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IN THE SUPREME COURT OF FLORIDA

LEON DAVIS,	:	
Appellant,	:	
vs.	:	Case No. SC13-1
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

SUPPLEMENTAL INITIAL BRIEF OF APPELLANT REGARDING THE APPLICATION OF HURST V. FLORIDA

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STATEMENT OF THE CASE

ARGUMENT

ISSUE: DAVIS MUST BE RESENTENCED TO LIFE IN PRISON BECAUSE HIS PRESERVED RING CHALLENGE TO THE CONSTITUTIONALITY OF THE CAPITAL SENTENCING SCHEME HAS NOW BEEN VINDICATED BY HURST V. FLORIDA.

1. Because Davis's Direct Appeal is Pending in this Court, He is Entitled to the Benefit of Hurst.

The U.S. Supreme Court's Hurst v. Florida, 136 S. Ct. 616, 621 (2016), decision follows from the line of cases beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000),[1] in which the Court has held that a defendant is entitled to a jury finding on any sentencing factor that would increase the sentence beyond that approved by the jury verdict or guilty plea alone. After the U.S. Supreme Court decided Ring v. Arizona, 536 U.S. 584 (2002), it was apparent to many legal observers that Florida's capital sentencing scheme violated the Sixth Amendment, despite this Court's rulings to the contrary, see, e.g., Jackson v. State, 180 So. 3d 938, 964 (Fla. 2015) ("We decline to revisit the numerous decisions that hold that Florida's capital sentencing scheme does not violate the United States Constitution under Ring or Apprendi."). Davis filed in the trial court a "Motion to Declare Florida's Death Penalty Unconstitutional Under Ring v. Arizona" on May 17, 2012, which was

[1] See Ring v. Arizona, 536 U.S. 584 (2002); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007); Southern Union Co. v. United States, 132 S.Ct. 2344 (2012); Alleyne v. United States, 133 S.Ct. 2151 (2013).

argued and denied at a hearing held on May 21, 2012 (v25/R4332-4359 (motion); v25/4377-4379(hearing);v26/4437(order). The trial court denied the Ring motion, stating: "What I'm doing at this point in regard to this Motion under Ring versus Arizona, I'm denying the Motion based on existing and prevailing law out of the Supreme Court of Florida, without prejudice to re-raise this at a later date with – if the law in any way is changed by the federal government." (v25/R4378) Davis raised the Ring issue in his Initial Brief, filed in January 2014, urging this Court to hold the Florida sentencing scheme unconstitutional.

The U.S. Supreme Court granted certiorari in Hurst v. Florida in March 2015, and issued its decision in January 2016, rejecting the State's attempt to distinguish Ring and holding the Florida sentencing scheme unconstitutional. The Hurst opinion calls the advisory jury recommendation provided by the capital sentencing scheme "immaterial" to the Sixth Amendment's requirements because ultimately the judge was responsible for the findings that determined whether to impose a death sentence. "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst, 136 S.Ct 616, 619 (2016). The Supreme Court determined that the Florida scheme was no better than the Arizona scheme discussed in Ring, which relied solely on a judge's findings for a death sentence.

The Hurst issue was preserved by Davis, see Reynolds v. State, 934 So. 2d 1128, 1150 (Fla. 2006), and Davis is entitled to the benefit of the Hurst holding. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding 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).

2. Davis's Waiver of the Penalty Phase Jury Recommendation Does Not Constitute Either a Withdrawal of His Ring Motion or a Waiver of his Sixth Amendment Rights.

Whether Davis waived his Sixth Amendment right under Ring and Hurst is a federal question that is controlled by federal law. See Brookhart v. Janis, 384 U.S. 1, 4 (1966)("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."). A presumption lies against waiver and "[d]oubts are resolved in favor of protecting the constitutional claim." Michigan v. Jackson, 475 U.S. 625, 633 (1986). Any waiver of Sixth Amendment rights must be knowing and voluntary. Bousley v. United States, 523 U.S. 614, 618 (1998); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." Zerbst, 304 U.S. at 464. "It is settled law that an inferred waiver of a constitutional right is disfavored." Brewer v. Williams, 430 U.S. 387, 412 (1977) (Powell, J., concurring).

Davis never entered a general waiver of his Sixth Amendment right to jury findings of each fact necessary to impose a death sentence. His waiver of a jury's nonbinding recommendation on penalty was not abandonment or withdrawal of his Ring motion's Sixth Amendment challenge to the constitutionality of the sentencing scheme. The Ring motion was denied because the Sixth Amendment right to binding jury findings was not recognized under our capital sentencing scheme. It would have been impossible for Davis

to waive rights that were not even on the table when his trial began.

The U.S. Supreme Court addressed a similar issue in Halbert v. Michigan, 545 U.S. 605 (2005), rejecting Michigan's waiver argument in a case concerning the constitutionally guaranteed right to appointed counsel for first-level appellate review. Michigan law denied appointed appellate counsel to defendants who entered pleas. After finding that Michigan law violated Halbert's constitutional right to appointed counsel for a first appeal, the Court turned to Michigan's argument that Halbert had waived that right by entering a plea of nolo contendere. The Supreme Court rejected the waiver argument on the grounds that "[a]t the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo." 545 U.S. at 623. In the same way, at the time that Davis waived the penalty phase jury, he had no recognized Sixth Amendment right to binding jury findings for the penalty phase that he could elect to forgo.

Furthermore, Davis obtained a ruling on his Ring motion before he decided to waive the statutory right to a jury recommendation conferred under the unconstitutional capital sentencing scheme. His Ring motion was preserved when it was denied by the trial judge and his subsequent procedural decisions cannot be construed as a waiver of the Sixth Amendment Ring issue. Even if this Court could infer a waiver of the Ring issue through Davis's penalty jury waiver, Florida case law would dictate against that inference. There is a well-established doctrine, regularly applied in civil cases, where a litigant who obtains an erroneous

ruling on a pretrial motion and makes subsequent procedural choices in reliance on the erroneous pretrial ruling will not be denied the benefit of the favorable change in law showing the pretrial ruling to be incorrect. See Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 527 So. 2d 211, 215 (Fla. 3d DCA 1987)("The cases are legion in which the appellate courts, noting the manifest injustice of penalizing a party for its good faith reliance on a trial court's later-found-to-be-erroneous ruling, have given the litigants a second chance or, more accurately, a first chance under the now-corrected ruling.") (and see the cases cited therein); see also John Hancock Mut. Life Ins. Co. v. Zalay, 522 So. 2d 944, 946 (Fla. 2d DCA 1988)("Where a ruling is subsequently found to be erroneous, litigants must be granted an opportunity to present their case under the corrected ruling.") The Third District's Arky, Freed opinion was subsequently disapproved by this court, 537 So. 2d 561 (Fla. 1988), but the general proposition of law endures in the civil arena. See Moody v. Dorsett, 149 So. 3d 1182, 1184 n.2 (Fla. 2d DCA 2014) ("[T]he general proposition from Arky, Freed relied on in John Hancock Mutual remains valid and applicable to these facts."). If this doctrine, which is based on fairness, is properly applied in civil cases, it must surely also be relevant in capital cases where due process protections are heightened pursuant to Eighth Amendment requirements.

Davis should be put back in the position he was in when the trial court denied his Ring motion. Had the trial court properly granted the Ring motion, Davis would have been entitled to the right to binding jury factfinding for each fact necessary to

support a death sentence. Due process, fairness, equal protection, and the Sixth Amendment all require that he now be given the opportunity to avail himself of that right.

3. This Court's Legally Erroneous Waiver Analysis Set Forth in Mullens v. State Should Not Be Perpetuated Here. [2]

In Mullens v. State, 41 Fla. L. Weekly S279, 2016 WL 3348429 (Fla. June 16, 2016), this Court denied a Hurst claim because Mullens waived the right to a penalty phase jury's advisory sentence: "The [trial] court confirmed that Mullens understood that he chose to waive his right to have a jury decide his guilt and recommend an advisory sentence." Id., 2016 WL 3348429 at *17. In addressing the Hurst claim, this court inflated the nature of the penalty-phase waiver: "In this case, Mullens waived his right to jury sentencing after he pleaded guilty to two counts of first-degree murder." Id., 2016 WL 3348429 at *20 (emphasis added). This court characterized Mullens' waiver of the advisory jury recommendation as a subversion of a right to "jury factfinding," and this Court said that after having subverted his rights, Mullens could not suggest that a "subsequent development in the law" undermines his sentence. Id. This court has since relied on Mullens to reject another Hurst claim in Brant v. State, 2016 WL 3569418 (Fla. June 30, 2016).

The waiver analysis employed in Mullens is legally unsound and must not be perpetuated here because it misstates the nature of a pre-Hurst advisory penalty jury waiver, relies on out-of-state cases that are taken out of context and misinterpreted, and

[2] Mullens filed a motion for rehearing on July 1, 2016, which remains pending and gives this Court the opportunity to correct

infers waiver of a Sixth Amendment right that was not even recognized as a right in Florida when the waiver was obtained. Mullens equates a defendant's waiver of a pre-Hurst nonbinding jury recommendation with waiver of the thing that Florida has never actually provided a capital defendant: the Sixth Amendment right to binding jury factfinding. This Court's conclusion in Mullens that a waiver of a pre-Hurst penalty phase jury was "a waiver of the Sixth Amendment right to jury factfinding in sentencing procedures as recognized by Ring and Apprendi," ignores the U.S. Supreme Court's characterization of the jury's role under the unconstitutional Florida capital sentencing statute. This Court stated: "Hurst said nothing about whether a defendant could waive the Sixth Amendment right to jury factfinding in sentencing procedures as recognized by Ring and Apprendi . . . . In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment pursuant to section 775.082(2), Florida Statutes (2008), fails. Mullens, 2016 WL 3348429 at *18.

Mullens first recites the noncontroversial proposition that a defendant can waive the right to jury factfinding under Apprendi. This court in Mullens goes on to cite out-of-state cases that are factually distinguishable and then uses those cases to justify its conclusion that Mullens waived jury sentencing. For instance, State ex rel Taylor v. Steele, 341 S.W.3d 634 (Mo. 2011), is completely irrelevant to the Hurst waiver issue because that case involved waiver of the right to actual jury sentencing. That Missouri court went to great lengths to explain that Ring was not

(..continued)
the analysis.

implicated by the factual scenario at hand because Taylor specifically waived a right to be sentenced by a jury in conjunction with his 1991 guilty plea. Since actual binding jury sentencing was not even contemplated in Florida, Taylor actually supports Davis's argument against finding waiver here.

The Taylor court recognized that "what Taylor knew, intended, and understood in 1991 when he entered his guilty plea is paramount to determining whether he waived his rights to jury sentencing." 341 S.W.3d at 641. The transcript excerpt from Taylor's original plea hearing indicates that he was told that if he did not enter the plea, his sentence would be determined by the jury. Id. at 642. Because no Florida capital defendant could ever have been told that their sentence would be conclusively determined by the jury, no pre-Hurst defendant could ever have intended to waive that right, and the issue in Taylor could not arise in Florida.

This Court in Mullens also cites an Arizona case, State v. Murdaugh, 209 Ariz. 19, 97 P.3d 844, 852-54 (2004), in which the Arizona state court upheld the denial of a defendant's motion to withdraw his plea. This Court cites Murdaugh for the legal proposition that: "A subsequent change in the law regarding the right to jury sentencing did not render that initial waiver involuntary."[3] But subsequent Arizona decisions have explained that Murdaugh does not support the proposition that this Court cites it for in Mullens. For instance, in State v. Ward, 211 Ariz. 158, 162-65, 118 P.3d 1122 (Ariz. App. 2005), the court rejected the state's reliance on Murdaugh, explaining the significance of that

[3] It would be more accurate to say that a subsequent change in the law regarding the right to jury sentencing did not render Murdaugh's guilty plea to the charges involuntary.

case:

> Lastly, the State argues that pursuant to State v. Murdaugh, 209 Ariz. 19, 97 P.3d 844 (2004), the fact that the law changed after Ward pled guilty does not render his plea involuntary. However, Murdaugh, and the case on which it relied, Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), involved claims that the respective plea agreements were involuntary and coerced. In each case, the defendant was seeking to withdraw from the plea. In contrast Ward, like the defendant in Aragon, does not seek to withdraw from the plea. Rather, he seeks to invoke his right to a jury determination of the aggravating factors used to increase his sentence. See Brown, 210 Ariz. 534, 542, ¶ 23, 115 P.3d at 136. (Murdaugh "does not require a different result" because McMullen is not claiming his plea is involuntary, he is invoking his right to a jury trial on sentencing facts).
>
> ¶ 23 Finally, we note that even if Murdaugh could be interpreted as the State urges, the validity of such interpretation would be highly questionable in light of the express language in Blakely.

Ward has been cited many times and represents the widely followed law in Arizona and the correct analysis of the waiver issue here.[4]

This Court concludes its waiver analysis in Mullens with a cryptic sentence that emphasizes the defendant's waiver of a right to present "mitigating evidence" to a jury: "If a defendant remains free to waive his or her right to a jury trial, even if such a waiver under the previous law of a different jurisdiction

[4] After Blakely, 542 U.S 296, which involved a guilty plea, other state courts recognized that the change in law required new sentencing proceedings for appellants who likewise entered pleas to their charges but did not waive a jury's determination of sentencing issues. See State v. Schofield, 895 A.2d 927, 929–31 (Me. 2005) (waiver of right to jury trial on depraved indifference murder and manslaughter charges did not extend to findings for increased sentence); State v. King, 142 N.M. 699, 704, 168 P.3d 1123 (App.) (guilty plea on sexual assault charges was not constitutional waiver of right to jury trial on sentence enhancement factors), cert. quashed, 143 N.M. 157, 173 P.3d 764 (2007); State v. Williams, 197 Or.App. 21, 25, 104 P.3d 1151 (2005) ("[w]e cannot assume that [the] defendant, by waiving a jury trial on the burglary charge, intended to waive the right to have a jury determine the facts required for imposition of an enhanced dangerous offender sentence").

automatically imposed judicial factfinding and sentencing, we fail to see how Mullens, *who was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right,* can claim error." This sentence appears to confuse the waiver of a right to present mitigating evidence to an advisory jury with the analysis of a waiver of a Sixth Amendment right to binding jury factual findings. These are waivers of two separate rights and the waiver of one cannot be used to infer waiver of the other. This confusing passage further supports the conclusion that the waiver analysis employed in Mullens is legally unsound.

The dispositive issue that this Court avoided in Mullens is whether a defendant's waiver of a statutorily-conferred procedure, i.e., the nonbinding jury recommendation, that does not satisfy the Sixth Amendment, can be construed retroactively to infer waiver of the binding and unanimous jury findings required by the Sixth Amendment. This Court avoids that legal issue by repeatedly misstating the character of what Mullens waived. In Hurst, the Supreme Court said, "The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires." 136 S. Ct. at 622. But that is exactly what this Court did in Mullens.

In the present case, Davis never waived a constitutional right to jury factfinding or any other substantive constitutional right; he vigorously contested all guilt and penalty issues. He retained the right to litigate the penalty issues before the only material factfinder that Florida law recognized: the judge. Davis's waiver of his statutory right to a nonbinding advisory's

jury recommendation was not the waiver of constitutional right to jury factfinding. His waiver of a jury recommendation did not "subvert a right to jury factfinding," as this Court characterized the waiver in Mullens, because Davis was never offered that right.

Davis's waiver of the advisory jury recommendation cannot preclude relief under Hurst because this Court cannot infer either a withdrawal of Davis's Ring motion or waiver of his Sixth Amendment right to jury findings of the facts necessary to impose a sentence of death. Because the capital sentencing scheme in existence at the time that Davis waived the right to the advisory jury provided no Sixth Amendment right for Davis to elect to forego, his waiver of the advisory jury recommendation termed "immaterial" by the U.S. Supreme Court cannot now be transformed retroactively into a waiver of the binding jury findings that Hurst requires.

The Hurst decision requires reversal of Davis's death sentences and remand for Davis to be resentenced under a scheme that offers him an opportunity to avail himself of the Sixth Amendment right to actual jury factfinding. However, because no such scheme is available and resort to the newly-enacted capital sentencing statute will constitute an ex post facto violation, Davis must be resentenced to life, pursuant to the dictates of section 775.082, Fla. Stat. (2014).

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Timothy Freeland at the Office of the Attorney General at Cappapp@myfloridalegal.com, on this 22 day of July, 2016.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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