IN THE SUPREME COURT OF FLORIDA

LEON DAVIS, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC13-1
L.T. No. CF07-009613-XX
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE ADDRESSING HURST V. FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

The record on appeal consists of 162 volumes and citations to the record on appeal will be referred to by the appropriate volume number followed by the page number ("V__/__").

STATEMENT OF THE CASE AND FACTS

The State of Florida relies on the Statement of Case and Facts as set forth in the Initial Brief with the following additions pertinent to the issue on which this Court ordered supplemental briefing.

On May 17, 2012, Davis filed a pretrial "Motion to Declare Florida's Death Penalty Unconstitutional Under Ring v. Arizona" (V25/T4332). The motion was denied on May 21, 2012. (V26/T4437).

On the day jury selection was to commence, September 10, 2012, Davis's counsel informed the court that Davis wished to address an issue. Davis stated, "I told [defense counsel] I want to waive my rights to a jury trial." (V27/T4720). After the court explained to Davis his absolute right to a jury trial defense counsel stated, " . . . Mr. Davis can correct me if I'm wrong. But the bottom line, Mr. Davis has a right to choose to waive a jury trial and to go nonjury trial. That's his absolute right. . . . It is my understanding, based on the way this came out, came about, that Mr. Davis is adamant about exercising his right to a nonjury trial, regardless of any consultation on my part, and does not feel he needs consultation on this issue on

my part, because he's already thought through (sic) and made that decision." (V27/T4723-24). After extensive discussion with Davis, defense counsel, and the assistant state attorneys, the Court found that Davis knowingly, intelligently, and voluntarily waived his right to a guilt-phase jury. (V27/T4724-32).

The case proceeded to a bench trial and on October 4, 2012, Davis was found guilty as charged. (V35/T4; V43/T1536-37). Immediately after announcing his verdict, the court informed Davis that he had "a right to have a trial in the penalty phase by a jury." (V43/T1538). The court afforded Davis an opportunity to consider his options and set the penalty phase to begin on October 9, 2012.

On October 9, 2012, the court addressed Davis's right to a penalty-phase jury. The court stated:

> Mr. Davis, I need to address you once again. You, at the inception of the case, waived your right to a trial in front of a jury, and allowed me to be the tryer (sic) of fact. We're at the stage in the proceeding, it's in essence a bifurcation proceeding. And you have a right to have the trial in front of a jury at this phase of the proceedings. And, um, what a jury would do is hear the evidence and then would make a recommendation to me as the Judge to determine what an appropriate disposition or sentencing would be. A jury's recommendation under the law is given great weight, but it is an opportunity to present evidence to a jury, argue[] to the jury, and have them make a decision as to how they think the Court should proceed. Their determination is done by a vote. It does not need to be unanimous at this stage, but they give a recommendation of a vote, however many of the 12 would vote in favor of one thing or the other. But I'm bringing this to your

> attention because it is your right, your constitutional right to have a trial in front of a jury as to these issues that are going to be considered by me if choose (sic) not to have jury. Do you wish to have a jury hear this evidence, or do you wish to waive the right to a jury trial and proceed with me hearing the evidence.

(V43/T1542-43).

Davis responded "I would like to waive the right." (T43/T1543). The court then conducted a colloquy to ensure that Davis knowingly, intelligently, and voluntarily waived his right to a penalty-phase jury. Finding the waiver was, indeed, knowingly and intelligently entered, the court stated, "Mr. Davis, I'm going to respect your decision." (V43/T1545).

Ultimately, the court sentenced Davis to death finding the State proved the following three aggravators beyond a reasonable doubt: the capital felony was committed by a person previously convicted of a felony; the defendant was previously convicted of another capital felony or a felony involving the use of threat or violence to the person; the capital felony was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit a robbery. (V34/T5997).

SUMMARY OF THE ARGUMENT

Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016) are applicable to cases in which the defendant is deprived of *requested* penalty-phase jury findings. Those cases do not apply to instances in which a defendant not only did not request penalty-phase jury findings, but specifically and explicitly waived a penalty-phase jury all together. Here, Davis waived any and all jury involvement in determining his conviction and his sentence. Having been sentenced to death he now claims that despite this waiver he is entitled to the imposition of a life sentence. As this Court noted in Mullens v. State, 41 Fla. L. Weekly S279 (Fla. June 16, 2016) accepting such an argument would encourage capital defendants to abuse the judicial process by waiving a penalty-phase jury and claiming reversible error when they are judicially sentenced to death. As it did in Mullens, this Court should reject such an argument and should find that Davis waived his right to have a jury determine the facts that qualify him for the death penalty.

ARGUMENT

ISSUE

DAVIS'S KNOWING, INTELLIGENT, AND VOLUNTARY WAIVER OF A PENALTY-PHASE JURY IS NOT RENDERED INVALID DUE TO THE UNITED STATES SUPREME COURT'S SUBSEQUENT DECISION IN HURST V. FLORIDA.

Davis is not entitled to relief based on the United States Supreme Court's opinion in Hurst v. Florida, 136 S. Ct. 616 (2016). In Hurst, the United States Supreme Court found Florida's then-existing statutory procedures for implementing the death penalty was unconstitutional. Specifically, the Court held "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is . . . unconstitutional" because the Sixth Amendment requires that any fact that qualifies a defendant for a sentence of death be found by a jury. Hurst, 136 S. Ct. at 624 citing Ring v. Arizona, 536 U.S. 584 (2002).

Davis waived his constitutional right to a have a jury make the findings of fact necessary to qualify him for the death penalty.

"Legal rights, even constitutional ones, are presumptively waivable." Halbert v. Michigan, 545 U.S. 605, 637 (2005) (Thomas, J., dissenting) citing United States v. Mezzanatto, 513 U.S. 196, 200-01 (1995) (additional citations omitted); See also Boykin v. Alabama, 395 U.S. 238 (1969). Criminal defendants can waive their constitutional rights as long they knowingly, intelligently, and voluntarily do so. Iowa v. Tovar, 541 U.S.

77, 78 (2004). It is enough that an individual understand the waived right "*in general* . . . even though the defendant may not know the *specific detailed* consequences of invoking it." Tovar, 541 U.S. at 92. To escape the consequence of waiving one's constitutional rights there must be affirmative indications that, under the relevant circumstances, the waiver was unknowing or involuntary. Mezzanatto, 513 U.S. 806.

Davis cites to Halbert v. Michigan in support of his proposition that "at the time [he] waived the penalty phase jury, he had no recognized Sixth Amendment right to binding jury findings" that he could elect to forego. (Supp. IB p.4). The decision in Halbert does not reach as far as Davis claims. In Halbert, the Court addressed a Michigan statute that prohibited appointment of counsel to indigent criminal defendants who pleaded guilty or nolo contendere. The Court found that the Due Process and Equal Protection clauses require that indigent defendants who seek a first-tier review of their plea-based convictions are entitled to appointed counsel. Halbert, 545 U.S. at 610, citing Douglas v. California, 372 U.S. 353 (1963).

Davis relies on the Court's rejection of Michigan's waiver argument. The Court stated "at 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 forego." Halbert, 545 U.S. at 623.

In relying on this one sentence of the opinion, Davis fails to recognize a number of distinguishing factors that make Halbert inapplicable to his case. First, the "waiver" asserted in Halbert was, at best, an implicit waiver of appellate counsel that flowed from his plea rather than an explicit waiver of a jury's factual determination regarding aggravators. Second, Halbert was not informed that his plea would result in a *complete denial* of appointed appellate counsel. While there were some circumstances in which Michigan courts *could* appoint counsel, the statute operated in a way that did not provide indigent defendants equal access to the courts. Therefore, the Court concluded, any alleged "waiver" was not knowingly and intelligently given and Halbert was not sufficiently aware of the relevant circumstances surrounding any such waiver.

Moreover, as the dissent in Halbert points out, the Court's cryptic statement implying that rights that are "not recognized" cannot be waived "cannot possibly mean that only rights that have been explicitly and uniformly recognized by statute or case law may be waived." Halbert, 545 U.S. 640 (Thomas, J. dissenting). Instead, defendants can and do waive rights whose existence is unsettled. Id.

It is beyond dispute that whether Florida's statute violated defendants' Sixth Amendment right to a jury trial was "unsettled" when Davis waived his penalty-phase jury. In fact,

Davis himself filed a pretrial motion challenging the statute claiming it violated his Sixth Amendment right to a jury trial. A right he now claims he did not know existed. Davis could have preserved his right to argue the unconstitutionality of Florida's procedure by subjecting himself to it and challenging its validity on appeal. Apprendi/Ring/Hurst claims are available to defendants who are deprived of *requested* penalty-phase jury findings of sufficient aggravators. State v. Piper, 709 N.W. 2d 783, 807 (S.D. 2006), citing Colwell v. State, 59 P. 2d 463 (Nev. 2002); Moore v. State, 771 N.E. 2d 46 (Ind. 2002).

Davis waived *all* jury involvement - constitutionally mandated or not - in determining his penalty. Davis asks this Court to invalidate his voluntary waiver based on the speculation that had he known that the United States Supreme Court in Hurst was going to agree with his pretrial contention *he might have* asked for a penalty-phase jury. The fact that Florida's pre-Hurst statutory scheme did not provide for binding jury findings regarding aggravators is irrelevant to the question of whether capital defendants had a federal constitutional (and waivable) right to binding jury findings prior to the Court's Hurst decision. See Halbert, 545 U.S. at 641.

Furthermore, even guilty pleas, which encompass waivers of the right to a jury trial, the right to confront one's accusers,

and the right to put the government to its burden of proof beyond a reasonable doubt, are valid even if "later judicial decisions indicate that the plea rested on a faulty premise." Brady v. United States, 397 U.S. 742, 757 (1970). In Brady the appellant claimed that the United States Supreme Court's decision in United States v. Jackson, 390 U.S. 570 (1968)[1] rendered his pre-Jackson plea invalid.

The Court disagreed holding that "[t]he fact that Brady did not anticipate *United States v. Jackson* . . . does not impugn the truth or reliability of his plea. We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought or that the maximum penalty then assumed applicable has been held inapplicable in subsequent judicial decisions." Brady, 397 U.S. at 757.

Likewise, even assuming Davis had not anticipated the United States Supreme Court's decision in Hurst that fact does not impact the knowing, intelligent, and voluntary nature of his

[1] Jackson invalidated as unconstitutional a death penalty statute that permitted the death penalty to be imposed *only* upon a jury's recommendation. The Court determined the statute impinged on defendants' Fifth Amendment right to plead not guilty and Sixth Amendment right to a jury trial.

penalty-phase jury waiver. Davis's assertion that his "waiver of a jury's nonbinding recommendation on penalty was not an abandonment or withdrawal of his Ring motion's Sixth Amendment challenge to the constitutionally of the sentencing scheme" (Supp. IB p.3) is contradicted by the foregoing authorities. Davis's explicit waiver of a penalty-phase jury *is* a waiver of his Ring (and Hurst) claim.

Indeed, this Court has already said as much. In Mullens v. State, 41 Fla. L. Weekly S279 (Fla. June 16, 2016), this Court recognized that 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." Mullens, 41 Fla. L. Weekly S279 at *18. This Court observed that the United States Supreme Court has held that criminal defendants are free to waive the right to jury factfinding. Id. citing Blakely v. Washington, 542 U.S. 296, 310 (2004):

> [N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. *See Apprendi*, 530 U.S., at 488, 120 S.Ct. 2348; *Duncan v. Louisiana*, 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

Blakely, 542 U.S. at 310.

Davis is critical of this Court's citation to State ex rel Taylor v. Steele, 341 S.W. 634 (Mo. 2011) and State v. Murdaugh, 97 P.3d 844 (Ariz. 2004) in support of the conclusion in Mullens that a capital defendant can waive penalty-phase jury factfinding. (Supp. IB pp. 7-9). In fact, Davis asserts that Taylor actually supports his contention that he did not waive his right to jury factfinding. Not so. When Taylor entered his initial plea, Missouri's death penalty scheme "intertwined having a jury for the guilt and punishment phases of the trial. As such, [Taylor's] guilty plea foreclosed him from having a jury determine his sentence." Taylor, 341 S.W. 3d at 641 n10. Nonetheless, the court found that Taylor's plea encompassed waivers of jury findings for both the guilt and penalty phases. More importantly, the court found that Taylor was fully aware that his plea waived his right to penalty phase jury findings and that he freely and voluntarily acquiesced to judge-based findings of fact regarding necessary aggravators and the appropriate ultimate sentence.

The fact that Missouri's then-existing statutory death penalty scheme apparently allowed the jury to determine the ultimate sentence, not just the existence of factors necessary to impose the sentence, was not necessary to the court's conclusion that Taylor validly waived his penalty phase jury. In

reviewing the colloquy from Taylor's 1991 plea, the court noted "The . . . testimony illuminates that Taylor willingly declined a *jury's involvement* in his sentencing." Taylor, 341 S.W. at 644. (emphasis added).

Davis's claim that Taylor supports his position stems from the unsupported premise that Hurst requires juries to determine the ultimate sentence, not just the factors that expose the individual to the sentence. However, Hurst plainly does not require *jury sentencing*. Instead, the Supreme Court in Hurst held that Florida's prior capital sentencing scheme was unconstitutional because it "required the judge alone to find the existence of an aggravating circumstance." Hurst, 136 S. Ct. at 624. In fact, Justice Breyer refused to join the majority opinion because it did not require jury sentencing. Id. (Breyer, J., concurring).

Moreover, the Court expressly stated that it was overruling its prior decisions in Spaziano v. Florida, 468 U.S. 447 (1984), and Hildwin v. Florida, 490 U.S. 638 (1989), only "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct. at 624. Spaziano and Hildwin also held that jury sentencing *was not* constitutionally required. Hildwin, 490 U.S. at 638-40; Spaziano, 468 U.S. at 458-65. By only overruling the portions of

Spaziano and Hildwin that allow a judge independently to find an aggravator needed to make a defendant eligible for a death sentence, the Court left intact the portions of those decisions that held that jury sentencing was not constitutionally required.

Additionally, State v. Ward, 118 P. 3d 1122 (Ariz. App. 2005) does not support Davis's contention that he did not and could not waive his right to penalty-phase jury findings of fact. Ward did not address a capital defendant's explicit waiver of a penalty-phase jury. Rather, in Ward the defendant pleaded guilty to kidnapping and theft of a credit card. His sentence was enhanced based on the judge's factual determination that Ward's crimes caused the victim trauma. The court addressed the state's waiver argument finding that Ward's plea did not waive his right to jury-based findings of facts that enhanced his sentence. In doing so, the court stated that "Ward was not advised of, and did not knowingly waive, his right to jury determination of any fact necessary to increase his sentence beyond the presumptive term." Ward, 118 P.3d at 1127.

The court observed that Blakely, itself, was a plea case and had the United States Supreme Court believed that a guilty plea to the charged offense also waived the right to jury determinations of aggravating factors it would have said as much. Instead, the Blakely Court noted that "the State is free

to seek judicial sentence enhancements *so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding*. Blakely, 542 U.S. at 310 (emphasis).

Davis is correct that the Ward court cited numerous cases finding that defendants do not consent to judicial factfinding regarding sentence enhancers merely by entering a guilty plea to the charged offense. Even if that is true, it is irrelevant to the issue before this Court. Davis did not impliedly waive jury findings regarding aggravators by entering a plea, or even by waiving his guilt-phase jury. Instead, he knowingly and intelligently consented to judicial factfinding and willingly declined a jury's involvement in his sentencing.

Finally, Davis misapplies the cited civil cases in support of his proposition that he should be "put back in the position he was when the trial court denied his Ring motion." In the cited cases litigants made procedural and strategic decisions based on good-faith reliance on *favorable* trial court rulings that were later deemed erroneous. See Moody v. Dorsett, 149 So. 3d 1182 (Fla. 2d DCA 2014) ("A party who relied on a favorable trial court ruling should not be placed at risk of being worse off than had the ruling been unfavorable in the first instance" citing John Hancock Mut. Life Ins. Co. v. Zalay, 522 So. 2d 944, 946 (Fla. 2d DCA 1988) quoting Arky, Freed, Stearns, Waston, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp., 527 So.

2d 211, 215 (Fla. 3d DCA 1987) disapproved on other grounds 537 So. 2d 561 (Fla. 1988)).

As noted earlier, Apprendi, Ring, and Hurst are applicable to cases in which the defendant is deprived of *requested* penalty-phase jury findings. Those cases do not apply to instances in which a defendant not only did not request penalty-phase jury findings, but specifically and explicitly waived a penalty-phase jury altogether. Here, Davis waived any and all jury involvement in determining his sentence. Having been sentenced to death he now claims that despite this waiver he is entitled to the imposition of a life sentence. As this Court noted in Mullens accepting such an argument would encourage capital defendants to abuse the judicial process by waiving a penalty-phase jury and claiming reversible error when they are judicially sentenced to death. Mullens, 41 Fla. L. Weekly S279 *20. This Court should find that Davis waived his right to have a jury determine the aggravators necessary for the imposition of a death sentence.

CONCLUSION

WHEREFORE, the State requests that this Honorable Court affirm the judgments and sentences imposed below.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2016, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: **Karen M. Kinney**, Assistant Public Defender, Office of the Public Defender, Post Office Box 9000 - Drawer PD, Bartow, Florida 33831, **appealfilings@pd10.state.fl.us**, **kkinney@pd10.state.fl.us** [and] **mlinton@pd10.state.fl.us**.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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