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IN THE SUPREME COURT OF FLORIDA

MICHAEL LEE ROBINSON,

Appellant,

v.

CASE NO. SC18-16
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

APPELLEES'S REPLY TO APPELLANT'S RESPONSE TO FEBRUARY 23, 2018, ORDER TO SHOW CAUSE

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TABLE OF CONTENTS

STATEMENT OF THE CASE AND FACTS..... 3

SUMMARY OF THE ARGUMENT..... 4

ARGUMENT..... 5

ISSUE I: ROBINSON IS PROCEDURALLY BARRED FROM OBTAINING REVIEW OF HIS WAIVER OF A PENALTY PHASE JURY; ROBINSON'S DUROCHER WAIVER WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND FUTURE CHANGES IN THE LAW DO NOT SUBVERT ROBINSON'S DUROCHER WAIVER..... 5

A. ROBINSON IS PROCEDURALLY BARRED FROM OBTAINING REVIEW OF HIS WAIVER OF A PENALTY PHASE JURY..... 5

B. ROBINSON'S DUROCHER WAIVER WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND FUTURE CHANGES IN THE LAW DO NOT SUBVERT ROBINSON'S DUROCHER WAIVER 6

ISSUE II: ROBINSON'S DEATH SENTENCE DOES NOT VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT, A VIOLATION OF HIS EQUAL PROTECTION RIGHTS, AND IS NOT FUNDAMENTALLY UNFAIR CONCLUSION. 11

CONCLUSION..... 15

CERTIFICATE OF SERVICE..... 15

STATEMENT OF THE CASE AND FACTS

On January 23, 1995, Robinson pled guilty to the first-degree murder of Jane Silvia. Prior to the plea colloquy, Robinson's counsel explained that Robinson did not wish to proceed to trial, did not wish to present any defense, did not want his attorneys to file any motions on his behalf, and did not want to present any mitigation at the penalty phase. Robinson expressed that he desired to die and was "seeking the death penalty in this case."

On March 30, 1995, Robinson waived his right to a penalty phase jury and the cause proceeded to sentencing before the trial court. On April 12, 1995, the trial court sentenced Robinson to death. Robinson v. State, 684 So. 2d 175, 176 (Fla. 1996).

On appeal, the Florida Supreme Court vacated Robinson's death sentence and ordered a new penalty phase proceeding, because the trial court failed to consider and weigh the mitigating evidence in the record. Id. at 180. The remand opinion also specified that the new penalty phase proceeding was to be held "before the judge alone . . . ." Id. at 180.

A new penalty phase proceeding was conducted before the trial court, and after conclusion of the penalty phase, the trial court again sentenced Robinson to death for Ms. Silvia's murder. Robinson v. State, 761 So. 2d 269, 271-72 (Fla. 1999). The United States Supreme Court denied certiorari review of Robinson's conviction and sentence on April 3, 2000. Robinson v. Florida, 529 U.S. 1057 (2000).

Robinson subsequently sought postconviction relief, and filed a motion to vacate his death sentence, which was denied by the trial court. Robinson v. State, 913 So. 2d 514, 517 (Fla. 2005). The Florida Supreme Court affirmed the trial court's order denying Robinson's motion for postconviction relief. Id. at 528. Robinson filed a successive motion for postconviction relief on September 18, 2017. Following the denial of that motion, Robinson filed an appeal in this Court seeking Hurst relief. This Court then issued an order to show cause "addressing why the lower court's order should not be affirmed based on this Court's precedent in Mullens v. State, 197 So. 3d 16 (Fla. 2016)."

SUMMARY OF THE ARGUMENT

Robinson has failed to show cause as to why his case should be excluded from this Court's precedent in Mullens v. State, 197 So. 3d 16 (Fla. 2016). Because Robinson's Durocher[1] waiver was knowing, intelligent, and voluntary, and because a subsequent change in the law does not invalidate his Durocher waiver, this Court should deny Robinson's pending appeal from the denial of his successive motion.

Robinson has failed to show cause as to why his case should be excluded from this Court's precedent in Asay as reaffirmed by Hitchcock. Because Robinson's case was final before Ring, and Hurst is not retroactive under federal law, this Court should deny Robinson's pending appeal from the denial of his successive motion.

[1] Durocher v. Singletary, 623 So. 2d 482 (Fla.1993).

ARGUMENT

ISSUE 1

A. ROBINSON WAIVED HIS RIGHT TO A PENALTY PHASE JURY DURING HIS SECOND PENALTY PHASE

Robinson contends that there was no valid waiver of a penalty phase jury after his case was remanded from the Florida Supreme Court. However, Robinson's claim is procedurally barred, and even if it is not procedurally barred, Robinson would not be entitled to any relief.

First, the law is well settled that "[c]laims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." Hendrix v. State, 136 So. 3d 1122, 1125 (Fla. 2014). Here, Robinson's claim regarding the alleged lack of a waiver of a penalty phase jury was already raised in his prior postconviction motion. See Robinson, 913 So. 2d at 523 ("He claims that, notwithstanding Robinson's earlier waiver, this Court's remand should have afforded him the right to decide anew whether he wished to have a jury because a defendant has the right to change his mind when afforded a new sentencing proceeding.")

Furthermore, Robinson filed a successive Rule 3.851 motion on September 18, 2017, which is far beyond the one-year time limitation after the judgment and sentence were finalized on April 3, 2000, when the United States Supreme Court denied certiorari review of his convictions and sentences. See Fla. R. Crim. P. 3.851 (d) (1). (A) – (B). As his claim did not fall into one of the

enumerated exceptions to the one-year limitation, his petition was untimely. Fla. R. Crim. P. 3.851(d)(2).

Finally, Robinson is not entitled to any relief, because this Court already determined that Robinson's argument is meritless. Specifically, this Court reasoned that, in addition to the prior waiver, the Court's directions in its remand opinion from Robinson's first direct appeal ordered a new penalty before the trial judge only. Robinson, 913 So. 2d at 523. Thus, this Court determined that Robinson was not entitled to any relief, due to the previous waiver, and in addition to the fact that the trial court was bound by the directions in the remand opinion. Id. at 523. Robinson entered a valid Durocher waiver and the trial court's acceptance of that waiver was affirmed by this Court. Robinson cannot now assert postconviction claims simply because he has changed his mind. See Trease v. State, 41 So. 3d 119, 126 (Fla. 2010).

B. ROBINSON'S DUROCHER WAIVER WAS KNOWING, INTELLIGENT, AND VOLUNTARY AND FUTURE CHANGES IN THE LAW DO NOT SUBVERT ROBINSON'S DUROCHER WAIVER

Robinson also argues that his Durocher waiver is insufficient to bar Hurst relief because he was not aware that he was waiving any possible future litigation, including litigation based on future changes in the law.

In Mullens v. State, 197 So. 3d 16, 38-40 (Fla. 2016), this Court rejected a Hurst claim in a case where the defendant waived

his penalty phase jury. Mullens pleaded guilty to two counts of first-degree murder and one count of attempted first-degree murder and, like Robinson, waived his right to a penalty phase jury. This Court noted that, regardless of the exact scope and nature of the rights established in Hurst, the defendant was entitled to no relief because he waived the penalty phase jury. Mullens, 197 So. 3d at 38. This 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)). This 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. Following Mullens, this Court has repeatedly denied Hurst relief in cases involving the waiver of the penalty phase jury. See Brant v. State, 197 So. 3d 1051 (Fla. 2016); Davis v. State, 207 So. 3d 177 (Fla. 2016); Wright v. State, 213 So. 3d 881 (Fla. 2016); Knight v. State, 211 So. 3d 1 (Fla. 2016).

Most recently, in State v. Silvia, No. SC17-337, 2018 WL 654715 (Fla. Feb. 1, 2018), this Court held that Silvia's valid

Durocher waiver barred him from seeking Hurst relief, even though Hurst had not been issued when Silvia entered his waiver. This Court relied on Mullens v. State, 197 So. 3d 16 (Fla. 2016), noting that Mullens' waiver of a penalty phase jury was much like Silvia's waiver of his postconviction proceedings. Although, this Court mentioned that during Silvia's colloquy, he was made aware that he was losing his right to take advantage of any future change in the law, Mullens demonstrates that this disclosure does not need to be explicitly stated during a colloquy for a waiver to act as a bar to Hurst relief. Silvia, 2018 WL 654715 at *2.

In Mullens, the court never provided any explanation to Mullens that his waiver could bar claims he might want to raise based on future changes in the law. In fact, the judge never discussed with Mullens any impact that his waiver could have on future litigation. In spite of this, Mullens' waiver of a penalty phase jury is still knowing, intelligent, and voluntary, and bars any Hurst claim. Mullens, 197 So. 3d at 38-40 ("Accordingly, 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.").

Although Robinson attempts to distinguish Mullins from his case by arguing that he was not properly informed of the consequences of his waiver, the record indicates that Robinson was thoroughly informed in much the same manner as Mullins. When this Court reviewed Robinson's Durocher waiver, this Court held that

"Robinson's plea was only accepted after an extensive inquiry. At the plea colloquy, the trial court asked Robinson whether he intended to plead guilty to first-degree murder and informed Robinson that the only possible sentences upon conviction for first-degree murder were death and life in prison." Robinson v. State, 761 So. 2d 269, 271-72 (Fla. 1999).

Here, Robinson waived the right to a jury penalty phase proceeding and requested that the judge make the sentencing decision. Robinson also sought to join the State in seeking a death sentence and instructed his attorneys not to present any mitigating evidence to the court or to argue against any of the aggravating factors.

What is more, even if the trial court never specifically informed Robinson that he could not take advantage of future changes in the law, that should have no impact on his case. Much like Robinson, Mullens was not specifically informed that he could not take advantage of future changes in the law, and his waiver was still a knowing waiver and was sufficient to bar Hurst relief in his case. Mullens, 197 So. 3d at 38-40.

Robinson's argument that a defendant cannot knowingly and intelligently waive a constitutional right which had not yet been recognized by the courts is incorrect and without merit. Contrary to Robinson's attack on the validity of his waiver, subsequent changes in the law do not render a prior waiver invalid.

This Court has already rejected the argument that a waiver is invalidated by future changes in the law. Mullens, 197 So. 3d at 16; Rodgers v. State, No. SC17-1050, 2018 WL 773974 (Fla. Feb. 8, 2018)(holding that the Hurst decisions do not apply to defendants, like Rodgers, who waive a penalty phase jury). The United States Supreme Court has rejected it as well. In McMann v. Richardson, 397 U.S. 759, 773-74 (1970), Richardson entered a guilty plea, and some years later, the United States Supreme Court issued a new opinion on coerced confessions. Richardson argued that he should be permitted to raise a claim based on the change in the law, because his plea was rendered involuntary by the change in the law. Id. 773-74. The Court rejected this argument, holding that "when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing." Id. at 774. See also Brady v. United States, 397 U.S. 742, 757 (1970) (rejecting an attempt to vacate a plea based partially on a statute that was later declared unconstitutional because defendant's failure to 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).

The rationale applied to jury trial waivers in Richardson applies equally to Robinson's waiver of postconviction proceedings. Robinson was not required to foresee Hurst or Ring for his waiver of all his postconviction proceedings to be valid. Robinson's Durocher waiver is not disturbed by any subsequent change in the law and is sufficient to bar Hurst relief in his case.

ISSUE II

ROBINSON'S DEATH SENTENCE DOES NOT VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT, THE EQUAL PROTECTION CLAUSE, AND IS NOT FUNDAMENTALLY UNFAIR

Irrespective of the waiver, Robinson's judgment and sentence were final prior to the decision in Ring, therefore Hurst is not retroactive to him. In Asay, this Court discussed the appropriate test for applying retroactivity to Hurst. Asay, 210 So. 3d at 15-16. This Court applied the Witt analysis for retroactivity under state law, "which provides more expansive retroactivity standards than those adopted in Teague," which enumerates the federal retroactivity standards. Id. (emphasis in original), quoting Johnson v. State, 904 So. 2d 400, 409 (Fla. 2005); Witt v. State, 387 So. 2d 922 (Fla. 1980); Teague v. Lane, 489 U.S. 288 (1989); see also Danforth v. Minnesota, 552 U.S. 264, 280-81 (2008) (allowing states to adopt a retroactivity test that is broader than Teague).

The Eleventh Circuit has also addressed the issue of retroactivity and denied Hurst relief because Hurst is not retroactive under federal law, stating: "[t]he Supreme Court has held that Ring does not apply retroactively to cases on collateral review. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that Ring does not apply retroactively under federal law to death-penalty cases already final on direct review.)." Lambrix v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1170, 1182 (11th Cir. 2017), cert. denied, Lambrix v. Florida, Lambrix v. Jones, 138 S.Ct. 312 (2017).

Further, the Eleventh Circuit held that this Court's ruling, that Hurst did not retroactively apply to Lambrix, whose judgment was final in 1986, "is fully in accord with the U.S. Supreme Court's precedent in Ring and Schriro." Lambrix, 872 F.3d at 1182. The Eleventh Circuit also rejected the statutory retroactivity argument stating

> jurists of reason would not find this position debatable: the Florida court's rejection of Lambrix's constitutional-statutory claim was not contrary to, or an unreasonable application of, the holding of a Supreme Court decision.

Id. at 1183; see also Dobbert v. Florida, 432 U.S. 282, 301 (1977).

Additionally, with retroactivity, there is usually a cutoff date to provide for finality in appellate proceedings. Penry v. Lynaugh, 492 U.S. 302, 314 (1989) (holding finality concerns in retroactivity are applicable in the capital context). In Griffith, the Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Griffith v. Kentucky, 479 U.S. 314, 328 (1987); see also Smith v. State, 598 So. 2d 1063, 1065 (Fla. 1992). Under this "pipeline" concept, only those still pending direct review would receive the benefit of relief from Hurst error. The fact that this Court has drawn the line at the decision date in Ring instead of the decision date in Hurst, benefits more appellants. Further, this Court has previously heard and rejected Appellant's due process, equal protection, and arbitrariness

arguments. See Lambrix v. State, 227 So. 3d 112 (Fla. 2017). Thus, this Court's retroactivity cutoff does not violate the Fourteenth Amendment's guarantee of equal protection and due process.

Thus far, this Court has refused to extend Hurst v. Florida and Hurst based solely on the fact that their judgments were final prior to the decision in Ring. On August 10, 2017, this Court reaffirmed the decision in Asay stating:

> Although Hitchcock references various constitutional provisions as a basis for arguments that Hurst v. State should entitle him to a new sentencing proceeding, these are nothing more than arguments that Hurst v. State should be applied retroactively to his sentence, which became final prior to Ring. As such, these arguments were rejected when we decided Asay. Accordingly, we affirm the circuit court's order summarily denying Hitchcock's successive postconviction motion pursuant to Asay.

Hitchcock, 226 So. 3d 216 (Fla. 2017); see also Asay, 224 So. 3d at 703 (rejecting claim chapter 2017-1, Laws of Florida, "creates a substantive right to a life sentence unless a jury unanimously recommends otherwise"); Lambrix, 227 So. 3d 112 (Fla. 2017) (rejecting arguments based on Eighth Amendment, due process, equal protection, and a substantive right based on new legislation).

Appellant argues that if given a case-by-case determination, his case would be eligible for retroactivity under Witt. Witt v. State, 387 So.2d 922, 929 (Fla. 1980). However, case specific determination under the Witt test requires an analysis of Hurst, not all capital cases. The test requires analyzing Hurst in the context of the purpose of the new rule, reliance on the old rule, and the effect on the administration of justice. Id. at 926, 929-

30. This Court performed this analysis in both Mosley, a post-Ring case, and Asay, a pre-Ring case, and determined that the sole determining factor for Hurst retroactivity is whether the sentence in question was final before Ring. Mosley v. State, 209 So. 3d 1248, 1273-84 (Fla. 2016); Asay, 210 So. 3d at 15-17. The purpose of performing this analysis in both Mosley and Asay was to determine whether Hurst applied retroactively in a pre-Ring scenario and whether Hurst applied retroactively in a post-Ring scenario. The purpose was not to perform a case-by-case analysis of the retroactivity in every capital case. Even if this Court did such analysis in every capital case, the result would be the same, that Hurst applies retroactively to post-Ring cases only.

Additionally, Appellant argues that he should receive the retroactive benefit of Hurst under this Court's "fundamental fairness" doctrine. However, the fundamental fairness doctrine discussed in Mosley does not create a basis for retroactive application of Hurst to pre-Ring cases. See Mosley v. State, 209 So. 3d 1248, 1274-75 (Fla. 2016). This Court rejected this argument in Gaskin v. State, 218 So. 3d 399, 401 (Fla. 2017). Gaskin raised the substance of a Hurst claim both at his trial and on direct appeal. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). However, this Court held "[b]ecause Gaskin's sentence became final in 1993, Gaskin is not entitled to relief under Hurst v. Florida." Gaskin, 218 So. 3d at 401. Like in Gaskin, Appellant is not entitled to

retroactive application of Hurst because his judgment and sentence became final pre-Ring.

A future change in the law does not undermine a knowing, voluntary, intelligent waiver. Robinson's Durocher waiver is not disturbed by any subsequent change in the law and is sufficient to bar Hurst relief in his case. Like the situation in Mullens, Robinson should not be able to subvert the right to jury factfinding by knowingly waiving that right and then, more than fifteen years later, complain that subsequent developments in the law have undermined his sentence. Accordingly, this Court should follow Mullens and affirm the lower court's summary denial of Robinson's Hurst claim given his waiver of the jury penalty phase proceeding.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 22,2018, a true and correct copy of the above has been furnished by e-mail/e-portal to: Maria E. DeLiberato, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, deliberato@ccmr.state.fl.us; Julissa R. Fontan, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, fontan@ccmr.state.fl.us; and Chelsea Shirley, 12973 N. Telecom

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