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 REPLY BRIEF OF APPELLANT REGARDING THE APPLICATION OF HURST V. FLORIDA

HOWARD L. "REX" DIMMIG,II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

KAREN M. KINNEY
Assistant Public Defender
FLORIDA BAR NUMBER 0856932

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

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.

The State dances around the binding precedent of the U.S. Supreme Court's opinion in Halbert v. Michigan, 545 U.S. 605 (2005), and bases its argument on Justice Thomas' dissent in that case. This Court should not be persuaded to adopt the losing argument set out in the Halbert dissent. Justice Thomas opines in part III of his dissenting opinion that "Halbert's waiver was knowing and intelligent." 545 U.S. at 637. Justice Thomas continues in part III to explain why the majority is wrong to hold that Halbert could not waive a right that the state did not recognize.

Justice Thomas explains in his Halbert dissent that whether the state law provided the right at issue is irrelevant to whether the defendant had waived the independent federal constitutional right at issue:

> At issue here is whether Halbert waived any federal constitutional right to appointed appellate counsel he might have enjoyed. Whether Michigan law provides for such counsel says nothing about whether a defendant possesses (and hence can waive) a federal constitutional right to that effect. That Michigan, as a matter of state law, prohibited Halbert from receiving appointed appellate counsel if he pleaded guilty or no contest is irrelevant to whether Halbert had (and could waive) an independent federal constitutional right to such counsel.

Halbert, 545 U.S. at 640 (Thomas, J., dissenting).

The State's discussion of "unsettled" rights in its Supple-

mental Answer Brief at p.7 comes from Justice Thomas's Halbert dissent, and that argument is also foreclosed by the majority opinion:

> Assuming, as Justice THOMAS suggests, that whether Michigan law conferred on Halbert a postplea right to appointed appellate counsel is irrelevant to whether Halbert waived a federal constitutional right to such counsel, *post,* at 2603–2604, the remainder of the dissent's argument slips from our grasp, see *post,* at 2604. No conditional waiver—"on[e] in which a defendant agrees that, if he has ... a right, he waives it," *ibid.*—is at issue here. Further, nothing in Halbert's plea colloquy indicates that he waived an "unsettled," but assumed, right to the assistance of appointed appellate counsel, postplea. *Ibid.*

Halbert, 545 U.S. at 641 n.7.

The Halbert majority opinion resolves the waiver issue in this case with regard to Davis's Sixth Amendment right to a binding penalty jury verdict. This Court's wrongly decided opinion on waiver in Mullens v. State, 41 Fla. L. Weekly S279 (Fla. June 16, 2016), follows the same line of reasoning that Justice Thomas conveys in his dissent, although in Mullens this Court does not seem to recognize that the waiver issue is itself a federal constitutional issue (or if it does recognize that, this Court's reliance on various state cases does not make such recognition apparent).

Nothing in Davis's penalty-phase waiver colloquy indicates that he relinquished the claims he argued in his Ring motion. The State prosecuted Davis under an unconstitutional capital sentencing scheme. Davis unsuccessfully objected to the State's use of the unconstitutional statute. He later waived his right to an immaterial nonbinding jury recommendation and proceeded before the only decisionmaker and factfinder that Florida law recognized: the judge. Having denied Davis an opportunity to exercise his Sixth

Amendment right to trial by jury that the U.S. Supreme Court previously recognized in Ring v. Arizona, 536 U.S. 584 (2002), the State cannot now transform Davis's waiver of an immaterial and nonbinding jury recommendation into relinquishment of the very constitutional rights that the State purposefully denied him. (Note the trial court's emphasis on the jury's nonbinding "recommendation" in the colloquy.) This court should follow Halbert and reject the State's waiver argument. Because Davis preserved the Sixth Amendment Ring claim that has now been vindicated by Hurst v. Florida, 136 S.Ct. 616 (2016), and his direct appeal remains pending, this Court must reverse the death sentences.

CERTIFICATE OF SERVICE

I certify that a copy has been served via the e-portal on Marilyn Muir Beccue at the Office of the Attorney General at Cappapp@myfloridalegal.com, on this 9th day of August, 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,

Karen M. Kinney
/S/KAREN M. KINNEY
Assistant Public Defender
Florida Bar Number 856932
P. O. Box 9000 - Drawer PD
Bartow, FL 33831
appealfilings@pd10.org
kkinney@pd10.org
mjudino@pd10.org

HOWARD L. "REX" DIMMIG,II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

kmk