. State*, 2018 WL 1007810 at *5 (emphasis added).

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convinces a unanimous jury to return a "recommendation" of death. Before it can return a unanimous death "recommendation" and authorize a death sentence, the jury must first "identify[] each aggravating factor" that it has unanimously found proven beyond a reasonable doubt. *See* § 921.141(2)(b). Next, the jury must unanimously find beyond a reasonable doubt that the aggravators that found to exist are sufficient to justify a death sentence. Then, the jury must unanimously find beyond a reasonable doubt that the aggravators outweigh the mitigators. *See* § 921.141(2)(b)(2). Having made these unanimous findings, the jurors must then unanimously reject mercy in favor of a death sentence. Only if the jury returns a unanimous death verdict, can a judge under the revised § 921.141 impose a death sentence.

Under Fla. Stat. § 921.141, the statutory maximum sentence that can be imposed on a first degree murder conviction is one of life imprisonment. For a death sentence to be permissible, the defendant must be convicted of the next higher degree of murder, i.e. capital first degree murder. The revised § 921.141 provides for proof of the **elements** necessary to raise a conviction of first degree murder up to capital first degree murder to be presented at a "penalty phase" proceeding. But, a unanimous jury's finding that the State has proven the necessary elements beyond a reasonable doubt is functionally **a verdict finding the defendant guilty of the greater offense of capital first degree murder**.

The requirement that any factual determination authorizing an increase in the statutorily proscribed maximum punishment be submitted to a jury and proven beyond a reasonable doubt was established in *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000) (whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt). This Court made clear in *Apprendi* that the Due Process Clause of the Fourteenth Amendment entitled a criminal defendant to a jury determination of guilt of every element of the crime for which they are being charged beyond a reasonable doubt. *Id.* at 476-77.

In *Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), the Supreme Court noted: "*Apprendi* concluded that any 'facts that increase the prescribed range of

penalties to which a criminal defendant is exposed' are elements of the crime." *Alleyne* said:

> When a finding of fact alters the legally prescribed punishment so as to aggravate it, **the fact necessarily forms a constituent part of a new offense and must be submitted to the jury**. It is no answer to say that the defendant could have received the same sentence with or without that fact. It is obvious, for example, that a defendant could not be convicted and sentenced for assault, if the jury only finds the facts for larceny, even if the punishments prescribed for each crime are identical. One reason is that each crime has different elements and a defendant can be convicted only if the jury has found each element of the crime of conviction.

Alleyne, 133 S. Ct. at 2162 (emphasis added). The identifying of the facts necessary to increase the authorized punishment is a matter of substantive law. *Id.* at 2161 ("Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment."). In essence, the Court's reasoning amounted to the acknowledgment that due process demands fair warning be given.

Thus, as *Alleyne* held, the facts necessary to increase the authorized punishment to include death are elements of a new or separate offense. Subsequently, the facts that are identified in § 921.141 as necessary to authorize death are elements of a criminal offense and as such, must be proven beyond a reasonable doubt to a unanimous jury. Under the § 921.141, first degree murder plus the additional elements set forth in the statute constitute a new offense, i.e. capital first degree murder. This new offense constitutes a higher degree of murder for which death is authorized and therefore due process requires all of its elements to be proven beyond

a reasonable doubt. The jury verdict, however it is labeled in the statute, is functionally a determination of the defendant's guilt of that criminal offense-capital first degree murder.

A court decision identifying **the elements of a statutorily defined criminal offense constitutes substantive law** that dates back to the enactment of the statute. *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part) ("This case does not raise any question concerning the possible retroactive application of a new rule of law, *cf. Teague v. Lane*, 489 U.S. 288 (1989), because our decision in *Bailey v. United States*, 516 U.S. 137 (1995), did not change the law. **It merely explained what § 924(c) had meant ever since the statute was enacted**. The fact that a number of Courts of Appeals had construed the statute differently is of no greater legal significance than the fact that 42 U.S.C. § 1981 had been consistently misconstrued prior to our decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).") (emphasis added). "A judicial construction of a statute is an authoritative statement of what the statute meant **before as well as after the decision** of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.,* 511 U.S. 298, 312-13 (1994) (emphasis added).

When Mr. Twilegar waived a penalty phase jury, he was never informed that he had a right to a unanimous jury verdict on every element of the offense of capital first degree murder. He was not informed that the jury must find any aggravator unanimously and beyond a reasonable doubt, or that a jury would have to unanimously and beyond a reasonable doubt find that the aggravators were

sufficient, or that a jury would have to unanimously and beyond a reasonable doubt find that the aggravators outweigh the mitigators, or that the jury's verdict would have to be unanimous. Mr. Twilegar was also never told that individual jurors "are not required to recommend the death sentence even if the jury concludes that the aggravating factors outweigh the mitigating circumstances." *See Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016). In fact, the extent of Mr. Twilegar's waiver of the jury at penalty phase was as follows:

THE COURT: And do you also, in connection with that, wish to waive the jury determination as to their **recommendation** for the penalty phase?

> THE DEFENDANT: Yes, I do.
>
> THE COURT: Have you discussed the pros and cons of this with your attorney?
>
> THE DEFENDANT: In depth.
>
> THE COURT: Do you have any questions or anything about making this as a final decision you want to discuss with them at this time? Or with me?
>
> THE DEFENDANT: Uh, no. I believe we've discussed it all, and I want to waive that right.
>
> THE COURT: All right. Counsel do you wish to ask him any additional questions about this? Or put anything on the record?
>
> MR. MCLOUGHLIN: Just basically that Mr. Twilegar and I have discussed this. Myself and Miss Beard have discussed this with you, one time last week and then again yesterday?
>
> THE DEFENDANT: Yes.
> MR. MCLOUGHLIN: And this is your wish to waive the jury in the penalty phase?

> THE DEFENDANT: That is my wish.
>
> MR. MCLOUGHLIN: No further questions, Your Honor.
>
> THE COURT: All right, anything else?
> I have previously found Mr. Twilegar to be competent and intelligent and to be capable of making these decisions himself. And I'm satisfied that he is—remains that way, and has done so in this case. So I would grant the Defense motion to waive the penalty-the jury in the penalty phase, and an order will be forthcoming on that issue.
>
> MS. WADE: For the record, the State does object. And the State would ask that any issue with regard to waiving the jury in the penalty phase, that decision should be made prior to the penalty phase, and after the guilt phase.

(R. 42-43)(emphasis added). Without Mr. Twilegar's consideration of the elements of capital first degree murder and the right to have those elements found unanimously and beyond a reasonable doubt, Mr. Twilegar's waiver is unreliable. Any waiver by a capital defendant that is not made without contemplation of those rights and sufficient awareness of the relevant circumstances and likely consequences cannot be deemed knowing and voluntary. Mr. Twilegar's waiver was based on an unconstitutional application of his Sixth and Eighth Amendment rights and was a violation of due process.

A waiver is ordinarily an intentional relinquishment or abandonment of a ***known*** right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938). Of course, a relinquishment of any constitutional right must be knowing, intelligent and voluntary. *See Brady v. United States*, 397 U.S. 742 (1970) For example, "only a voluntary and intelligent guilty plea is constitutionally

valid" and "a plea is not intelligent unless a defendant first receives real notice of the nature of the charge against him." *Bousley v. United States*, 523 U.S. 614, 614, 118 S. Ct. 1604, 1607, 140 L. Ed. 2d 828 (1998).

In *Bailey v. United States*, 516 U.S. 137 (1995), in a direct appeal, this Court interpreted the term "use" in a penal statute. The Court rejected the lower court's adoption of a "proximity and accessibility" test to determine if a defendant had "use" of a gun, and applied a plainer meaning to the term in determining that "use" denotes "active employment." Subsequently, in *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), this Court held that the *Teague* rules on retroactivity did not apply to retroactive application of *Bailey* because the constitutional claim challenged Bousley's guilty plea as not "knowing and intelligent." The issue raised was whether a guilty plea could survive when both the prosecuting and defending attorneys, as well as the defendant, misunderstood the statutory meaning of the term "use" while entering into the plea. *Id.* at 617-619. The court supported its determination that *Bailey* should be applied retroactively with the conclusion that there is "nothing new" about the principle that a guilty plea must be knowing and intelligent. *Id.* at 620.

So too must *Hurst v. Florida*, *Hurst v. State* and the revised § 921.141 be applied to Mr. Twilegar because there is nothing new about the requirement that a waiver be knowing and intelligent. Contrary to the Florida Supreme Court's reasoning that Mr. Twilegar "cannot subvert the right to jury factfinding by waiving that right," Mr. Twilegar could not subvert the right to jury factfinding where he was never informed as to what that factfinding meant, he was not told what facts needed

to be found and he merely waived a "recommendation," not factfinding. As Justice Stephens reasoned in *Bousley*, "the fact that a number of [courts] had construed the statute differently is of no great[ ] legal significance" *Bousley v. United States*, 523 U.S. 614, 625 (1998) (Stevens, J., concurring in part and dissenting in part). The Florida Supreme Court did not evaluate whether Mr. Twilegar's waiver can continue to be valid in light of its recognition in *Hurst v. State* of the longstanding elements of capital first degree murder.

Instead, the Florida Supreme Court's denial of Mr. Twilegar's constitutional claims is premised on *Mullens v. State*, 197 So. 3d 16 (2016). Mullens waived his right to jury sentencing after he pleaded guilty to two counts of first-degree murder. *Id.* at 38-40. The Florida Supreme Court's reasoning in *Mullens* rests on the idea that "[i]n states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding" because "the defendants knew that when they entered a guilty plea, they fully forfeited their right to a jury trial." *Mullens*, 197 So. 3d at 39. The Florida Supreme Court's reasoning presumes that such people were fully and correctly advised of their right to a jury determination of guilt or innocence—and that the jury's findings of fact would have to be unanimous and beyond a reasonable doubt—and they chose to plead guilty anyway. Based on the guilty plea, there was a presumption for *Hurst* purposes of a valid waiver.

Unlike the defendant in *Mullens*, Mr. Twilegar did not plead guilty or waive the jury for the guilt phase of trial. This is an important distinction, because at the

time of Mr. Twilegar's trial, a guilty plea was treated differently from a waiver of a penalty phase jury. If someone wished to waive a jury trial and plead guilty, the court would fully explain all of the rights the person was abandoning, including the right to unanimous jury factfinding on each element of each charge. *See* Fla. R. Crim. P. 3.172(c)(3). But capital defendants in Florida were never told that they had a right to unanimous jury factfinding at the penalty phase on each aggravator, or that the jury's recommendation would have to be unanimous, because until *Hurst*, no Florida court had ever applied *Apprendi*/*Ring* to a capital trial.

Without Mr. Twilegar's consideration of the substantive right to unanimity and the right to have a jury find the necessary elements of the offense of capital first degree murder beyond a reasonable doubt, Mr. Twilegar's waiver is unreliable. Any waiver by a capital defendant that is not made without contemplation of those rights and sufficient notice and awareness of the relevant circumstances and likely consequences cannot be deemed knowing and voluntary. Simply put, Mr. Twilegar could not waive that which he was not informed of and that he did not know.

CONCLUSION

Based on the foregoing, Petitioner submits that certiorari review is warranted to review the decision of the Florida Supreme Court in this case.

Respectfully submitted,

/s/ Suzanne Keffer
SUZANNE MYERS KEFFER
Fla. Bar No. 0150177
Chief Assistant CCRC
Capital Collateral Regional
Counsel - South

1 East Broward Blvd, Suite 444
Fort Lauderdale, FL 33301
P: (954) 713-1284
F: (954) 713-1299

COUNSEL FOR PETITIONER