DOCKET NO. 17-8236

IN THE SUPREME COURT OF THE UNITED STATES

MARK TWILEGAR,

***Petitioner*,**

vs.

STATE OF FLORIDA,

***Respondent*.**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PAMELA JO BONDI
ATTORNEY GENERAL

SCOTT A. BROWNE
Senior Assistant Attorney General
Florida Bar No. 0802743

TIMOTHY A. FREELAND
Senior Assistant Attorney General
Florida Bar No. 539181

Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
scott.browne@myfloridalegal.com
timothy.freeland@myfloridalegal.com

COUNSEL FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

[Capital Case]

In 2007, Mark Twilegar was found guilty of premeditated murder. Prior to trial and against his attorney's advice, Twilegar announced to the court that if he were found guilty, he intended to waive his right to a penalty phase jury. He told the trial court that he did not want to spend his life in prison if he were found guilty; he would rather be given a death sentence. Twilegar was undeterred by the trial court's warning that the law might change, and even though the matter was revisited several times during the months leading up to his trial, Twilegar remained firm in his stance. Eventually, the court accepted Twilegar's waiver as being knowing and voluntary. Significantly, Twilegar also directed his attorney to withdraw a previously filed motion that, if granted, would have required unanimity from his penalty phase jury. After he was found guilty, the court held a non-jury penalty phase hearing and Twilegar was sentenced to death.

In Hurst v. Florida, 136 S. Ct. 616 (2016), this Court disallowed Florida's procedure permitting trial judges (as opposed to juries) to make findings of fact in capital cases. In response, Florida adopted new procedural requirements that, among other things, mandated that all factual findings necessary

to impose death be found by a unanimous jury. The Florida Supreme Court subsequently held that the new procedure did not apply to all capital cases; specifically, it excluded them from applying to any capital defendant who, like Twilegar, waived his penalty phase jury.[1]

Despite the Florida Supreme Court's clear directive, Twilegar sought post-conviction relief and asserted for the first time in 2017 that his penalty-phase waiver of jury fact-finding was involuntary. Had he known he was entitled to a *unanimous* penalty-phase verdict, Twilegar claimed, he would never have waived that right. The Florida Supreme Court affirmed the trial court's finding that his waiver was knowing and voluntary. Twilegar v. State, 228 So. 3d 550 (2017). Twilegar's claim gives rise to the following question before this Honorable Court:

> Does Florida's change in capital sentencing procedures render Twilegar's decision to waive jury fact-finding involuntary when his waiver was based on law that was correct at the time?

[1] Mullens v. State, 197 So. 3d 16, 38-40 (Fla. 2016).

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) Mark Twilegar, Petitioner in this Court, was the appellant below.

2) The State of Florida, Respondent in this Court, was the appellee below.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

CITATION TO OPINION BELOW

The matter before this Honorable Court is the affirmance of the denial of relief on a successive motion for postconviction relief under Florida Rule of Criminal Procedure 3.851. The published opinion of the Florida Supreme Court is found at Twilegar v. State, 228 So. 3d 550 (Fla. 2017), which is attached hereto as Appendix A.

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that section 1257 sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE

Petitioner, Mark Twilegar, was convicted of first-degree murder. The following facts are drawn from the Florida Supreme Court's opinion affirming Twilegar's direct appeal:

> On April 3, 2003, Mark Twilegar was charged with first-degree murder, either by premeditated design or in the course of a robbery, for the shooting death of David Thomas in Fort Myers on August 7, 2002. The evidence presented at trial showed that Twilegar came to Fort Myers from Missouri in the spring of 2002 and lived for a couple of weeks with his niece, Jennifer Morrison, who rented a residence from the victim, David Thomas, and his wife, Mary Ann Lehman. Twilegar's mother arrived a few weeks later and also moved in with Morrison. After several weeks, Twilegar moved out and eventually pitched a three-room tent in an undeveloped area adjacent to the backyard of a house at 412 Miramar Road, which was occupied by Britany and Shane McArthur. Twilegar did not own a car and did not have a regular job. In lieu of paying rent, he worked as a handyman on the premises. His possessions included a couch, a TV, some clothes and a twelve-gauge shotgun, which he kept in the tent. The McArthurs moved out of the house in June 2002, and Britany's younger brother, Spencer, moved into the house in September. Prior to moving in, Spencer stopped by the house on a regular basis to perform renovations, as discussed below.
>
> On occasion, Twilegar worked as a handyman for the victim, David Thomas, and on August 2, 2002, the two drove in Thomas's pickup truck to Montgomery, Alabama, where Twilegar had agreed to install a deck on a house Thomas owned there. Thomas told his wife that he would be gone six to eight weeks. On the morning of August 6, 2002, Thomas withdrew $25,000 in cash from a bank in Montgomery, ostensibly to purchase a house at an auction, and then later that same morning he rented a Dodge Neon, arranging to return the car in Montgomery on August 9, 2002. Thomas called his girlfriend, Valerie Bisnett Fabina, in Fort Myers and told her that he and Twilegar would be returning to Fort Myers

that night. Thomas's neighbor last saw Thomas and Twilegar at the Montgomery house at approximately 3 p.m. that afternoon. Thomas and Twilegar then returned to Fort Myers, where Thomas met with Fabina at approximately 11 p.m. and obtained a motel room key card from her. At the meeting, Fabina observed Twilegar sitting in the passenger seat of the Neon.

The next evening, August 7, 2002, Thomas visited Fabina at her job at 7 or 7:30 p.m. and returned the motel key card. When he opened his wallet to remove the key card, Fabina noticed that he had an unusually large amount of cash. Thomas told her that he and Twilegar were going to go look at a truck to buy for Twilegar to use on the job in Alabama, and that he would meet her later that night at the motel. Fabina never saw or heard from him again. Thomas spoke with his wife, Mary Ann Lehman, by phone a little after 9 p.m. that evening, and they made arrangements to speak again in the morning. She never saw or heard from him again. Later that night, Twilegar, alone, arrived at Jennifer Morrison's house, where Twilegar's mother was staying. Morrison then drove Twilegar to 7–Eleven where he purchased cell-phones and supplies. She also drove him to Wal–Mart where he made additional purchases. When they arrived back at the house, Morrison went to bed. When she woke the next morning, Twilegar and his mother and their possessions were gone. Morrison would never see Twilegar in Fort Myers again.

After Britany and Shane moved out of the Miramar house in June but before Spencer moved into the house in September, Spencer arrived at the house one day at 4 p.m. to perform renovations and he saw Twilegar digging in the backyard on the far side of his tent. Spencer watched him briefly, unobserved, then returned to the front of the house. A few minutes later, Twilegar approached him and explained that a man would be stopping by to deliver a couple of pounds of “weed” and that the man would not stop if he saw Spencer there. Twilegar asked him to leave the premises and told him that if he did he would give him either $100 or an ounce of weed. Spencer left, and when he returned the next day, he found a $100 bill in the prearranged spot. He also found Twilegar's tent

disassembled and smoldering in the backyard incinerator. Most of Twilegar's possessions were gone, including the shotgun. Spencer would never see Twilegar in Fort Myers again. On September 26, 2002, after Thomas's disappearance was publicized, Spencer went to the spot where Twilegar had been digging and found that the area was covered by Twilegar's couch. He moved the couch aside and found an area of freshly dug dirt, covered with palm fronds. Beneath the palm fronds was a piece of plywood, and beneath that a couple of cinder blocks and a car ramp. After digging several feet, he detected a strong odor. Police were called and they discovered Thomas's body.

Thomas died from a single shotgun blast to his upper right back, delivered at close range. The 7 1/2 birdshot, from a twelve-gauge shell, had travelled through his body at a downward trajectory. He had died within minutes of being shot. Soft fine sand, similar to that which covered the exterior of his body, was found deep inside his throat, in his larynx, indicating that he had still been breathing, though not necessarily conscious, when buried. He was still wearing the same clothes he had been wearing when Fabina last saw him on August 7, 2002, but his wallet was missing. His body was badly decomposed, and the time of death was uncertain. A spent twelve-gauge shell was found in the incinerator, along with a broken D-shaped garden tool handle. Twilegar's shotgun was never found. Several live twelve-gauge shells were found discarded in the area, along with a shovel with a broken handle. Thomas's rental car key fob was found approximately 100 feet from the body. The rental car was found earlier, on August 13, 2002, burned in a remote area of Lee County. Twilegar was apprehended September 20, 2002, in Greenville, Tennessee, where he had been staying at a campground since August 21, 2002. Among the property seized at the campground were numerous retail receipts totaling thousands of dollars for camping supplies and other items purchased after Twilegar had left Fort Myers. The merchandise was all purchased with cash. While awaiting trial, Twilegar made several incriminating phone calls, which were recorded.

Twilegar's trial began January 16, 2007, and he testified in the guilt phase. He stated that the "weed" incident had in fact occurred but that it had happened before he left for Alabama with Thomas, not after he returned. He said that he had often dug holes near his tent for latrine purposes. He also testified that he had returned from Alabama not with Thomas on August 6, 2002, but alone on August 5, 2002, in a car Thomas had given him as partial payment for the deck work he was doing, and that he had later sold the car to an itinerant in Palm Beach. He testified that during the early morning hours of August 8, 2002, after shopping at 7–Eleven and Wal–Mart, he had driven his mother's car, which was already packed with their possessions, back to his tent to get his shaving kit and that someone had pointed a shotgun at him in the dark and that he had deflected the shot, injuring his hand. He kicked the assailant and ran away.

After closing arguments, the jury deliberated for little more than an hour and on January 26, 2007, returned a verdict finding Twilegar guilty of first-degree premeditated murder. Twilegar waived a penalty phase jury and waived both the investigation and the presentation of mitigation. The penalty phase proceeding was held before the judge on February 16, 2007, and the State presented argument in aggravation, while the defense stood mute. The *Spencer*[1] hearing was held February 19, 2007. On August 14, 2007, the court sentenced Twilegar to death, based on two aggravating circumstances,[2] no statutory mitigating circumstances, and four nonstatutory mitigating circumstances.[3]

> [FN1] *Spencer v. State,* 615 So. 2d 688, 690–91 (Fla. 1993)("[T]he trial judge should hold a hearing to: a)give the defendant, his counsel, and the State, an opportunity to be heard; b)afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c)allow both sides to comment on or rebut information in any presentence or medical report; and d)afford the defendant an opportunity to be heard in person.").
>
> [FN2] The court found that the following aggravating circumstances had been established,

> with the following weights: (1)the capital felony was committed for pecuniary gain (great weight); and (2)the capital felony was committed in a cold, calculated and premeditated manner (CCP) (great weight).
>
> [FN3] The court found that the following nonstatutory mitigating circumstances had been established, with the following weights: (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); and (4)the alternative punishment to death is life in prison without parole (significant weight).

Twilegar v. State, 42 So. 3d 177, 185-188 (Fla. 2010).

REASONS FOR DENYING THE WRIT

Twilegar's petition should be rejected. The primary purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the United States courts of appeal and state courts "concerning the meaning and provisions of federal law." Braxton v. United States, 500 U.S. 344, 348 (1991). Twilegar's argument is of extremely limited scope, does not identify any federal or state court conflict, and instead amounts to nothing more than his general disagreement with how Florida has elected to apply its own death penalty laws. In short, there is no federal constitutional question here and no reason for this Court to grant review. See Braxton, id.

Rule 10 of the Rules of the Supreme Court of the United States identifies the relevant considerations in determining the propriety of certiorari review. Noting review is only granted for "compelling reasons," the Rule indicates consideration of a decision by a state court of last resort should involve an unresolved question of federal law or a conflict among higher courts.

Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184,

n. 3 (1987). See also Supreme Court Rule 10.

No conflict or unsettled question of federal law is presented in Twilegar's petition. Instead, he seeks certiorari review of the Florida Supreme Court's fact-based determination regarding the validity of his knowing and voluntary waiver of a penalty phase jury. Specifically, he asserts that his waiver was invalid because Florida has made procedural changes that did not exist at the time of his waiver. The Florida Supreme Court has determined, however, that the changes in question do not apply to a defendant who waived his right to jury fact-finding, a determination that does not rise to the level of a federal constitutional violation. Despite his argument to the contrary, the record shows that Twilegar's decision to waive his penalty phase jury was not effected out of ignorance of his constitutional rights, but was legitimate trial strategy.

Legal rights, even constitutional ones, are presumptively waivable. Halbert v. Michigan, 545 U.S. 605, 637 (2005) (Thomas, J., dissenting) (citing United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995) (additional citations omitted)); See also Boykin v. Alabama, 395 U.S. 238 (1969). Criminal defendants can waive their constitutional rights as long as they knowingly, intelligently, and voluntarily do so. Iowa v. Tovar, 541 U.S. 77, 78 (2004). It is enough that an individual understands the

waived right "in general . . . even though the defendant may not know the specific detailed consequences of invoking it." Tovar, 541 U.S. at 92. To escape the consequence of waiving one's constitutional rights there must be affirmative indications that, under the relevant circumstances, the waiver was unknowing or involuntary. Mezzanatto, 513 U.S. 806. If this Court were to accept review, the resolution of the case would turn upon whether the state court correctly interpreted the facts surrounding Twilegar's waiver. In other words, this case is strongly fact-based and does not implicate any broad questions of constitutional law that have not already been resolved long ago. See, e.g., Blakely v. Washington, 542 U.S. 296, 309 (2004) (Sixth Amendment right to jury fact finding is waivable). Indeed, the question raised by Twilegar may only be resolved by assessing the correctness of the trial court's factual findings. Accordingly, certiorari review is inappropriate here.

In rejecting Twilegar's postconviction claim, the Supreme Court of Florida agreed with the trial court's determination that Twilegar knowingly, voluntarily, and intelligently waived a penalty-phase jury, and Florida's own precedent precluded a grant of relief. Twilegar v. State, 228 So. 3d 550 (Fla. 2017). See also Mullens v. State, 197 So. 3d 16, 38-40 (Fla. 2016), cert. denied, 137 S. Ct. 672 (2017). Twilegar argues, however,

that because he did not know he had a constitutional right to unanimity, his waiver could not have been knowing and voluntary. In resolving this question, the trial court examined the facts and found no credible evidence to support this claim. To the contrary, the record reflects that Twilegar declined to follow any of counsel's penalty phase advice, going so far as to direct him to present no mitigation case whatsoever. Further, Twilegar told the court that if he was found guilty, he wanted no effort made to secure anything other than a death sentence. Even after multiple colloquies conducted over a four-month period,[2] Twilegar remained consistent in his view; despite counsel's advice to the contrary (Twilegar, clearly bored with the subject, told the trial court he had discussed the matter "many times" with his attorney), he wanted no effort made to secure a life sentence. Appellant's waiver of his penalty phase jury, granted over the State's strenuous objection, was consistent with his contemporaneous statement that if he were found guilty, the only sentence he wanted was death. These facts conflict with

[2] Twilegar's Affidavit opposing mitigation was signed 9/12/2006. The record reflects that the trial court discussed the mitigation waiver on 9/25/2006, did so again on 12/18/2006, granted Twilegar's motion to waive penalty phase jury after an additional colloquy held 1/16/2007, and revisited the matter a final time on the day of the penalty phase trial held 2/16/2007.

Twilegar's "if-only-I'd-known" unanimity argument.[3]

The trial court rejected Twilegar's argument that his penalty phase jury waiver was invalid, finding instead that Appellant's waiver was knowing and voluntary, and though the Florida legislature did subsequently (in 2017) change the rules so as to require penalty phase unanimity, Twilegar was "specifically warned during the December 18, 2006 hearing that the law was unsettled and could change". The Florida Supreme Court's denial of relief was based on these factual findings, and certiorari review by this Court would require examination of a fact-based claim that was rejected because Florida's decisional law required it. Mullens v. State, 197 So. 3d 16 (Fla. 2016).

Twilegar nevertheless insists that his waiver could not have been intelligent if counsel's advice (which presumably would have included a then-correct statement that unanimity was not required) has since turned out to be wrong. This argument fails, however, for two reasons.

First, Twilegar's claim logically prevails only if his

[3] The State also notes that it was common practice at the time of Twilegar's 2007 trial to file a motion alleging that Florida's sentencing procedures were in violation of this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), and virtually every defendant facing a possible death sentence (including Petitioner) filed a motion alleging that Florida's procedure violated Ring. Twilegar directed his attorney to withdraw his Ring motion, however, without seeking a ruling.

waiver was made in reliance on that aspect of counsel's advice that was later deemed erroneous. The state trial court noted, however, that Twilegar filed but later withdrew a motion demanding penalty phase unanimity without requesting a ruling; this plainly undermines Twilegar's present argument. If all he sought was unanimity, why withdraw a motion requesting that very thing? And while this action conflicts with his present claim, it is wholly consistent with Twilegar's contemporaneous statements to the court in 2007 that he did not want a life sentence if convicted.[4] Twilegar refused to cooperate with the mitigation specialist, he said he did not want anyone investigating his past, he told the psychologist hired by his attorney to get out. At no time during the many colloquies with his trial judge did he say anything about a unanimous penalty phase. Twilegar's waiver was clearly made for reasons unrelated to unanimity. No other explanation fits the known facts.

Second, even if we agree that Twilegar acted only because he did not know he was entitled to unanimity, this does not mandate a conclusion that his waiver was invalid. This Court has already determined that a defendant who voluntarily waives his Sixth Amendment right to jury trial is bound by his choice, even

[4] Twilegar told the trial judge "I don't want to do 20 years on death row waiting for it. I don't want a life sentence. Let's get it done."

where his decision was made in reliance on a flawed procedural rule later deemed unconstitutional.

In Brady v. United States, 397 U.S. 742 (1970) the defendant was charged under a federal law (18 U.S.C. § 1201(a)) that authorized a death sentence if the jury recommended it. Because § 1201(a) gave the judge no authority to impose death in the absence of a jury's specific findings, it naturally encouraged defendants to waive jury trial, and Brady did exactly that- he waived his Sixth Amendment right to a jury and entered a plea. One year later, after this Court struck down § 1201(a) as unconstitutional, Brady sought to withdraw his plea and argued that his waiver could not have been voluntary under the circumstances. This Court disagreed- the record showed that Brady might have had other, unrelated reasons for entering a waiver, and Brady's voluntary waiver of a constitutional right was consistent with the law in effect at the time. Such a plea, the Court held, "does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." Id. at 757. Clearly, even if Twilegar did waive his jury only because he could not get penalty phase unanimity, his waiver was based on the correct law at the time of his decision. This explains the Florida Supreme Court's decision to deny Twilegar a new penalty phase trial; under Florida law, a

defendant is not automatically entitled to be resentenced merely because a subsequent legal decision changed the rules regarding penalty phase unanimity, particularly where the right to jury fact-finding was waived for legitimate, strategic reasons. And, the Florida Supreme Court's conclusion in this regard is fully consistent with this Court's holding in Brady; accordingly, Twilegar's claim is inappropriate for certiorari review. At bottom, Twilegar's claim amounts to little more than a dispute over the correctness of the state court's ruling.[5]

There is no conflict among the state courts of last resort or the federal circuit courts on this issue and no unsettled question of federal law. This Court has noted that cases which have not divided the federal or state courts or presented important, unsettled questions of federal law do not usually merit certiorari review. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987). The law is well-settled that this Court does not grant certiorari "to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925); Texas v. Mead, 465 U.S. 1041 (1984); see also Bartlett v. Stephenson, 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the

[5] The State notes that if Twilegar's position is correct, any defendant who waives jury trial and enters a plea would be permitted to challenge his waiver any time the law changes.

presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). Accordingly, this Court must deny the petition for certiorari review filed herein.

CONCLUSION

For the foregoing reasons, the Court should DENY the petition for certiorari review of the decision of the Florida Supreme Court entered below.

PAMELA JO BONDI
ATTORNEY GENERAL, STATE OF FLORIDA

/s/ Scott A. Browne

SCOTT A. BROWNE*
Senior Assistant Attorney General
Florida Bar No. 0802743
*Counsel of Record

TIMOTHY A. FREELAND
Senior Assistant Attorney General
Florida Bar No. 539181

Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5501
capapp@myfloridalegal.com
scott.browne@myfloridalegal.com
timothy.freeland@myfloridalegal.com

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been submitted using the Electronic Filing System. I further certify that a copy has been sent electronically and by U.S. mail to Suzanne Myers Keffer, Chief Assistant CCRC, Capital Collateral Regional Counsel-South, 1 East Broward Boulevard, Suite 444, Ft. Lauderdale, Florida 33301, **keffers@ccsr.state.fl.us**, on this 25th day of April, 2018. All parties required to be served have been served.

/s/ Scott A. Browne

COUNSEL FOR RESPONDENT

APPENDIX A

228 So.3d 550
Supreme Court of Florida.

Mark A. TWILEGAR, Appellant,
v.
STATE of Florida, Appellee.

No. SC17–839
|
November 2, 2017

Synopsis

Background: Defendant, whose conviction for murder in the first degree and sentence of death was affirmed on direct appeal by the Supreme Court, 42 So.3d 177, sought postconviction relief. The Circuit Court, Lee County, No. 362003CF002151000ACH, Ramiro Mañalich, J., denied relief. Defendant appealed.

[Holding:] The Supreme Court held that Supreme Court decision determining that Florida's capital sentencing scheme violated Sixth Amendment right to jury trial did not apply to defendant who waived penalty phase jury.

Affirmed.

West Headnotes (1)

[1] **Jury**
Right to waive jury in general

Jury
Statutory provisions

United States Supreme Court decision in Hurst v. Florida, 136 S.Ct. 616, determining that Florida's capital sentencing scheme violated Sixth Amendment right to a jury trial did not apply to permit defendant who waived penalty phase jury to seek relief from death sentence. U.S. Const. Amend. 6.

Cases that cite this headnote

***551** An Appeal from the Circuit Court in and for Lee County, Ramiro Mañalich, Judge—Case No. 362003CF002151000ACH

Attorneys and Law Firms

Neal Dupree, Capital Collateral Regional Counsel, Suzanne Myers Keffer, Chief Assistant, and Scott Gavin, Staff Attorney, Capital Collateral Regional Counsel, Southern Region, Fort Lauderdale, Florida, for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida, and Timothy A. Freeland, Senior Assistant Attorney General, Tampa, Florida, for Appellee

Opinion

PER CURIAM.

Mark A. Twilegar, a prisoner under sentence of death, appeals the circuit court's order denying his successive motion for postconviction relief filed under Florida Rule of Criminal Procedure 3.851 seeking relief from his death sentence pursuant to Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), and Hurst v. State, 202 So.3d 40 (Fla. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 2161, 198 L.Ed.2d 246 (2017). We have jurisdiction. See art. V, § 3(b)(1), Fla. Const.

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, —— U.S. ——, 137 S.Ct. 672, 196 L.Ed.2d 557 (2017); see also 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, 131 S.Ct. 1476, 179 L.Ed.2d 315 (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.

It is so ordered.

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

All Citations

228 So.3d 550, 42 Fla. L. Weekly S887