No. SC17-1229

IN THE

Supreme Court of Florida

JEFFREY GLENN HUTCHINSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLANT'S REPLY BRIEF

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RENEWED REQUESTS FOR FULL BRIEFING AND ORAL ARGUMENT

Appellant respectfully renews his requests to allow oral argument pursuant to Fla. R. App. P. 9.320, and for the opportunity to file a full, untruncated brief pursuant to the standard Florida Rules of Appellate Procedure. This appeal presents important issues of first impression regarding the need for evidentiary development where, unlike in *Mullens* and this Court's other "jury waiver" *Hurst* cases, the defendant proffers evidence in the circuit court indicating that his waiver of a penalty-phase jury is invalid because the waiver was the direct result of the unconstitutional pre-*Hurst* sentencing statute's influence on counsel's advice to waive. These issues are more complex than the State's brief suggests and warrant full briefing and argument.

ARGUMENT[1]

I. The State fails to address Appellant's argument that a remand is appropriate for a hearing based on his challenge to the validity of his waiver and evidentiary proffer in the circuit court

The State's brief fails to address Appellant's argument that a remand is appropriate for a hearing based on his challenge to the validity of his waiver and evidentiary proffer in the circuit court. The State acknowledges that Appellant proffered a declaration from trial counsel in the circuit court indicating that Appellant's decision to waive an "advisory" penalty-phase jury was based solely on

[1] The State is correct that the correct standard of review is de novo. *See* Answer Br. at 5-6. The circuit court's order denying relief is entitled to no appellate deference.

trial counsel's advice, and that trial counsel's advice was grounded entirely on Florida's pre-*Hurst* unconstitutional sentencing scheme. *See* Answer Br. at 6. But the State fails to recognize the significance of this proffer as creating a mixed question of law and fact that should trigger an evidentiary hearing under this Court's precedent. Brushing aside the arguments spanning the bulk of Appellant's initial brief in a single paragraph, the State mischaracterizes the issue of Appellant's waiver in the *Hurst* context as a "pure question of law that does not require any factual development." Answer Br. at 7 n.1. The State ignores the cases Appellant cited in his initial brief, including *Meeks v. Dugger*, 576 So. 2d 713, 716 (Fla. 1991), and *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989), establishing the opposite. Those cases make clear that a hearing should be held when evidence is proffered regarding the effect of an unconstitutional death-sentencing law on defense counsel. Initial Br. at 12-15. And the State's own brief highlights the need for factual development in this case by disputing facts in Appellant's evidentiary proffer concerning the reason he waived. *See* Answer Br. at 13 n.5 (speculating that, in contrast to the declarations Appellant proffered in the circuit court, it is not "likely that Hutchinson relied on pre-*Hurst* law as a basis of his decision to waive a penalty phase jury.").[2]

[2] The State elsewhere continues to mischaracterize Appellant's *Hurst* claim as a claim of ineffective assistance of counsel. *See id.* As explained in Appellant's initial brief, he is not arguing a claim that counsel was ineffective, but instead that counsel's advice to Appellant to waive a penalty jury would not have occurred in a

The only case the State cites in support of its assertion that this case "does not require any factual development" is this Court's recent opinion in *Covington v. State*, No. SC15-1252, 2017 WL 3764377 (Fla. Aug. 31, 2017). But *Covington* is inapposite because, unlike Appellant, the defendant in that case did not challenge the validity of his waiver based on an evidentiary proffer in the circuit court. In fact, the defendant in *Covington* could not have sought such evidentiary development because *Covington*, like *Mullens*, is a direct appeal case. As the *Covington* defendant noted in his initial brief, challenges to a waiver of a penalty-phase jury "should be fleshed out in a post-conviction motion." *See id.*, Initial Brief of Appellant at 101 & n.25 (filed June 27, 2016). Here, unlike in *Convington*, Appellant sought evidentiary development in a Rule 3.851 proceeding and proffered evidence in support of his request for a hearing. For the reasons discussed in Appellant's initial brief, which are largely unaddressed by the State, this Court should remand for a hearing.

II. The State misunderstands *Mullens*, which only precludes *Hurst* relief based on valid or unchallenged jury waivers and does not address waivers, like Appellant's, that are challenged as invalid based on a substantial evidentiary proffer

The State misunderstands *Mullens* as requiring summary denial of *Hurst* relief in all cases in which the defendant waived a penalty-phase jury, regardless of whether the waiver is challenged as invalid based on a substantial evidentiary

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constitutional proceeding where a single juror, as opposed to a majority of jurors, needed to be persuaded to recommend a life sentence. *See* Initial Br. at 14 n.6.

proffer. *See* Answer Br. at 4-5, 8. On the contrary, nothing in *Mullens* or this Court's other "jury waiver" cases suggests that a circuit court should ignore a defendant's evidentiary proffer challenging the validity of his waiver to preclude *Hurst* relief.

As explained in Appellant's brief, the facts of *Mullens* are not present in this case. Mr. Mullens did not, as Appellant did, accept counsel's advice to forego at the penalty phase the same jury that had convicted him at the guilt phase. Mr. Mullens did not, as Appellant did, challenge the validity of his jury waiver in his *Hurst* litigation, based on either the voluntariness of the waiver itself or the detrimental effect of the unconstitutional statute on counsel's advice to waive. Mr. Mullins did not, as Appellant did, allege that his wavier was invalid, that he waived a penalty jury based on the advice of counsel, that counsel's advice was grounded entirely on pre-*Hurst* law, or that he would not have waived in a post-*Hurst* proceeding. And Mr. Mullins did not, as Appellant did, request an evidentiary hearing or proffer evidence undermining the validity of his waiver. This Court evaluated whether Mr. Mullens's waiver was valid to bar *Hurst* relief without considering arguments or evidence regarding the validity of the waiver itself.

Appellant's case was tried before a jury at the guilt phase and, based solely on counsel's advice, Appellant waived presenting his penalty-phase case to that same jury. In his *Hurst* claim, unlike in *Mullens*, Appellant challenged the validity of the waiver, requested a hearing on the validity of the waiver as a basis to deny

Hurst relief, and proffered evidence that he would develop at a hearing to establish that the waiver is invalid as a bar to relief. Those circumstances were not present in *Mullens* or in any of the other cases cited in the State's brief, including *Wright v. State*, 213 So. 3d 881 (Fla. 2017) (no evidence proffered undermining the validity of the jury-waiver to preclude *Hurst* relief); *Covington*, 2017 WL 3764377, at *14 (same); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016) (same). Appellant is not "ignoring" the ruling in *Mullens*, as the State asserts. *See* Answer Br. at 9. The State is overextending *Mullens* by applying it to Appellant's distinguishable case.

The State's concern that distinguishing Appellant's case from *Mullens* would encourage capital defendants to "abuse the judicial process" is unfounded. Answer Br. at 8. Indeed, Appellant's challenge to the validity of his pre-*Hurst* jury waiver and his request for an evidentiary hearing are entirely consistent with this Court's decisions following *Hitchcock v. Dugger*, 481 U.S. 393 (1987). As noted above, in cases such as *Meeks*, 576 So. 2d at 716, and *Hall*, 541 So. 2d at 1128, this Court approved of evidentiary hearings based on the defendants' extra-record proffer concerning the effect of the constitutional error on defense counsel.

III. The State does not recognize that Appellant waived only his pre-*Hurst* right to a generalized, majority-vote jury recommendation, not his post-*Hurst* right to binding, unanimous jury fact-finding

The State's brief does not recognize that Appellant's waived only his pre-*Hurst* right to a generalized, majority-vote jury recommendation, not his post-*Hurst*

right to binding, unanimous jury fact-finding that is consistent with the Sixth Amendment. The State wrongly asserts that Appellant "waive[d] his Sixth Amendment right to a jury trial, which is the basis for *Hurst v. Florida* and *Hurst II* in the first place." Answer Br. at 9. In fact, Appellant's pre-*Hurst* jury waiver did not constitute *any* surrender of his Sixth Amendment rights because Florida's pre-*Hurst* scheme did not allocate fact-finding to juries. A pre-*Hurst* jury recommendation, which is the only right Appellant could have waived at the time, was not grounded in the beyond-a-reasonable-doubt standard and therefore does not comport with the Sixth Amendment's definition of a jury verdict. *See Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993). This reveals the fallacy of the State's analogy 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." Answer Br. at 9. That analogy would only make sense here if the right to jury fact-finding *at the guilt phase* was not recognized at the time the defendant opted for a bench trial.

The State places undue emphasis on the fact that Florida's unconstitutional scheme was considered valid by this Court before *Hurst*. *See* Answer Br. at 10-11, 15. The *Hurst* decisions make clear that Florida's capital sentencing scheme was unconstitutional because defendants were not afforded their right to binding, unanimous jury fact-finding at the penalty phase. It makes no difference in this case that, in the State's view, "[u]nder pre-*Hurst* law, a jury's recommendation was not

some sort of empty formality," or that the State believes that a pre-*Hurst* jury recommendation "mattered a great deal" despite being unconstitutional. *Id.* at 10, 11. What matters here is that a pre-*Hurst* jury recommendation did not implicate the right to binding, unanimous jury fact-finding, and therefore Appellant's pre-*Hurst* jury waiver could not have validly surrendered that right.

IV. The State's argument that defendants can waive constitutional rights that are not yet recognized by the courts cannot be squared with United States Supreme Court precedent or federal principles of due process

The State's argument that defendants can waive constitutional rights that are not yet recognized by the courts cannot be squared with United States Supreme Court precedent or federal principles of due process. As explained in Appellant's brief, the United States Supreme Court reaffirmed in *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), that defendants cannot waive rights that are not recognized by the courts at the time of the waiver. *See* Initial Br. at 20-22. *Halbert* is consistent with earlier precedent explaining that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a *known* right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (emphasis added), and that waivers of "constitutional rights in the criminal process generally must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances," *Iowa v. Tovar*, 541 U.S. 77, 81 (2004). These federal principles, grounded in due process, apply to Appellant's pre-

Hurst jury waiver, which occurred before the right to binding, unanimous jury fact-finding in Florida capital sentencing proceedings was recognized.

The State misunderstands Appellant's arguments under *Halbert*. Most fundamentally, Appellant does not argue, as the State incorrectly asserts, that his pre-*Hurst* jury waiver is now invalid "due to later changes in the law." Answer Br. at 11. Rather, as explained in his brief, Appellant's argument is that his pre-*Hurst* jury waiver is not a valid basis to preclude *Hurst* relief because (1) his decision to waive was based solely on trial counsel's advice, (2) counsel's advice was grounded entirely on Florida's pre-*Hurst* unconstitutional sentencing scheme, (3) counsel would not have advised Appellant to waive in a constitutional post-*Hurst* proceeding, (4) Appellant would not have waived absent counsel's advice, and (5) at least one juror in a constitutional proceeding would have voted for life based on the substantial mitigation in the case. *See* Initial Br. at 1. Thus, the cases cited by the State's brief purportedly establishing that changes in law do not by themselves render waivers invalid are not persuasive here. *See* Answer Br. at 11-13 & nn. 3-5.

Contrary to the State's selective reading, the plain language of *Halbert* reveals its holding. By its terms, *Halbert* held exactly what Appellant described in his initial brief: a defendant cannot waive rights not yet recognized by the courts. *Halbert*, 545 U.S. at 624. Although the State is correct that *Halbert* also stands for the proposition that the Constitution requires appellate counsel following a no contest

plea, Answer Br. at 13, *Halbert's* related holding, which prevents Florida from making the same argument here that Michigan did in *Halbert*, cannot be ignored.[3]

And the State erroneously argues that "the waiver logic of *Halbert* does not apply to this case" because *Halbert* "involved a totally unknown right." Answer Br. at 14. The State reasons that "[t]he right to a jury at the penalty phase in Florida was now unknown at the time of the waiver." *Id.* The State fails to recognize that the right to a jury before *Hurst* is not the same right to a jury after *Hurst*. Before *Hurst*, Appellant waived his right to a generalized, majority-vote jury recommendation. The post-*Hurst* right to binding, unanimous jury fact-finding was not yet recognized.

V. The State does not dispute that *Hurst* applies retroactively to Appellant, and the State correctly concedes that the "harmless error" doctrine is not an impediment to relief in this case

The State's brief does not dispute, and the State conceded below, that *Hurst* applies retroactively to Appellant because his death sentences became final in 2004, after *Ring v. Arizona*, 536 U.S. 584 (2002). *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see also* ROA at 148 (counsel for the Attorney General acknowledging that "the State agrees that *Hurst* is retroactive as to Mr. Hutchinson."). The State's brief also correctly concedes, as the State did below, that the "harmless error"

[3] The State's brief at points asserts that Appellant cited certain cases and made arguments that he never did, and then engages with those cases and arguments. *See* Answer Br. at 13, 15 & nn.5-6. Because Appellant never cited to those cases or made those arguments in his initial brief, they are not addressed in this reply.

doctrine is not an impediment to relief in this case. *See* Answer Br. at 6 ("The State also noted, that in a waiver case, a court cannot perform harmless error analysis on the *Hurst* error because there was no jury recommendation"); *id.* at 9-10 ("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. But, in a case where the defendant has waived a penalty phase jury, obviously there is no jury vote.") (internal citation omitted).[4]

Given these concessions, remanding for a hearing on Appellant's proffer is critical because the only issue that remains is whether Appellant's jury waiver is a valid basis to preclude *Hurst* relief.

CONCLUSION

For the reasons above and in Appellant's initial brief in response to this Court's August 22, 2017 order, Appellant respectfully asks this Court to vacate the circuit court's order and remand for an evidentiary hearing the validity of Appellant's pre-*Hurst* jury waiver to bar *Hurst* relief, or allow a new penalty phase proceeding that comports with *Hurst*. Appellant also requests the opportunity for full briefing under the ordinary appellate rules and for oral argument.

[4] Contrary to the State's assertion, Appellant has never argued that defendants who waived a pre-*Hurst* jury should automatically receive *Hurst* relief. *See* Answer Br. at 9-10. Rather, Appellant has argued, and the State has conceded, that this Court cannot apply its *current* harmless-error analysis to his *Hurst* claim because that analysis relies entirely on the vote by which the jury voted to recommend death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2017, the foregoing was electronically served via the e-portal to Clyde Taylor at ct@taylor-taylor-law.com, and Assistant Attorney General Charmaine Millsaps at charmaine.millsaps@myfloridalegal.com and capapp@myfloridalegal.com.

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