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No. SC17-1050

IN THE

Supreme Court of Florida

JEREMIAH RODGERS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY

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RENEWED REQUESTS FOR ORAL ARGUMENTAND FULL BRIEFING

This appeal presents important issues regarding the intersection of *Hurst* and the right to a hearing on credible new evidence indicating that pre-*Hurst* "waivers" were invalid due to an undiscovered mental condition. Accordingly, Appellant respectfully requests the opportunity for his counsel to present oral argument on these issues pursuant to Fla. R. App. P. 9.320, and for the opportunity to file a full, untruncated brief pursuant to the standard rules of appellate procedure.

ARGUMENT

I. Appellant properly challenges prior competency proceedings under the reasoning of *State v. Sireci*, 502 So. 2d 1221 (Fla. 1987), *Mason v. State,* 489 So. 2d 734 (1986), *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), and *Wright v. State*, 213 So. 3d 881 (Fla. 2017)

Appellant's waiver challenge is properly before this Court. Indeed, the State does not contest that *State v. Sireci*, 502 So. 2d 1221, 1223-24 (Fla. 1987) ("claim[s] regarding incompetent psychiatric evaluations [are] cognizable under a successive motion for post-conviction relief"), and *Mason v. State,* 489 So. 2d 734, 736 (1986) (claims regarding inadequate prior mental-health evaluations are cognizable in Florida post-conviction proceedings), are settled law. Moreover, the State does not contest that this Court in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), and in *Wright v. State*, 213 So. 3d 881 (Fla. 2017), considered the defendants' competence to waive *before* finding that their waivers precluded *Hurst* relief. *See Mullens*, 197 So. 3d at 38 ("neither party dispute[d] his competency"); *Wright*, 213 So. 3d at 903 (after

presenting evidence at two evidentiary hearings, Wright "was not intellectually disabled under Florida law").

Without attempting to distinguish *Sireci* and *Mason*, the State incorrectly asserts that a defendant "may not challenge [the] findings of prior competency determinations, which are law-of-the-case, by filing a successive *Hurst* motion years later." Appellee's Br. at 20. The settled law of this jurisdiction, however, is that an earlier finding of competency must be reconsidered when it is discovered that it relied on inadequate evaluations. *See Sireci*, 536 So. 2d at 233 (affirming trial court's grant of a new sentencing based upon findings that prior psychiatric examiners rendered inadequate examinations *even though the court had previously found the defendant competent*); *Mason*, 489 So. 2d at 737 (remanding for a hearing on the issue). *Sireci* and *Mason* would be rendered superfluous under the State's argument—any litigant challenging the adequacy of an expert's competency evaluation necessarily was found competent by at least one court.

The State refers to an irrelevant standard when it asserts that "a new expert does not entitle a defendant to relitigate old claims." Appellee's Br. at 20 (citing *Asay v. State*, 210 So. 3d 1, 23 (Fla. 2016)). This standard applies to newly discovered evidence claims—"evidence that would probably produce an acquittal at trial," *Asay*, 210 So. 3d at 22—not a claim under *Sireci* and *Mason* that prior mental health examiners rendered inadequate competency examinations. Indeed, a

defendant could not asserts his rights under *Sireci* and *Mason* without a new expert to attest to the prior experts' inadequate evaluations.

II. Appellant's gender dysphoria rendered him incompetent to waive

The State, without citing to *any* support, baldly asserts that "[g]ender [d]ysphoria and its related depression do not render a person mentally incompetent to waive postconviction proceedings or a jury." Appellee's Br. at 21. Appellant, however, has proffered two expert reports from highly-qualified psychiatric professionals stating that his gender dysphoria *did* render him incompetent to voluntarily waive. Both Drs. George Brown and Julie Kessel noted Appellant's lifelong gender dysphoria and the adverse impact on his mental state, particularly during the time of his waivers. Initial Br. at 9-11. Dr. Brown also explained that it was not until Dr. Kessel's 2016 evaluation that Appellant was actually diagnosed with gender dysphoria, despite "documentation going back to at least 1995." *Id.* at 10.

Appellant also presented extensive documentation regarding significant gender-specific issues that plagued him *prior* to the offense, including self-laceration and attempts at autopenectomy, *see id.* at 11-13, as well as the horrific environments in which he underwent extensive sexual and other abuses. Amicus curiae also highlight letters Appellant wrote to defense counsel, Robert A. Harper, prior to

Appellant's waiver of post-conviction review, in which Appellant described the excruciating pain of growing up with gender dysphoria. Amicus Br. at 8.

The State does not dispute Appellant's gender dysphoria diagnosis. *See* Appellant's Br. at 1 n.1. Instead, the State merely refers to past competency evaluations—those that never included the underlying untreated gender dysphoria diagnosis or described for the court its implications and effects on the voluntariness of any waiver. Appellee's Br. at 19-21. This is far from enough to overcome the need for a hearing in light of Appellant's proffers.

III. Appellant could not waive *Hurst* rights that were not yet recognized by the courts at the time of the waivers

The State misapprehends Appellant's arguments under *Halbert v. Michigan*, 545 U.S. 605 (2005). Nowhere does Appellant argue that his waivers were "invalid due to a change in the law." Appellee's Br. at 18. Rather, Appellant argues his waivers were invalid because the evaluating experts rendered grossly insufficient evaluations when they failed to address the evidence of his profoundly debilitating gender dysphoria. And nowhere does Appellant argue that "the waivers [were] rendered involuntary due to *Hurst*." *Id.* Rather, he argues that there was no waiver of his *Hurst* rights because those rights were not yet recognized by Florida courts. Indeed, Florida courts were routinely denying *Hurst*-like motions at the time Appellant entered his "waivers."

Many of the State's arguments are premised on fundamental misunderstandings of law.[1] For instance, the State believes that the United States Supreme Court did not hold in *Halbert v. Michigan*, 545 U.S. 605 (2005), that a defendant cannot waive a right not yet recognized by the courts. Appellee's Br. at 15. A "holding" is: "A court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision." Black's Law Dictionary 749 (8th ed. 2004). The State does not dispute that *Halbert* addresses whether criminal defendants have a right to counsel at the notice-for-leave-to-appeal stage notwithstanding a *nolo contendere* plea. *Halbert*, 545 U.S. at 618-23. Michigan argued that Halbert had waived that right to counsel because he pleaded *nolo contendere*. *Id.* at 623. Pivotal to the Court's decision rejecting Michigan's argument was the principle that a defendant cannot waive rights not yet recognized by the courts. *Id.* at 639 ("Halbert . . . had no recognized right to appointed appellate counsel he could elect to forgo."). And so that is *Halbert*'s holding: that a defendant cannot waive a right not yet recognized by the courts. *See also Brady v. United States*, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be

[1] The State also claims, strangely, that Appellant relied on certain cases Appellant never cited and then distinguishes those cases. Appellee's Br. at 17. Because Appellant never cited to those cases in the initial brief, he does not address those cases in this reply.

voluntary but must be knowing intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

The State erroneously reasons that "[t]he waiver logic of *Halbert* does not apply to this case" because "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." Appellee's Br. at 16. This argument fails because Halbert *did explicitly waive his right to appellate review*: "During Halbert's plea colloquy, the trial court asked Halbert, 'You understand if I accept your plea you are giving up or waiving any claim of an appeal as of right,' and Halbert answered, 'Yes, sir.'" *Halbert*, 545 U.S. at 614.

The State attempts to analogize Appellant's waivers to plea-bargaining cases—including *McMann v. Richardson*, 397 U.S. 759 (1970), *Brady v. United States*, 397 U.S. 742 (1970), and *United States v. Ruiz*, 536 U.S. 622 (2002)— stating that pleas "are really a type of waiver—the waiver of a jury trial." Appellee's Br. at 15. But a plea is not merely the waiver of a jury trial; a plea is also the admission of the elements of the crime. *See Brady*, 397 U.S. at 748. Here, Appellant's jury waiver did not include the admission of the elements of the offense that would make him eligible for the death penalty; it was only the waiver of a jury *recommendation*.

Moreover, in the guilty-plea cases cited by the State, *the courts already recognized the defendants' jury-trial rights at the time the defendants pleaded guilty* and had advised the defendants to that effect. Here, in contrast, Florida's courts did not recognize Appellant's right to jury factfinding or juror unanimity at the time he entered his waiver, and the sentencing court did not advise Appellant that he was waiving those rights. Rather, Florida's courts were affirmatively denying *Hurst*-like motions at the time of Appellant's waivers.

Finally, the State incorrectly asserts that *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993), holds "a defendant who waives postconviction proceedings waives all future claims including future *Hurst* relief." Appellee's Br. at 5-6, 10. But *Durocher* does not address the waiver of rights not yet recognized by the courts. Under *Halbert*'s reasoning, Appellant could not have waived a post-conviction *Hurst* claim because Florida courts did not recognize the rights enunciated in *Hurst* at the time he entered his post-conviction waiver. *See Halbert*, 545 U.S. at 639. Moreover, such an all-encompassing waiver would violate Appellant's right to due process under the United States Constitution.

Durocher actually emphasizes the State's obligation to assure that waivers are "knowing, intelligent, and voluntary." *Durocher*, 623 So. 2d at 484–85 (Fla. 1993). Further, Chief Justice Barkett stated: "[T]he role of the State in imposing the death sentence transcends the desires of a particular inmate to commit state-assisted

suicide." *Id.* at 485 (Barkett, J. concurring). "[T]he State has a responsibility to ensure that society's ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake." *Id.* at 486 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976)). And more, this "responsibility does not end when an inmate's appeals are completed; it continues until the moment that the death sentence is imposed." *Id.* at 486. *Durocher* reinforces *Sireci*'s and *Mason*'s holdings that a defendant, such as Appellant, may litigate the competency and voluntariness of a waiver when he proffers evidence that the expert evaluations involved in those waivers were inadequate.

CONCLUSION

The State has had custody of Appellant for the majority of his life. From at least the age of 14, Appellant's state-created medical records provided evidence that he suffered from gender dysphoria and that he was not being provided appropriate treatment. ROA 59-68 (evidence that state facilities had documented obvious signs of Appellant's gender dysphoria but never provided treatment). It was this severe, untreated gender dysphoria—which neither the State itself nor the previous experts brought to the courts' attention—that resulted in Appellant's waivers, i.e., his compulsion to commit state-assisted suicide. ROA 62 (Appellant's letter to Attorney Robert Harper explaining that the trauma and pain from issues of gender caused Appellant "to lose his will to live and to choose death over life"). It is

unconscionable that the State should now benefit from Appellant's medical need, a need that it failed to identify and treat, without Appellant being allowed a hearing. Florida has the responsibility to ensure that it does not execute an individual in such circumstances without addressing, at a hearing, the evidence Appellant has proffered.

For the foregoing reasons, Appellant respectfully requests that this Court schedule full briefing, grant oral argument, and thereafter remand for an evidentiary hearing and/or grant relief under the *Hurst* decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy Nolas, hereby certify that on August 7, 2017, I served this filing by electronic transmission via the e-portal to Assistant Attorney General Charmaine Millsaps at capapp@myfloridalegal.com and charmaine.millsaps@myfloridalegal.com.

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