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**IN THE SUPREME COURT OF FLORIDA**

MATTHEW LEE CAYLOR,

Appellant,

vs.

CASE No. SC23-0338
L.T. No. 08-2244-CF

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

# REPLY BRIEF OF APPELLANT

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### I. The Court Erred in Denying Mr. Caylor's Motion to Withdraw His Waiver of a Penalty Phase Jury.

The Answer Brief focuses mainly on the timing of Mr. Caylor's motion to withdraw his waivers, including the waiver of a penalty phase jury, without acknowledging that the penalty phase "trial" was not an evidentiary hearing or addressing the issue that the waivers could not be considered knowing or voluntary when Mr. Caylor did not know he was attempting to honor a promise to someone who had been dead for months before his waivers were accepted.

The timing of the motion to withdraw needs to be seen in context. *See, e.g.*, *Zemunski v. Kenney*, 984 F.2d 953, 954 (8th Cir. 1993) (noting that timeliness depends on the circumstances of each case).

> **January and October 2020**: Mr. Caylor writes a pro se notice of his waiver of jury sentencing. (R. 275.) It is apparently not filed until October 2020. During this time a motion to reinstate Mr. Caylor's original death sentence is pending, so no additional proceedings take place. (R. 270-72.) That motion is not formally resolved until March 2021. (R. 287-88.)

**January 2021: Rhonda McNalin dies.**[1]

**May 19, 2021**: At a Zoom hearing Mr. Caylor explains that he had previously wanted to waive a jury trial because he had told Ms. Hinson's family he would accept whatever sentence he received but, when he realized his sentence was unconstitutional, he decided he had to fight for a life sentence. (R. 311-12, 318-20.) He states "I want a jury trial. I want the opportunity to present a case to the Court." (R. 320.)

**June 24, 2021**: Mr. Caylor mails a letter apologizing for the "back and forth" and says his requested waivers were "the right thing to do." (R. 352-53.) The court construes this as a notice of a voluntary waiver of jury sentencing and sets a hearing date of August 18, 2021. (R. 354.) Mr. Caylor reiterates his wishes in a second letter sent on August 4, 2021. (R. 355.)

**August 18, 2021**: Appearing by Zoom, Mr. Caylor explains the reason for his waivers was a promise he had made to Rhonda McNalin:

> I made a promise 13 years ago to Rhonda that I would — and this is before I was — even knew I was going to get a death sentence or life. And I promised her — because we were in contact. And I promised her 13 years ago that I would not drag her family through the appeals process. That I would accept whatever it was that I was given, and I would take

[1] An online obituary indicates Ms. McNallin's name is misspelled in the record on appeal. For consistency among briefs, the record spelling is maintained here.

> responsibility. And I would not do this to her family.

(R. 375.) Mr. Caylor adds that his own family does not understand his reasoning. (R. 377.) The court accepts his waiver of a penalty phase jury, as well as his waivers of a mitigation presentation and physical presence at sentencing. (R. 379, 380-89, 389-97, 404-05.) Mr. Caylor requests that Ms. McNalin be informed, saying "I wanted to ask the Court is it possible that Mr. Basford or somebody in the court could contact Rhonda and tell her that I'm sorry that I have put her through this this long. It's over now. I'm going to fulfill my promise to her. And that I apologize. And, you know, I'm just sorry." (R. 398.) He also asks that she be provided with a link to the Zoom resentencing proceeding. (R. 398.)

**November 17, 2021**: At the penalty phase proceeding, where Mr. Caylor appears by Zoom, not in the presence of his counsel, the court begins by confirming that Mr. Caylor wants to maintain his waivers. (R. 461-62.) Only after that does the State inform the court and defense that Rhonda McNalin is dead. (R. 463.) The State does not inform the court and defense that she died over 11 months earlier. The State immediately proceeds to move into evidence the transcript of Mr. Caylor's 2009 trial and subsequent hearings, as well as DOC records. (R. 463-64.) The State adds that an expert has been asked to review the DOC records, which are over 1200 pages long, and provide a summary of information relating to Mr. Caylor's behavior and psychological issues. (R. 466-67.) The State rests. (R. 468.) Mr. Caylor asks if he can make a statement and is

told he will have the opportunity to do so at the *Spencer* hearing. (R. 469.)

**March 23, 2022**: The defense files "Defendant's Motion to Withdraw Waiver of a Sentencing Proceeding by a Jury, Defendant's Presence at Sentencing & Presentation of Mitigating Evidence." (R. 494-95.)

**March 28, 2022**: Mr. Caylor writes to the court, stating he would not have entered his waivers if he knew Rhonda McNalin was already dead. (R. 572-73.)

**April 6, 2022**: At a motion hearing held on the date previously calendared for a *Spencer* hearing, Mr. Caylor reiterates that his waivers were based on his promise to Ms. McNalin, and that he would not have entered them if he had been informed of her death:

> …I have made it blatantly clear that the entire reason that I was willing to waive my Constitutional rights to a jury trial, mitigation, and presence was for Rhonda, and I made that promise to her 13 years ago, close to.
>
> […] Even while I was making requests to have contact with her, no one told me, Mr. Basford, my attorneys, nobody. So we carried on, we moved forward, I waived my Constitutional rights not knowing this information; three months later we had a bench trial, and I find out on the day of the bench trial that she had been passed away since January of 21.
>
> […] But no one stopped the bench trial to say hey, you know, the whole reason

> you're doing this, she's not here anymore. They even went on to read a victim impact statement from her as if she was alive still.
>
> And when I found this out, I was in a panic. I would have, if I had been told before I waived, that Ms. McNalin, Rhonda would have passed away, I never would have waived my Constitutional rights.

(R. 580-82.)

The timeline, viewed in its entirety, reveals an 11-month delay in informing Mr. Caylor of Ms. McNalin's death; that he learned of her death at a hearing he attended by Zoom, without an opportunity to speak separately with his counsel; and that his counsel filed a motion to withdraw his waivers four months later, before the *Spencer* hearing took place.

### A. The Answer Brief does not address the fact that Mr. Caylor's request to withdraw the waiver of a jury was followed a hearing at which the only evidence presented was from the record of previous proceedings.

The penalty phase trial in this resentencing consisted of the introduction of transcripts, evidence, and records of prior proceedings, along with several victim impact letters. The Answer

Brief minimizes the fact that the penalty phase did not include the time, effort, or judicial investment of an evidentiary proceeding. The State rested its case in the penalty phase after simply listing the records and exhibits it was moving into evidence, without calling any witnesses. Moreover, Mr. Caylor's initial waivers of a jury took place before any jury had been selected for his resentencing. These facts distinguish the cases cited in the Answer Brief. Mr. Caylor's request to withdraw his waivers did not cause the kind of delay, expenditure of resources, or judicial labor that would justify depriving him of a penalty phase trial by jury.

In *United States v. Jackson*, 2022 WL 6861556 (8th Cir. Oct. 12, 2022), for example, where the Eighth Circuit upheld the denial of a motion to withdraw a jury waiver, the trial court had already begun screening 170 jurors when the defendant waived a jury. *Id.* at *1. Jury selection had been particularly cumbersome in that case because of the COVID-19 pandemic. *Id.* In its decision the Eighth Circuit noted that replicating the COVID-19 protocols in place at the time to empanel another jury "would take a matter of months and require 'enormous…resources'." *Id.*

The earlier Eighth Circuit decision in *Zemunski*, similarly, involved a case where a jury panel was already waiting when the defendant waived a jury trial. 984 F.2d at 954. The defendant moved to withdraw his waiver when the bench trial began; the motion was denied but, when the trial judge had a heart attack, a mistrial was declared. *Id.* A month later, at the beginning of a second bench trial — which was a trial deciding the defendant's guilt or innocence of the charged offense, not a resentencing — the defendant again moved to withdraw his waiver, and the motion was again denied. *Id.*

In *Honie v. Powell*, where the defendant argued he had received ineffective assistance when his attorney did not, among other things, file a motion to withdraw a penalty phase jury, the opinion does not directly address whether the request was too late. *See Honie v. Powell*, 58 F.4th 1173, 1186-89 (10th Cir. 2023), cert. denied, 23-5660, 2023 WL 8531974 (U.S. Dec. 11, 2023). Instead, the opinion focuses on whether counsel's general advice to waive a jury demonstrated deficient performance: "Honie hasn't shown that all fairminded jurists would conclude that the Utah Supreme Court's ruling on this deficient-performance-claim test was

unreasonable, let alone even as mistaken or wrong." *Id.* at 1189. Interestingly, a concurring opinion in *Honie* noted that "[t]he record contradicts counsel's explanation to Honie that it was 'too late' to withdraw his jury sentencing waiver." *Id.* at 1208–09 (Lucero, J., concurring in part). The concurring opinion also noted that "inconvenience is not the appropriate measure to balance against a defendant's life." *Id.*

While granting the motion to withdraw Mr. Caylor's waivers and hold a full penalty phase might have involved inconvenience, it would not have "negated the first bench penalty phase entirely," Answ. Br. at 51, as the prior records and transcripts introduced there without objection could certainly have been kept and referred to by the trial court. There was no testimony or new evidence to "negate."

### B. Mr. Caylor's waiver of a jury could not be knowing or voluntary, and thus he was not seeking to withdraw a valid prior waiver.

There are two problems with the Answer Brief's assertion that "subsequent changes in the law or changes in the facts do not render a prior voluntary waiver invalid." Answ. Br. At 41. First, the

authorities cited all deal with changes in the law, which is not the basis for Mr. Caylor's request to withdraw his waivers. *See Brady v. United States*, 397 U.S. 742 (1970) (affirming the denial of a motion to withdraw a plea entered under a statute later held unconstitutional); *United States v. Cardenas*, 230 Fed. Appx. 933 (11th Cir. 2007) (upholding a sentence imposed under federal sentencing guidelines before the guidelines were rendered advisory rather than compulsory); *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (en banc) (affirming a sentence imposed pursuant to a plea entered before *Apprendi v. New Jersey* lowered the permissible sentence for the defendants' convictions).[2]

And second, Mr. Caylor was misinformed as to the factual basis of his waiver **when the court accepted it**. Ms. McNalin's death is not a "subsequent change in the facts." His waiver could

[2] Appellant acknowledged that the unconstitutionality of his sentence pursuant to *Hurst* was one of the reasons he had been conflicted about whether to waive a jury and a mitigation presentation. However, the waivers at issue here were offered in 2020 and accepted in 2021, long after the *Hurst* decision. The record makes abundantly clear that Mr. Caylor's request to withdraw the waivers in 2022 was based on Ms. McNalin's death and not on an earlier change in the law.

not be knowing and voluntary when it was premised on a belief that had, unbeknownst to him, been rendered impossible.

### C. The error was not harmless.

In 2022, a jury sentencing Mr. Caylor would have had to reach unanimity regarding a death sentence in addition to finding the presence of an aggravating factor. An error is harmful unless the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict. *Davis v. State*, 347 So. 3d 315, 323 (Fla. 2022). As in *Davis*, where the denial of a motion to disqualify the trial judge affected the management of the trial and several "consequential decisions," *id.* at 326-27, the record here demonstrates more than a reasonable possibility that the denial of the motion to withdraw Mr. Caylor's waivers affected the outcome of the penalty phase. Based on the presence of mitigation, as well as the non-unanimous (8-4) vote at Mr. Caylor's first trial, it cannot be said beyond a reasonable doubt that Mr. Caylor would have been sentenced to death by a jury under the law in effect at the time of his sentencing.

Whether Mr. Caylor would be "highly unlikely" to receive a life sentence under the current death penalty statute is not the

standard for harmless error. The harmless error test focuses on the trier of fact, not on the result: it "is not a 'sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test'." *Figueroa-Sanabria v. State*, 366 So. 3d 1035, 1050 (Fla. 2023) (quoting *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986)). Further, while the harmless error test applies to errors based on constitutional rights, "the State bears an extremely heavy burden in cases involving constitutional error." *Orme v. State*, 214 So. 3d 1269, 1274 (Fla. 2017). The State cannot meet that burden here.

## II. The Court Erred in Denying in Part Mr. Caylor's Request to Withdraw His Waiver of Mitigation.

Mr. Caylor reincorporates his responses as to the context of his waivers, as well as whether they were knowing and voluntary, from Section I, above.

In addition, whether Mr. Caylor was allowed to present mitigation at a *Spencer* hearing, which he would have been able to do with or without a jury in the penalty phase, does not determine whether the court's error was harmless. He was not able to present a full mitigation case to a jury, something that resulted in a non-unanimous vote for death the first time he was sentenced.

Conducting a penalty phase trial would have resulted in a delay, but would not have "negated" a previous penalty phase trial because, as noted in Section I, above, the penalty phase conducted in 2021 consisted of the trial court receiving transcripts and records from earlier proceedings. There were no witnesses for either party.

## III. Fundamental Error Occurred When the Court Failed to Instruct the Jury It Had to Determine Beyond a Reasonable Doubt that the Aggravating Factors Were Sufficient to Justify Death and that the Aggravating Factors Outweighed the Mitigating Circumstances.

Mr. Caylor relies on his Initial Brief as to this issue, which was raised for the purpose of preserving it for future review.

## CONCLUSION

For the reasons stated above and in his Initial Brief Mr. Caylor requests that his sentence of death be vacated as unconstitutional; alternatively, he requests a new penalty phase trial.

## CERTIFICATES OF SERVICE AND FONT SIZE

I certify that a copy of the foregoing has been furnished electronically via the Florida Courts e-filing portal to Charmaine Millsaps, Senior Assistant Attorney General, Capital Appeals Division, at capapp@myfloridalegal.com, on January 2, 2024. I certify that this brief complies with the font and word count provisions of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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