

In the Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v.

CASE NO. SC17-1229

STATE OF FLORIDA,

Appellee.

_____ /

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, JEFFREY GLENN HUTCHINSON, the defendant in the trial court, will be referred to as appellant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

Hutchinson murdered his live-in girlfriend, Renee Flaherty, and her three young children: Logan, Amanda, and Geoffrey. *Hutchinson v. State*, 882 So.2d 943, 948-49 (Fla. 2004). The jury convicted him of four counts of first-degree murder with a firearm. *Id.* at 948. Hutchinson waived his right to a penalty phase jury but presented mitigation to the trial judge at the bench penalty phase. *Id.* On January 21, 2001, the trial court conducted a colloquy, found the waiver voluntary, and excused the jury. *Id.* at 949. He was sentenced to life imprisonment for the murder of Renee Flaherty and to death for the murder of each of the three children. *Id.* The trial court found two aggravating circumstances for the murders of Logan and Amanda: 1) previously convicted of another capital felony for the murders of the other children and 2) the victim was less than 12 years of age, but found three aggravating circumstances for the murder of Geoffrey Flaherty: 1) previously convicted of another capital felony for the murders of the other

children; 2) the victim was less than 12 years of age; and 3) heinous, atrocious, or cruel (HAC).

On appeal to the Florida Supreme Court, Hutchinson raised 10 issues. *Hutchinson*, 882 So.2d at 949-50. The Florida Supreme Court affirmed the four convictions of first-degree murder and affirmed the three death sentences for the murders of the three children. *Id.* at 961.

In October of 2005, Hutchinson filed a 3.851 motion for postconviction relief in state trial court. *Hutchinson v. State*, 17 So.3d 696, 699 (Fla. 2009). A second amended postconviction motion was filed after Hutchinson's original postconviction counsel withdrew and the trial court appointed new postconviction counsel. *Id.* at 699. Following an evidentiary hearing on some of the claims, the trial court denied the motion for postconviction relief. *State v. Hutchinson*, 2008 WL 8948638 (Fla. Cir. Ct. Jan. 3, 2008).

In his postconviction appeal to the Florida Supreme Court, Hutchinson raised three issues. *Hutchinson v. State*, 17 So.3d 696, 700 (Fla. 2009). The Florida Supreme Court affirmed the denial of postconviction relief. *Id.* at 704.

On July 24, 2009, Hutchinson filed a *pro se* federal habeas petition in district court. (Doc. #1). On November 23, 2009, habeas counsel Todd Doss, filed an amended habeas petition. (Doc. #19). The amended petition raised five grounds. On December 13, 2009, Respondents filed a motion to dismiss the petition as untimely. The district court granted the motion and dismissed the amended petition as untimely. *Hutchinson v. Florida*, 2010 WL 3833921 (N.D. Fla. Sept. 28, 2010).

The Eleventh Circuit affirmed the dismissal of Hutchinson's original habeas petition as being untimely, finding that equitable tolling did not apply. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012). Hutchinson then filed a petition for writ of certiorari in the United States Supreme Court raising three issues related

to equitable tolling. On October 9, 2012, the United States Supreme Court denied the petition. *Hutchinson v. Florida*, 568 U.S. 947 (2012) (No. 12-5582).

In 2014, Hutchinson filed a *pro se* rule 60(b) motion to reopen his capital federal habeas case based on *Martinez v. Ryan*, 566 U.S. 1 (2012). The federal district court then appointed the capital habeas unit (CHU) as federal habeas counsel of record. The 60(b)(6) motion is still pending in federal court and is being stayed pending the outcome of this appeal. (Doc. #70).

On January 11, 2017, Hutchinson, represented by registry counsel Clyde M. Taylor and Billy Nolas of the Capital Habeas Unit (CHU) of the Federal Defender's Office, filed a successive 3.851 motion for postconviction relief in this capital case raising a claim based on *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*), in the state court. (Succ. PC at 46-66). On January 27, 2017, the State filed an answer to the successive motion asserting the motion should be summarily denied because Hutchinson waived any right to *Hurst* relief by waiving his penalty phase jury. (Succ. PC at 67-81). On March 29, 2017, Hutchinson filed a reply. (Succ. PC at 115-138). On May 10, 2017, the trial court held a case management conference on the successive motion. (Succ. PC at 140-157). On May 30, 2017, the trial court summarily denied the successive motion. (Succ. PC at 158-174).

This appeal follows.

SUMMARY OF ARGUMENT

Hutchinson asserts that his death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). But he waived any right to *Hurst* relief by waiving his penalty phase jury. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). In this Court's words, a defendant may not "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." *Mullens*, 197 So.3d at 40. The *Hurst* claim was waived.

Contrary to opposing counsel's attack on the validity of the waiver, subsequent changes in the law do not render prior waivers invalid. As the United States Supreme Court has explained, a defendant who waives a proceeding or right does so under the current law. And those waivers remain valid regardless of later developments in the law. So, the waiver of the penalty phase jury remains valid in the wake of *Hurst*. The trial court properly summarily denied the successive postconviction motion based on the waiver and this Court's precedent.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT PROPERLY SUMMARILY DENIED THE SUCCESSIVE 3.851 MOTION RAISING A SIXTH AMENDMENT RIGHT TO A JURY TRIAL CLAIM BASED ON *HURST V. FLORIDA*, 136 S.CT. 616 (2016), AND *HURST V. STATE*, 202 SO.3D 40 (FLA. 2016), IN A CASE INVOLVING A WAIVER OF THE PENALTY PHASE JURY? (Restated)

Hutchinson asserts that his death sentence violates *Hurst v. Florida*, 136 S.Ct. 616 (2016) (*Hurst v. Florida*), and *Hurst v. State*, 202 So.3d 40 (Fla. 2016) (*Hurst II*). But Hutchinson waived any right to *Hurst* relief by waiving his right to a jury at the penalty phase. Under this Court's precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief. *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016). In this Court's words, a defendant may not "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." *Mullens*, 197 So.3d at 40. Contrary to opposing counsel's attack on the validity of the waivers, subsequent changes in the law do not render prior waivers invalid. A waiver remains valid regardless of later developments in the law. The trial court properly summarily denied the successive postconviction motion based on the waiver and this Court's precedent.

Standard of review

The standard of review for a summary denial of a postconviction motion is *de novo*. Because a trial court's decision to summarily deny a postconviction motion is "ultimately based on written materials before the court, its ruling is tantamount to a pure question of law, subject to *de novo* review." *Barnes v. State*, 124 So.3d 904, 911 (Fla. 2013) (citing *Seibert v. State*, 64 So.3d 67, 75 (Fla. 2010)). Furthermore, the scope of a waiver is a question of law and questions of law are reviewed *de novo*. *United States v. Adams*, 814 F.3d 178, 182 (4th Cir. 2016)

(stating that the validity and scope of appellate waivers are reviewed *de novo*). The standard of review, therefore, is *de novo*.

The postconviction court's ruling

On January 11, 2017, Hutchinson file a 3.851 successive postconviction motion raising a claim based on *Hurst v. Florida* and *Hurst II* in the state trial court. (Succ. PC at 46-66). On January 27, 2017, the State filed an answer to the successive *Hurst* postconviction motion asserting that the successive motion should be summarily denied because Hutchinson waived any right to *Hurst* relief by waiving his penalty phase jury. (Succ. PC at 67-81). The State cited *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), and *Wright v. State*, 213 So.3d 881, 903 (Fla. 2017), in support of its argument. (Succ. PC at 74-75). On March 29, 2017, Hutchinson filed a reply arguing that the waiver was not knowing, intelligent, and voluntary due to ineffectiveness of counsel in advising him to waive the jury at the penalty phase. (Succ. PC at 115-138). Hutchinson relied on an affidavit from penalty phase counsel, Kimberly Ward, claiming her advice to waive the penalty phase was based on the law at the time. (Succ. PC at 131-134).

On May 10, 2017, the trial court held a case management conference on the successive motion at which the Court heard the arguments of counsel regarding the *Hurst* motion. (Succ. PC at 140-157). Billy Nolas of the CHU presented the argument for Hutchinson. (Succ. PC at 141). The State emphasized the waiver of the penalty phase jury during its presentation. (Succ. PC at 147-148). The State also noted, that in a waiver case, a court cannot perform a harmless error analysis on the *Hurst* error because there was no jury recommendation. (Succ. PC at 148-149).

On May 30, 2017, the trial court summarily denied the *Hurst* claim based on the waiver. (Succ. PC at 158-174). The trial court noted that Hutchinson had

waived his penalty phase jury attaching the waiver colloquy at trial to its order. (Succ. PC at 160 citing Exhibit A of the trial transcript including page 2313-2316). The trial court cited and quoted *Mullens* and *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016), in support of its ruling that a defendant who waives a penalty phase jury is not entitled to *Hurst* relief. (Succ. PC at 160). The trial court found that the “Defendant is not entitled to *Hurst* relief.” (Succ. PC at 161). Alternatively, the trial court rejected any ineffectiveness claim for penalty phase counsel advising Hutchinson to waive the penalty phase jury because counsel is not ineffective for failing to anticipate changes in the law, such as *Hurst*. (Succ. PC at 161 citing *Walton v. State*, 847 So.2d 438, 445 (Fla. 2003)).¹ The trial court summarily denied the successive motion. (Succ. PC at 161).

Merits

Hutchinson waived his *Hurst* claim by waiving his right to a penalty phase jury. At the penalty phase, Hutchinson waived the jury. *Hutchinson*, 882 So.2d at 948. Under this Court’s precedent, a defendant who waives his right to a penalty phase jury is not entitled to any *Hurst* relief.

¹ The trial court accurately characterized the claim that penalty phase counsel should not have advised Hutchinson to waive the penalty phase jury as a claim of ineffective assistance of counsel, opposing counsel’s protests to the contrary notwithstanding. This Court has never remanded a *Hurst* claim for factual development at an evidentiary hearing in any of the dozens of such cases where the issue was raised despite repeated invitations by the defense bar to do so. Nor has this Court remanded cases raising *Hurst* claims involving waivers for evidentiary hearings and certainly did not do so in *Covington v. State*, 2017 WL 3764377, *14 (Fla. Aug. 31, 2017) (No. SC15-1252). The interaction between *Hurst* and *Mullens* is a pure issue of law that does not require any factual development.

Waiver of the right to a penalty phase jury

In *Mullens v. State*, 197 So.3d 16, 38-40 (Fla. 2016), the Florida Supreme Court rejected a *Hurst* claim in a case where the defendant had waived his penalty phase jury. Mullens pleaded guilty to two counts of first-degree murder and one count of attempted first-degree murder and waived his right to a penalty phase jury. The Florida Supreme Court observed that, regardless of the exact scope and nature of the rights established in *Hurst v. Florida*, the defendant was entitled to no relief because he waived the penalty phase jury. *Mullens*, 197 So.3d at 38. The Florida Supreme 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)). The Florida Supreme Court observed that “accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. *Id.* at 40. The Florida Supreme 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. The Florida Supreme Court denied any *Hurst* relief. *See also Covington v. State*, 2017 WL 3764377, *14 (Fla. Aug. 31, 2017) (No. SC15-1252) (stating that a defendant “who has waived the right to a penalty phase jury is not entitled to relief under *Hurst*” citing *Mullens*); *Wright v. State*, 213 So.3d 881, 903 (Fla. 2017) (rejecting a *Hurst* claim because the defendant waived his penalty phase jury citing *Mullens*); *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016) (rejecting a *Hurst*

claim in the postconviction context due to defendant's waiver of his right to a penalty phase jury citing and quoting *Mullens*).

Opposing counsel is ignoring this Court's statement in *Mullens* that a defendant "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." *Mullens*, 197 So.3d at 40. It is this logic that is at the core of this Court's decision in *Mullens* and it is this logic that opposing counsel does not address in his brief.

A defendant who waives a jury trial has waived his Sixth Amendment right to a jury trial, which is the basis for *Hurst v. Florida* and *Hurst II* in the first place. Cf. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (noting that sentencing a defendant based on facts that the defendant assented to during the plea colloquy does not violate *Apprendi*). This claim is akin to a defendant insisting on a bench trial after a waiver colloquy and then asserting on appeal that the bench trial violated his right to a jury trial. A defendant may not waive a penalty phase jury and then insist on his rights to jury findings.

Furthermore, due to the waiver, this Court cannot conduct a harmless error analysis. Under this Court's current precedent, this Court looks to whether the jury's final recommendation of death was unanimous to determine if the *Hurst* error is harmless. *Davis v. State*, 207 So.3d 142 (Fla. 2016). But, in a case where the defendant has waived a penalty phase jury, obviously, there is no jury vote. This Court cannot conduct its standard harmless error analysis in this case and that inability is due to the defendant's own conduct of waiving the penalty phase jury. The result of adopting opposing counsel's position would be that a defendant who waived the penalty phase jury would automatically obtain *Hurst* relief without any harmless error review. IB at 15. Such a defendant would be in

a better position than a defendant who did not waive his jury but whose jury recommended death.

Hutchinson's claim that he is entitled to *Hurst* relief regardless of his waiver of the penalty phase jury is contrary to this Court's controlling precedent. *Mullens* controls and mandates denial of this claim.

Validity of the waiver

Hutchinson's waiver of the penalty phase jury was knowing, intelligent, and voluntary. Under the pre-*Hurst* law, a jury's recommendation was not some sort of empty formality. It was nearly impossible for a trial judge to override a jury's recommendation of life under *Tedder v. State*, 322 So.2d 908 (Fla. 1975). As the Eleventh Circuit observed, this Court's "stringent application" of the *Tedder* standard meant that the last override affirmed on appeal was over 20 years ago. *Evans v. Sec'y, Fla. Dept. of Corr.*, 699 F.3d 1249, 1258 (11th Cir. 2012). But a trial court could, as a practical matter, totally ignore a jury's recommendation of death because the State could not appeal such a ruling under double jeopardy principles.² The law in Florida at the time of Hutchinson's waiver in 2001 was well established — a jury recommendation mattered a great deal. And all this was true even before *Ring* was decided in 2002, much less before *Hurst* was decided

² *Williams v. State*, 595 So.2d 936 (Fla. 1992) (holding that the Double Jeopardy Clause prohibits a new penalty phase where the judge had imposed a life sentence at the first penalty phase citing *Brown v. State*, 521 So.2d 110 (Fla. 1988)); *Arizona v. Rumsey*, 467 U.S. 203 (1984) (concluding that the Double Jeopardy Clause barred a new penalty phase where trial judge had found no aggravating circumstances and sentenced the defendant to life at the first penalty phase because a life sentence constitutes an "acquittal of the death penalty"); *State v. Ballard*, 956 So.2d 470, 475 (Fla. 2d DCA 2007) (Villanti, J., concurring) (noting that it is only a judge's decision to override a jury's recommendation of life that is appealable; conversely, a decision to override a jury's recommendation of death is not appealable).

in 2016. Hutchinson waived his right to a penalty phase jury despite the clear importance of the jury's recommendation in Florida's capital jurisprudence at the time of his waiver.

Waivers and subsequent changes in the law

Opposing counsel asserts that the waiver of the jury trial in this case was involuntary because Hutchinson could not have anticipated the change in the law that *Hurst* wrought. Opposing counsel is actually making the same arguments that this Court rejected in *Mullens* and *Covington*. Indeed, Covington in his reply brief cited to, and relied heavily, on *Halbert v. Michigan*, 545 U.S. 605 (2005), just as opposing counsel does in this case. See *Covington*, SC15-1252, RB at 26. And Covington distinguished the other state cases relied on by this Court in *Mullens* in his reply brief as well, just as opposing counsel does in his brief. *Covington*, SC15-1252, RB at 26-31.

Not only did this Court reject this argument but the United States Supreme Court has rejected it as well. The United States Supreme Court has held that pleas are not rendered involuntary due to later changes in the law. *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970). Richardson argued his plea was involuntary when a new decision regarding coerced confessions was issued by the United States Supreme Court. Richardson argued that he could now challenge his confession under the new decision instead of having to plead guilty. The United States Supreme Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary. The Supreme Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Richardson*, 397 U.S. at 774. The High Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided cases been the law at the time of the plea, "he is bound by his plea." *Id.* The Court

noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis for claiming a plea was involuntary. *See also Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not 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) (stating that the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor including a defendant’s failure “to anticipate a change in the law regarding relevant punishments”).

The federal appellate courts have followed the logic of *Richardson* regarding pleas.³ As the Seventh Circuit explained, if the law allowed the defendant to get off scot free in the event the argument later is shown to be a winner, then every plea would become a conditional plea, with the (unstated) condition that the defendant obtains the benefit of favorable legal developments, while the prosecutor is stuck with the original bargain no matter what happens later. *Young v. United States*, 124 F.3d 794, 798 (7th Cir. 1997). And the reasoning of the *Richardson* Court applies to all types of waivers, not merely pleas, which are really a type of

³ *United States v. Lockett*, 406 F.3d 207, 214 (3rd Cir. 2005) (observing that “the possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea”); *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005) (stating the possibility of a favorable change in the law occurring after a plea agreement is “one of the normal risks that accompanies a guilty plea”).

waiver — the waiver of a jury trial. Several federal circuits have followed the logic of *Richardson* regarding appellate waivers including the Eleventh Circuit.⁴

The same rationale expressed by the United States Supreme Court in *Richardson*, *Brady*, and *Ruiz* applies to Hutchinson’s waiver of a jury trial as well. He was not required to foresee *Hurst* for his waiver of the penalty phase jury to be valid. The validity of a waiver is not dependent on subsequent changes in the law.⁵

Opposing counsel mistakenly asserts that the holding of *Halbert v. Michigan*, 545 U.S. 605 (2005), was a defendant cannot waive a right that has not yet been

⁴ *United States v. Vela*, 740 F.3d 1150 (7th Cir. 2014) (holding a defendant’s waiver of his right to appeal was not rendered involuntary by subsequent Supreme Court ruling citing *Brady* and *Richardson*); *United States v. Copeland*, 707 F.3d 522, 529 (4th Cir. 2013) (stating that a criminal defendant “cannot invalidate his appeal waiver now to claim the benefit of subsequently issued caselaw”); *United States v. Grinard-Henry*, 399 F.3d 1294, 1295 (11th Cir. 2005) (refusing to reconsider the dismissal of an appeal based on an appellate waiver in a plea in light of a later decision being issued in *United States v. Booker*, 543 U.S. 220 (2005)); *United States v. Green*, 405 F.3d 1180, 1190 (10th Cir. 2005) (rejecting a claim that an appellate waiver was involuntary because the Supreme Court has made it clear that a defendant’s decision to give up some of his rights “remains voluntary and intelligent or knowing despite subsequent developments in the law” citing *Brady* and *Ruiz*).

⁵ Nor is it even likely that Hutchinson actually relied on pre-*Hurst* law as a basis of his decision to waive a penalty phase jury. It is much more likely that the desire to keep a jury from hearing in greater detail the gruesome facts of the crime which included killing three young children with a Mossberg pump shotgun which literally tore them apart was the basis of the decision to waive a penalty phase jury rather than any real reliance on *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002). Even if this Court was willing to entertain a claim that subsequent developments rendered a prior waiver involuntary, contrary to United States Supreme Court precedent, the Court should not do so automatically but only in those rare cases where the particular caselaw that changed was actually a critical part of the decision to waive. Opposing counsel makes no real argument attempting to show why he believes that *Bottoson* was a critical part of the decision to waive in this particular case.

recognized by the Courts. IB at 20. But that was not the holding of *Halbert*. The Court in *Halbert* held that the Equal Protection and Due Process clauses required the appointment of counsel for defendants seeking first-tier review of a conviction based on a plea or *nolo contendere*. The State of Michigan did contend that Halbert had waived the newly-created right to appellate counsel by entering a plea of *nolo contendere* and the Court rejected that waiver argument. *Id.* at 623. The *Halbert* Court observed, at the time he entered his plea, Halbert “had no recognized right to appointed appellate counsel he could elect to forgo.” *Id.* In a footnote to that observation, the Supreme Court stated that a “conditional waiver,” which it defined, as one in which a defendant agrees that, if he has a right, he waives it was not at issue in the case because nothing in the plea colloquy indicated that Halbert waived an “unsettled” right to appellate counsel. *Id.* at n.7. The Court noted that the trial court, during the plea colloquy, did not tell Halbert, simply and directly, that there would be no access to appointed counsel. *Id.* at 624. The Court wrote that a waiver must be a “knowing, intelligent act done with sufficient awareness of the relevant circumstances.” *Id.* (quoting *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), and citing *Brady v. United States*, 397 U.S. 742, 748 (1970)).

The *Halbert* Court did not overrule *Richardson*, *Brady*, or *Ruiz*. Moreover, the waiver logic of *Halbert* does not apply to this case. *Halbert* involved a totally unknown right. The right to a jury at the penalty phase in Florida was not unknown at the time of the waiver. There was no doubt that a capital defendant in 2001 was entitled to a jury at the penalty phase under the explicit text of Florida’s death penalty statute. While *Hurst v. Florida* and *Hurst II* expanded those rights, the right to a jury existed prior to either decision. While the full extent of the constitutional right was unsettled prior to *Hurst*, the existence of that right was not. The law in Florida at the time of Hutchinson’s waiver in 2001 regarding

the right to a jury at penalty phase was well established. Hutchinson knew that he had a right to a jury trial at the penalty phase but he waived that known right.

Opposing counsel's reliance on *United States v. Saac*, 632 F.3d 1203, 1208 (11th Cir. 2011), and *United States v. Palacios-Casquete*, 55 F.3d 557, 561 (11th Cir. 1995), is equally misplaced. The Eleventh Circuit in *Saac* stated that "a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted" citing *Palacios-Casquete*, and *Haynes v. United States*, 390 U.S. 85, 87 & n.2 (1968). *Saac*, 632 F.3d at 1208. But this simply is not the Eleventh Circuit's position regarding whether waivers are rendered involuntary due to subsequent changes in the law. Regarding that issue, which is the real issue in this case, the Eleventh Circuit, not surprisingly, follows the United States Supreme Court's decisions in *Richardson*, *Brady*, and *Ruiz*.⁶ Opposing counsel is mischaracterizing the issue and then citing caselaw that is totally inapplicable to the real issue in this case.

A defendant may not claim a waiver is "unknowing" based on future changes in the law under both Florida Supreme Court and United States Supreme Court precedent. Voluntariness of the waiver is determined under the law and knowledge that exists at the time. The waiver was not rendered involuntary due to the subsequent decision in *Hurst*. Hutchinson is not entitled to any *Hurst* relief due to his waiver.

⁶ *United States v. Cardenas*, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (stating "a guilty plea is not invalidated by a later change in the law" citing *United States v. Sanchez*, 269 F.3d 1250, 1283-85 (11th Cir. 2001) (en banc) (applying *Brady* to reject argument that defendants' guilty pleas had been rendered involuntary and unknowing in the light of the later decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *United States v. Grinard-Henry*, 399 F.3d 1294, 1295 (11th Cir. 2005) (refusing to reconsider the dismissal of an appeal based on an appellate waiver in a plea in light of a later decision being issued in *United States v. Booker*, 543 U.S. 220 (2005)).

Accordingly, the trial court properly summarily denied the successive postconviction motion.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the trial court's summary denial of the successive postconviction motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by e-portal to CLYDE M. TAYLOR, JR. of Taylor & Taylor, LLC, 2303 N. Ponce De Leon Blvd., Suite L, St. Augustine, FL 32084; Phone (904) 687-1630; email ct@taylor-taylor-law.com and BILLY H. NOLAS, Chief, Capital Habeas Unit, Office of the Federal Public Defender, Northern District of Florida, 227 N. Bronough St., Ste. 4200, Tallahassee, FL 32301-1300; phone: (850) 942-8818; email: billy_nolas@fd.org this 14th day of September, 2017.

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CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Bookman Old Style 12 point font.

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