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In the Supreme Court of Florida

JEREMIAH M. RODGERS,

Appellant,

v. CASE NO. SC17-1050

STATE OF FLORIDA,

Appellee.

_____/

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA, FLORIDA

ANSWER BRIEF OF APPELLEE

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TABLE OF CONTENTS

PAGE(S)

TABLE OF CONTENTS. i

TABLE OF CITATIONS. ii

PRELIMINARY STATEMENT. 1

STATEMENT OF THE CASE AND FACTS. 2

SUMMARY OF ARGUMENT. 5

ARGUMENT. 6

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 WITH A WAIVER OF POSTCONVICTION PROCEEDINGS AND A WAIVER OF THE PENALTY PHASE JURY? (Restated). 6

Standard of review. 7

The postconviction court's ruling. 7

Waivers of *Hurst* claim. 9

Durocher waiver. 10

Waiver of jury at second penalty phase. 11

Waivers and changes in the law. 13

Competency to waive. 19

CONCLUSION. 22

CERTIFICATE OF SERVICE. 23

CERTIFICATE OF FONT AND TYPE SIZE. 23

TABLE OF CITATIONS

CASES PAGE(S)

Ake v. Oklahoma,
470 U.S. 68 (1985).. 20

Apprendi v. New Jersey,
530 U.S. 466 (2000).. 12,13,17

Asay v. State,
210 So.3d 1 (Fla. 2016). 20

Barnes v. State,
124 So.3d 904 (Fla. 2013). 7

Blakely v. Washington,
542 U.S. 296 (2004).. 12

Bottoson v. Moore,
833 So.2d 693 (Fla. 2002). 19

Brady v. United States,
397 U.S. 742 (1970).. 14,15,16,17,18

Brant v. State,
197 So.3d 1051 (Fla. 2016). 9,12

Davis v. State,
207 So.3d 142 (Fla. 2016). 13

Durocher v. Singletary,
623 So.2d 482 (Fla. 1993). . . . . *passim*

Fla. Dept. of Trans. v. Juliano,
801 So.2d 101 (Fla. 2001). 20

Gary v. Warden,
686 F.3d 1261 (11th Cir. 2012). 7

Greene v. Massey,
384 So.2d 24 (Fla. 1980). 20

Halbert v. Michigan,
545 U.S. 605 (2005).. 16

Harbison v. Bell,
556 U.S. 180 (2009).. 7

Haynes v. United States,
390 U.S. 85 (1968).. 17

Howell v. State,
145 So.3d 774 (Fla. 2013). 20

Hurst v. Florida,
136 S.Ct. 616 (2016). . . . . *passim*

Hurst v. State,
202 So.3d 40 (Fla. 2016). . . . . *passim*

Iowa v. Tovar,
541 U.S. 77 (2004).. 16

James v. State,
974 So.2d 365 (Fla. 2008). 10,15

McMann v. Richardson,
397 U.S. 759 (1970).. . . . . *passim*

Mullens v. State,
197 So.3d 16 (Fla. 2016). . . . . *passim*

Ring v. Arizona,
536 U.S. 584 (2002).. 11

Rodgers v. State,
934 So.2d 1207 (Fla. 2006). . . . . *passim*

Rodgers v. State,
3 So.3d 1127 (Fla. 2009) . . . . . *passim*

Rodgers v. State,
104 So.3d 1087 (Fla. 2012). 3,7,9,10,20

Seibert v. State,
64 So.3d 67 (Fla. 2010). 7

Shepard v. United States,
544 U.S. 13 (2005).. 13

Trease v. State,
41 So.3d 119 (Fla. 2010). 10,15

United States v. Adams,
814 F.3d 178 (4th Cir. 2016). 7

United States v. Booker,
543 U.S. 220 (2005).. 15,17

United States v. Copeland,
707 F.3d 522 (4th Cir. 2013). 15

United States v. Green,

405 F.3d 1180 (10th Cir. 2005). 15

United States v. Grinard-Henry,
399 F.3d 1294 (11th Cir. 2005). 15,17

United States v. Lockett,
406 F.3d 207 (3rd Cir. 2005). 14

United States v. Palacios-Casquete,
55 F.3d 557 (11th Cir.1995).. 17

United States v. Ruiz,
536 U.S. 622 (2002).. 14,15,16,17,18

United States v. Saac,
632 F.3d 1203 (11th Cir. 2011). 16

United States v. Sahlin,
399 F.3d 27 (1st Cir. 2005). 17

United States v. Sanchez,
269 F.3d 1250 (11th Cir. 2001). 17

United States v. Vela,
740 F.3d 1150 (7th Cir. 2014). 14

Walls v. State,
926 So. 2d 1156 (Fla. 2006).. 20

Wright v. State,
41 Fla. L. Weekly S561, 2016 WL 6901449 (Fla. Nov. 23, 2016). 8,12

Young v. United States,
124 F.3d 794 (7th Cir. 1997). 15

OTHER AUTHORITIES

Rule 9.210(b), Fla. R. App. P. 1

Rule 3.851, Fla. R.Crim P.. . . . . *passim*

PRELIMINARY STATEMENT

Appellant, JEREMIAH M. RODGERS, 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

On July 24, 2000, Rodgers entered a plea of guilty as a principal to the first-degree murder of Jennifer Robinson, conspiracy to commit murder, giving alcohol to a minor, and abusing a human corpse. *Rodgers v. State*, 934 So.2d 1207, 1210 (Fla. 2006). The Florida Supreme Court affirmed the convictions but remanded for a new penalty phase.

At the second penalty phase, Rodgers waived his right to a jury. *Rodgers v. State*, 3 So.3d 1127, 1130 (Fla. 2009). There was no jury recommendation at the second penalty phase due to the waiver. The trial court found two aggravating circumstances: 1) the prior violent felony; and 2) cold, calculated, and premeditated (CCP). *Id.* at 1133. Following the resentencing proceedings, the Florida Supreme Court affirmed the death sentence.

Rodgers was found competent to plead guilty in the first appeal. *Rodgers*, 934 So.2d at 1210. Rodgers was again found competent to waive his right to a penalty phase jury during his second penalty phase in the second appeal. *Rodgers*, 3 So.3d at 1132-33.

On July 5, 2010, during the state postconviction proceedings, before any 3.851 motion for state postconviction relief was filed, Rodgers wrote a letter to Judge Rusmussen seeking to waive his statutory right to postconviction counsel and all postconviction proceedings.

On April 6, 2011, the trial court held a hearing to conduct a personal on-the-record waiver colloquy as required by state law. Fla. R. Crim P. 3.851(i); *Durocher v. Singletary*, 623 So.2d 482, 485 (Fla. 1993) (requiring trial courts to evaluate defendants to determine if they understand the consequences of waiving collateral counsel and proceedings). The trial court first inquired into Rodgers' competency to waive postconviction proceedings. Based mainly on two mental

health experts' reports, the trial court found Rodgers competent to waive postconviction proceedings.

During the colloquy, the trial court explained to Rodgers that if he waived his postconviction proceedings: "this basically means the case is over." Rodgers responded: "I understand." The trial court noted "that would include a federal review of state claims. Do you understand that as well?" Rodgers responded: "Yes, I do." The trial court continued: "Do you also understand, sir, that state postconviction motions and federal habeas corpus proceedings or petitions have time limitations? And that even if you wanted to reinstate the proceedings at a later date, you may waive those type proceedings and it may be too late for you to do so in either state or federal or both courts?" Rodgers responded: "Yes, I do."

On April 20, 2011, the state postconviction court entered a written order finding Rodgers competent and that he waived postconviction proceedings. The state trial court wrote:

> the Court is satisfied Defendant is competent to make a decision waiving his right to counsel and his right to postconviction proceedings and finds Defendant waives those rights. The Court further finds Defendant's waiver is freely, voluntarily, and intelligently entered, Defendant having articulated his reasons for his decision after being advised of his rights to counsel and further postconviction review, had benefit and advice of counsel, and expressed a knowledgeable understanding of the rights he is waiving and the consequences thereof.

Order at 2.

The order was appealed to the Florida Supreme Court. This Court affirmed the waiver in an unpublished opinion. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401). The Florida Supreme Court concluded: "Rodgers was fully aware of and understood the consequences of waiving postconviction counsel and

proceedings." *Id.* On October 17, 2012, the Florida Supreme Court affirmed the trial court's order finding Rodgers competent to discharge postconviction counsel and waive postconviction proceedings.

On January 11, 2017, Rodgers, represented by 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.[1] On February 14, 2017, the State filed an answer to the successive motion asserting the motion should be summarily denied because Rodgers waived any right to *Hurst* relief twice over. On May 2, 2017, the trial court summarily denied the successive motion. (Succ. PC at 109-111).

This appeal follows.

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[1] The CHU was appointed as federal habeas counsel to represent Rodgers in federal court on November 11, 2015. However, as of this date, the CHU has not filed a federal habeas petition in federal court. Any federal habeas petition would be untimely due to Rodgers' own actions of waiving all postconviction relief and discharging his state postconviction counsel who would have been federal habeas counsel. Moreover, Rodgers explicitly waived federal habeas review because the waiver colloquy in state court covered federal habeas review.

SUMMARY OF ARGUMENT

Rodgers 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 Rodgers waived any right to *Hurst* relief twice over. First, Rodgers waived all postconviction proceedings years ago. Under *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), a defendant who waives postconviction proceedings waives all future claims including future *Hurst* claims. Second, Rodgers waived his right to a jury trial at the second 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. 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 v. State*, 197 So.3d 16, 40 (Fla. 2016). The *Hurst* claim was waived twice over. Contrary to opposing counsel's attack on the validity of the waivers, 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. Both the *Durocher* waiver and the waiver of the penalty phase jury remain valid in the wake of *Hurst*. The trial court properly summarily denied the successive postconviction motion based on the waivers.

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 WITH A WAIVER OF POSTCONVICTION PROCEEDINGS AND A WAIVER OF THE PENALTY PHASE JURY? (Restated)

Rodgers 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 Rodgers waived any right to *Hurst* relief twice over. First, Rodgers waived all postconviction proceedings years ago. Under *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), a defendant who waives postconviction proceedings waives all future claims including future *Hurst* claims. Second, Rodgers waived his right to a jury trial at the second 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. 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 v. State*, 197 So.3d 16, 40 (Fla. 2016). The *Hurst* claim was waived twice over. Contrary to opposing counsel's attack on the validity of the waivers, 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. Both the *Durocher* waiver and the waiver of the penalty phase jury remain valid in the wake of *Hurst*. The trial court properly summarily denied the successive postconviction motion based on the waivers.

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, Rodgers, represented by federal habeas counsel Billy Nolas of the Captial Habeas Unit, 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 28-52).[2] Counsel attached two experts' reports to the motion. The January 31, 2017, report of Julie B. Kessel, M.D., of St. Peterburg, Florida, a board-certified psychiatrist, stated that she examined Rodgers on February 26, 2016. (Succ. PC at 56-63; Attachment A). She conducted a retrospective evaluation to determine Rodgers' mental state at the time of the waivers. (Succ.

[2] This Court discharged original state postconviction counsel, Robert Augustus Harper, Jr., in 2012, as part of the *Durocher* proceedings. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (No. SC11-1401). Mr. Harper has since died. Billy Nolas of the Capital Habeas Unit, who is Rodgers' federal habeas counsel, filed the *Hurst* motion in state court. If Rodgers waiver of state postconviction counsel is found to be invalid, new state postconviction counsel must be appointed and it may not be the CHU. Fla. R. Crim. P. 3.851(b)(4) (prohibiting state postconviction counsel from appearing for a limited purpose); *Harbison v. Bell*, 556 U.S. 180, 189 (2009), and *Gary v. Warden*, 686 F.3d 1261 (11th Cir. 2012).

PC at 56). She diagnosed Rodgers as suffering from Post Traumatic Stress Disorder (PTSD); Major Depressive Disorder; Gender Dysphoria Disorder; Marijuana and Alcohol Abuse in remission; and both Borderline and Antisocial Personality Disorders. (Succ. PC at 57). According to the February 9, 2017, report of George R. Brown, M.D., from Bluff City, Tennessee, a board-certified psychiatrist, he did not examine Rodgers but reviewed various records. (Succ. PC at 65-71; Attachment B). Dr. Brown conducted a paper retrospective evaluation to determine Rodgers' mental state at the time of the waivers. (Succ. PC at 65). He has an expertise in transgender health and Gender Dysphoria. Dr. Brown opined that there was "a high likelihood" that Rodgers is suffering from Gender Dysphoria Disorder. (Succ. PC at 69).

On February 14, 2017, the State filed an answer to the successive *Hurst* postconviction motion. (Succ. PC at 72-84). The State asserted that the *Hurst* claim was waived twice over because Rodgers waived his penalty phase jury and he waived all postconviction proceedings years ago. The State argued that the *Durocher* waiver of all postconviction proceedings included any and all future claims including *Hurst* claims. The State cited *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), and *Wright v. State*, 41 Fla. L. Weekly S561, 2016 WL 6901449, *17-*19 (Fla. Nov. 23, 2016), in support of its argument that waiving the penalty phase jury waived all *Hurst* claims. The State cited *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), in support of its argument that waivers are not rendered involuntary due to subsequent changes in the law. The State took the position that neither the issue of retroactivity nor harmless error needed to be addressed due to the two waivers. (Succ. PC at 82, n.1).

Rodgers filed a reply arguing that the two waivers were not knowing, intelligent, and voluntary because there was "no way" he could have known that he was being sentenced under an unconstitutional death penalty statute. (Succ.

PC at 88-102). Opposing counsel cited a trial court's ruling in *State v. Silvia*, No. 06-4522CFA (Seminole County Feb. 20, 2017), and Eleventh Circuit precedent in support of his position.

On April 21, 2017, the trial court conducted a case management conference at which the Court heard the arguments of counsel regarding the *Hurst* motion. The State emphasized the two waivers during its presentation.

On May 2, 2017, the trial court summarily denied the successive postconviction motion. (Succ. PC at 109-111). The trial court noted that Rodgers had waived his second penalty phase jury and had waived postconviction proceedings. (Succ. PC at 109). The trial court noted that both the trial court and the Florida Supreme Court had found both waivers to be valid in prior decisions. (Succ. PC at 109 citing *Rodgers v. State*, 3 So.3d 1127, 1132-33 (Fla. 2009), and *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (SC11-1401)). The trial court found that the "waivers stand" and that consequently Rodgers was not entitled to relief under *Hurst v. Florida* or *Hurst II.* (Succ. PC at 110). The trial court cited *Mullens*; *Wright*; and *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016), as well as other cases, in support of its ruling. (Succ. PC at 110). The trial court summarily denied the *Hurst* claim based on the waivers.

Waivers of *Hurst* claim

Rodgers waived his *Hurst* claim twice over. First, Rodgers waived all postconviction proceedings years ago. The *Durocher* waiver of postconviction proceedings included all possible future claims including *Hurst* claims. Second, Rodgers waived his jury at the second 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.

***Durocher* waiver**

Under *Durocher v. Singletary*, 623 So.2d 482 (Fla. 1993), a defendant who waives postconviction proceedings waives all future claims including any future *Hurst* claim. Rodgers is not entitled to any *Hurst* relief due to his waiver of all postconviction proceedings. Years after the second penalty phase, Rodgers waived all postconviction relief. *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012). Rodgers discharged his state postconviction counsel and waived all postconviction proceedings. As part of the colloquy, the state court explained to Rodgers that if he waived his postconviction proceedings: "In other words, this basically means the case is over." Rodgers responded: "I understand." The trial court continued: " . . . even if you wanted to reinstate the proceedings at a later date, you may waive those type proceedings and it may be too late for you to do so in either state or federal or both courts?" Rodgers responded: "Yes, I do." It is clear from this exchange that Rodgers understood that he was waiving all postconviction proceedings forever. After a *Durocher* hearing, the state trial court found Rodgers competent to waive and then dismissed the proceedings.

On appeal, this Court found the waiver of all postconviction proceedings to be "knowing and intelligent" and that "Rodgers was fully aware of and understood the consequences of waiving postconviction counsel and proceedings." *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012) (No. SC11-1401).

Durocher waivers are not limited to the claims raised in the initial postconviction proceeding. *Durocher* cannot be limited to the current claims in the current postconviction motion only. If *Durocher* was limited in that manner, then this Court's decisions in *James v. State*, 974 So.2d 365 (Fla. 2008), and *Trease v. State*, 41 So.3d 119 (Fla. 2010), that a capital defendant may not simply change his mind and reinstate his previously waived postconviction proceedings makes little sense. *Durocher* waivers are not limited in that manner. *Durocher*

waivers mean a defendant waives all postconviction proceedings forever including all future claims. When a capital defendant explicitly waives all postconviction proceedings, all means all.

Rodgers is really arguing that his waiver of postconviction proceedings was not a waiver of all postconviction proceedings, it was a waiver of only some postconviction proceedings. He is claiming that the scope of a *Durocher* waiver is limited only to the current claims. He is saying that *Durocher* does not include all postconviction proceedings. Rather, opposing counsel is asserting that future claims, such as any newly discovered evidence claims or any claims based on newly created rights, may be litigate despite the waiver of postconviction proceedings. But *Durocher* has never been limited in that manner before. Traditionally, a *Durocher* waiver has included all postconviction proceedings.

Rodgers may not raise any claim including a *Hurst* claim because he waived any and all postconviction proceedings years ago. And that waiver included any and all future claims. The *Hurst* claim is waived under *Durocher*.

Waiver of jury at second penalty phase

Rodgers is also not entitled to any *Hurst* relief due to his waiver of a penalty phase jury. At the second penalty phase, Rodgers waived the jury. *Rodgers v. State*, 3 So.3d 1127, 1130 (Fla. 2009).

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 Wright v. State*, 41 Fla. L. Weekly S561, 2016 WL 6901449, *17-*19 (Fla. Nov. 23, 2016) (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 actually making the same argument that the Florida Supreme Court rejected in *Mullens* and *Wright*. 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.

Moreover, 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. Opposing counsel ignores the legal consequences of the waiver, such as the inability to conduct a harmless error analysis, in his arguments.

Rodgers' 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.

Waivers and changes in the law

Opposing counsel also asserts that both waivers were involuntary because Rodgers could not have anticipated the change in the law that *Hurst* wrought. Not only did this Court reject this argument in *Mullens* 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. *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"). 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).

But the reasoning of the *Richardson* Court applies to all types of waivers, not merely pleas, which are really a type of waiver — the waiver of a jury trial. Several federal circuits have followed the logic of *Richardson* regarding appellate waivers including the Eleventh Circuit. *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*).

The same rationale expressed by the United States Supreme Court in *Richardson, Brady*, and *Ruiz* applies to both of Rodgers' waivers. Rodgers was not required to foresee *Hurst* for his waiver of all postconviction proceedings and his waiver of the penalty phase jury to be valid. The validity of a waiver is not dependent on subsequent changes in the law.

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 recognized by the Courts. I.B. 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 did contend that Halbert had waived the newly-created right to appellate counsel by entering a plea of nolo contendere and the Court rejected the 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 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 waiver logic of *Halbert* does not apply to this case. The *Halbert* Court did not overrule *Richardson*, *Brady*, or *Ruiz*. Furthermore, if Halbert had explicitly waived the right to any appellate review, the United States Supreme Court, no doubt, as a simple matter of logic, would have found that he waived the right to an attorney during that appeal by waiving the entire appeal. Here, Rodgers did the equivalent of explicitly waiving the entire appeal by explicitly waiving all postconviction proceedings. Again, all means all. Moreover, here, the trial court did "simply and directly" tell Rodgers that his case "would be over" if he waived

postconviction proceedings. Rodgers entered a conditional waiver of all future claims. Rodgers waived all claims - past, present, and future claims - as part of the *Durocher* proceedings. The nature of the waiver in any *Durocher* case covers all claims, not merely the present claims.

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 *United States v. Palaciosâ-Casquete*, 55 F.3d 557, 561 (11th Cir.1995), 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 here as well, the Eleventh Circuit, not surprisingly, follows the United States Supreme Court's decisions in *Richardson*, *Brady*, and *Ruiz*. *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)). Opposing counsel is mischaracterizing the issue and then citing caselaw that is totally inapplicable to the real issue in this case.

Opposing counsel also relies on a trial court's ruling in *State v. Silvia*, No. 06-4522CFA (Seminole County Feb. 20, 2017), which had found that a defendant

does not waive any claims that does not exist at the time.[3] The trial court in *Silvia* did not distinguish *Richardson*, *Brady*, or *Ruiz*. Indeed, the trial court in *Silvia* did not cite any case in support of its conclusion that waivers of postconviction proceedings are limited to the existing claims at the time of the waiver. The trial court's logic was that a defendant cannot waive rights that he does not yet have but the right the defendant is waiving in a *Durocher* situation is the right to postconviction proceedings which is a known right. Once again, if *Durocher* waivers are limited to the initial postconviction proceeding only, then any capital defendant can file a successive 3.851 motion even after having waived the initial proceedings. *Durocher* cannot be limited to the current proceedings only. If *Durocher* was limited in that manner, then this Court's decisions in *James v. State*, 974 So.2d 365 (Fla. 2008) and *Trease v. State*, 41 So. 3d 119 (Fla. 2010), that a capital defendant may not simply change his mind and reinstate his previously waived postconviction proceedings makes little sense. *Durocher* waivers are not limited in that manner. *Durocher* waivers mean a defendant waives all postconviction proceedings forever including all future claims. Moreover, the trial court' logic conflicts with the United States Supreme Court's logic in *Richardson*, *Brady*, and *Ruiz*. *Silvia* is incorrectly decided.

A defendant may not claim waivers are "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. Neither of Rodgers' waivers was invalid due to a change in law. Neither of the waivers was rendered involuntary due to *Hurst*.

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[3] The State filed an appeal in *Silvia* that is currently pending in this Court. *State v. Silvia*, SC17-337.

Rodgers is not entitled to any *Hurst* relief due to his waivers. Rodgers waived his *Hurst* claim twice over.[4]

Competency to waive

Opposing counsel asserts that both the waiver of all postconviction proceedings and the waiver of the penalty phase jury were involuntary due to Rodgers' mental condition of "Gender Dysphoria." Opposing counsel bases this claim of incompetency on a 2017 report from Dr. Julie B. Kessel, M.D., diagnosing Rodgers as having Gender Dysphoria Disorder leading to intense depression, as well as, a 2017 report from George R. Brown, M.D., that there was "a high likelihood" that Rodgers suffers from Gender Dysphoria Disorder.

But Rodgers has been found to be competent at several times over the years during this case. Rodgers has been found competent three times and those

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[4] Nor is it even likely that Rodgers 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 the gruesome facts of the crime which included mutilating a young girl and taking pictures of her, including a picture of the co-defendant Lawrence's hand holding the victim's foot, and taking her calf muscle as a souvenir, all of which was done as part of a prearranged plan, according to the handwritten notes which referred to the victim's body parts as "meat," that 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). Moreover, Rodgers had the advantage of seeing the first penalty phase jury's reaction to the gory details of this crime resulting in a nine to three vote and knowing that the co-defendant's penalty phase jury had voted eleven to one for death in 2000 before Rodger's second penalty phase in 2007. It was these types of considerations, not *Bottoson*, that was the basis of the decision to waive the penalty phase jury.

Even if an appellate court was willing to entertain a claim that subsequent developments rendered a prior waiver involuntary, contrary to United States Supreme Court precedent, such a 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.

findings have been affirmed on appeal by this Court. Rodgers was found competent to plead guilty before the first penalty phase and then Rodgers was found competent again years later when he waived his right to a penalty phase jury during his second penalty phase, and then Rodgers was found competent yet again years after that when he waived his postconviction proceedings. *Rodgers*, 934 So.2d at 1210; *Rodgers*, 3 So.3d at 1132-33). As this Court observed in the *Durocher* appeal, "two mental health experts examined Rodgers in preparation for the *Durocher* hearing, and both determined that Rodgers was competent." *Rodgers v. State*, 104 So.3d 1087 (Fla. 2012). Indeed, the Florida Supreme Court characterized the claim of mental incompetency during the *Durocher* appeal as being "without merit." Id.

Rodgers may not challenge those findings, which are law-of-the-case, by filing a successive *Hurst* motion years later. Under the law-of-the-case doctrine, all questions of law decided on appeal govern the case through all subsequent stages of the proceedings. *Fla. Dep't. of Transp. v. Juliano*, 801 So.2d 101, 105 (Fla. 2001) (citing *Greene v. Massey*, 384 So.2d 24, 28 (Fla. 1980)). The same claim may not be relitigated.

Simply getting a new expert does not entitle a defendant to relitigate old claims. *Asay v. State*, 210 So.3d 1, 23 (Fla. 2016) (stating that merely "obtaining a new expert to review the same records does not create newly discovered evidence" citing *Howell v. State*, 145 So.3d 774, 775 (Fla. 2013)). And, contrary to opposing counsel's assertion, there is no such claim as ineffective assistance of expert. IB at 13. Opposing counsel claims that the numerous prior mental health experts involved in this case all rendered "insufficient" competency evaluations . But *Ake v. Oklahoma*, 470 U.S. 68 (1985), did not establish a right to a good mental health expert, much less the right to a good one in postconviction proceedings. *Walls v. State*, 926 So. 2d 1156, 1177 (Fla. 2006)

(stating that *Ake* did not establish a claim of ineffective assistance of mental health expert citing cases). Getting yet another defense expert does not negate the law-of-the-case doctrine. This Court has already found Rodgers to be competent to waive postconviction proceedings and competent to waive the jury at the second penalty phase which ends the matter.

Moreover, Gender Dysphoria and its related depression do not render a person mentally incompetent to waive postconviction proceedings or a jury.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by e-portal to 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 28th day of July, 2017.

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CERTIFICATE OF FONT AND TYPE SIZE

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

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