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IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC17-846

ANDREW RICHARD ALLRED,
Appellant,

vs.

CAPITAL POSTCONVICTION CASE
Lower Tribunal No.
521999CF015522XXXXNO

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT FOR SEMINOLE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS. I

TABLE OF AUTHORITIES. ii

STATEMENT OF THE CASE. 1

SUMMARY OF ARGUMENT. 3

ARGUMENT. 4

CONCLUSION. 9

CERTIFICATE OF SERVICE. 10

CERTIFICATE OF COMPLIANCE. 12

TABLE OF AUTHORITIES

Page

Cases

Allred v. State, 55 So. 3d 1267 (2010). 2, 4

Asay v. State, 210 So. 3d 1 (2016). 8

Cruz v. Lowe's Home Centers, Inc., 2009 WL 2180489,
(M.D. Fla. Jul. 21, 2009). 5

Furman v. Georgia, 408 U.S. 238 (1972). 9

Gregg v. Georgia, 428 U.S. 153 (1976)). 9

Halbert v. Michigan, 545 U.S. 605 (2005). 5, 6

Hurst v. Florida, 136 S. Ct. 616 (2016). 1, 8

Hurst v. State, 202 So. 3d 40 (Fla. 2016). 1, 2, 7

Management Health Systems, Inc. v. Access Therapies, Inc., No. 10-61792-CIV,
2010 WL 5572832 (S.D. Fla. Dec. 8, 2010). 5

Menna v. New York, 423 U.S. 61 (1975). 5

Mullens v. State, 197 So. 3d 16 (Fla. 2016). 3, 4, 6, 9

Perry v. State, 210 So. 3d 630 (Fla. 2016). 7

Ring v. Arizona, 536 U.S. 584 (2002). 1, 3, 5, 8

Rodgers v. Jones, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016). 6

Trease v. State, 41 So. 3d 119 (Fla. 2010). 6

Witt v. State, 387 So. 2d 922 (Fla. 1980). 8

STATEMENT OF THE CASE

This is an appeal of the trial court's summary denial of a successive motion to vacate the Appellant's death sentence predicated on *Hurst v. Florida,* 136 S. Ct. 616 (2016) and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). This is a post-*Ring*[1] case in which Allred waived his right to a penalty-phase jury.

The trial court stated the relevant procedural history of this case as follows

> [T]his cause comes before the Court on the Defendant's "Successive Motion to Vacate Judgments and Sentence," filed January 11, 2017, pursuant to Fla. R. Crim. P. 3.851. The State responded January 31,2017. The Court held a case management conference, and being fully advised of the premises, the Court finds as follows:
>
> The Defendant, Andrew Allred, was indicted for one count of first degree premeditated murder for victim Michael Ruschak; one count of first degree premeditated murder for Tiffany Barwick; one count of armed burglary of a dwelling while inflicting great bodily harm or death; one count of aggravated battery with firearm while inflicting great bodily harm or death for Eric Roberts; and one count of criminal mischief. On April 30, 2008, the Defendant entered a written plea to all charges of the indictment. On May 15,2008, the Defendant waived his appearance and his right to have a trial by jury during the penalty phase of the proceedings. The penalty phase nonjury trial occurred from September 22, 2008 to September 24,2008. A *Spencer* hearing took place on October 2,2008. On November 19, 2008, the Court sentenced the Defendant to death for Counts I and II of first-degree murder, life imprisonment for Counts III and

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[1]*Ring v. Arizona*, 536 U.S. 584 (2002)

IV of armed burglary of a dwelling and aggravated battery with a firearm while inflicting great bodily harm or death, and five years imprisonment for Count V of criminal mischief. The Defendant appealed his sentence and the Florida Supreme Court affirmed. *Allred v. State of Florida*, 55 So. 3d 1267 (Fla. 2010).

Following the affirmance, the Defendant filed a Motion to Vacate Judgments and Sentence and Memorandum of Law pursuant to Rule 3.851, Fla. R. Crim. P., and subsequently amended his motion twice. Following the evidentiary hearing, the Court denied the motions. The Defendant appealed and the Florida Supreme Court affirmed. *Allred v. State*, 186 So. 3d 530, 534 (Fla. 2016), reh'g denied, SC 13-2170, 2016 WL 966682 (Fla. Mar. 14, 2016).

In his current motion, the Defendant raises five claims for relief in light of the decision of the United States Supreme Court in *Hurst v. State of Florida*, 136 S. Ct. 616,621 (2016), hereinafter referred to as "*Hurst I*", and the decision of the Florida Supreme Court in *Hurst v. State of Florida*, 202 So. 3d 40, 45 (Fla. 2016), hereinafter referred to as "*Hurst II*". The United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment right to jury trial because a judge, rather than a jury, makes the findings of fact necessary to impose the death sentence. *Hurst I*, 136 S. Ct. at 619. On remand of *Hurst*, the Florida Supreme Court held

Before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst II, 202 So. 3d at 57. Moreover, the *Hurst* decisions apply retroactively to defendants whose

> sentences were final subsequent to the United States Supreme Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002). *Mosley v. State*, SC14-2108, 2016 WL 7406506, at *25 (Fla. Dec. 22, 2016), reh'g denied, SC14-2108,2017 WL 510491 (Fla. Feb. 8, 20I7).
>
> Nevertheless, the Defendant is not entitled to relief under *Hurst* due to his waiver of his right of a penalty phase jury. . . .

Order Denying Defendant's Successive Motion to Vacate Judgments of Conviction and Sentence PC-R 150-52, citing *Mullens v. State*, 197 So. 3d 16 (Fla. 2016) (footnotes omitted). "For the aforementioned reasons, this Court finds that the Defendant is not entitled to relief pursuant to *Hurst*. The Defendant also alleged [*ore tenus*] at the hearing that the death penalty in Florida is unconstitutional as cruel and unusual punishment. This Court does not find this to be so." *Id.*

In this appeal, this Court directed the Parties to file briefs addressing why the lower court's order should not be affirmed pursuant to *Mullens*. The Court also authorized a "statement to preserve arguments as to the merits of the Court's previously decided cases, as deemed necessary, without additional argument."

SUMMARY OF ARGUMENT

Undersigned counsel must agree that *Mullens* appears to preclude relief in cases where the defendant waived having a penalty phase jury sit on his case. As asserted in the trial court and as presented herein, he nevertheless takes the position

that *Mullens* was wrongly decided and must ultimately fall. He also contends that the waiver was necessarily invalid because it could not have been knowing and intelligent at the time it was made. Both the lower court's colloquy and counsel's advice about the applicable law were incorrect.

ARGUMENT

Allred waived having his case heard by a penalty phase jury.

> [A]gainst the advice of counsel, Allred moved to waive his right to a jury in the penalty phase and to waive his right to be present during the proceedings. After determining that Allred understood the consequences of these waivers, the Court overruled the State's objection and granted Allred's requests.

Allred v. State, 55 So. 3d 1267, 1271 (2010). It is conceded that under *Mullens* this fact would ordinarily preclude *Hurst* relief, however the Appellant respectfully contends that this Court's reasoning is flawed and must ultimately fall. He also contends that the waiver was necessarily invalid because it could not have been knowing and intelligent at the time it was made. Both the lower court's colloquy and counsel's advice about the applicable law were incorrect.

The colloquy conducted below made it quite clear that Mr. Allred was waiving a jury "recommendation" – not a jury determination of any aggravating circumstance – and certainly not a unanimous jury recommendation as to the existence of one

aggravating circumstance. In *Hurst*, which was decided in January 2016, the United States Supreme Court held that *Ring* did apply to Florida, and that Florida's death penalty scheme, which provided only for a jury "recommendation," was inadequate and unconstitutional. Therefore, at the time of Mr. Allred's waiver of an advisory jury, Florida's death penalty scheme was unconstitutional and in violation of *Ring v. Arizona.*

A defendant cannot waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); see also *Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have.") *Cruz v. Lowe's Home Centers, Inc.*, No. 8:09-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009) (same); cf. *Menna v. New York,* 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established").

At the time of Defendant's death sentencing, before *Hurst*, Florida's unconstitutional capital-sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a death sentence. Allred, therefore, waived only the right to a jury recommendation, not to his then-unrecognized

constitutional right to jury fact-finding that could result in his exposure to a death sentence. Under *Halbert*, Allred could not have waived his right to jury fact-finding.

Even if this Court concludes that a pre-*Hurst* defendant could waive *Hurst* relief, Allred's waiver was not knowing, voluntary, and intelligent, *Mullens*, 197 So. 3d at 39 (waiver of jury sentencing must be "knowingly, voluntarily, and intelligently made"); *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be "knowing, intelligent, and voluntary"), because it did not consider the possibility that Florida's death-sentencing scheme would be found unconstitutional, see *Rodgers v. Jones*, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016) (federal district court order noting Defendant's waiver was pre-*Hurst* and did not address "the possibility that the entire Florida sentencing scheme would be held unconstitutional").

In fact, in the wake of *Hurst,* the advice of counsel and the colloquy by a court in cases of waivers will have to change dramatically. *Hurst* will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; it will make the ultimate decision of whether a capital defendant's life will be spared. The landscape of *voir dire* and death qualification, pre-trial motions, opening and closing arguments, investigation and presentation of

evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions will have to change so that a capital defendant is afforded a constitutional trial.

In this case, there could be no waiver of a constitutionally valid penalty phase jury because a constitutional penalty phase jury did not exist at the time. What was waived was an unconstitutional fact finding and ultimate sentencing decision by the judge potentially biased by an adverse but otherwise legally meaningless recommendation by a bare majority or more of a purported but improperly instructed "jury." The Appellant here did not waive a proceeding at which "the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances, and must unanimously recommend a sentence of death." *Hurst v. State; Perry v. State,* 210 So. 3d 630 (Fla. 2016). All Allred and his counsel thought was being waived was an advisory proceeding which would be of benefit to the defense only if at least half of the jurors recommended a life sentence. Now, under *Hurst*, the Appellant would receive a life sentence even if only one juror decided to vote for life based on mercy alone. Under the unconstitutional scheme that the Appellant purportedly waived, if more than half of the jury recommended death he would be walking into the actual sentencing hearing with a millstone around his neck. A scheme under which that could happen has now been

determined to be unconstitutional, and that determination has been found to apply retroactively to the time of the waiver in this case. Accordingly there was no constitutionally valid waiver in this case and there is therefore no impediment to granting *Hurst* relief.

Finally, exclusion of *Hurst* relief where the defendant unwittingly waived an unconstitutional procedure, while granting relief to otherwise similarly situated defendants who did not, is not "ensuring fairness and uniformity in individual adjudications" and is an arbitrary application of the death penalty. *Asay v. State,* 210 So. 3d 1, 37-41 (2016), Perry, J dissenting from the majority's adoption of a "partial retroactivity" scheme, quoting *Witt v. State*, 387 So. 2d 922 (Fla. 1980). "The grave injustice of assigning whether a person lives or dies on a date in time, when it is clear that they were illegally sentenced, is irreversible." *See id*. ("[U]nder the present majority's decision, another defendant who committed his offense on an earlier date but had his sentence vacated and was later resentenced after *Ring*, cannot receive the death penalty without the protections articulated in *Hurst*. . . The majority's application of *Hurst v. Florida* makes constitutional protection depend on little more than a roll of the dice. This cannot be tolerated." (Internal footnote omitted)). That is likewise the case with an arbitrary distinction between those who waived a penalty phase under an unconstitutional and potentially damaging scheme and those who did

not. Such an arbitrary application of the *Hurst* decisions and their progeny constitutes a violation of *Furman v. Georgia*, 408 U.S. 238 (1972). "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Invocation of a constitutionally invalid waiver to preclude relief that would otherwise be available would be just such a "wholly arbitrary and capricious action." *Id.*

CONCLUSION

Although Appellant must concede that *Mullens* appears to preclude relief, he nevertheless argues that the lower court's order denying *Hurst* relief should be vacated and this case remanded for a new penalty phase, or for such other relief as this Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy in PDF format of the foregoing INITIAL BRIEF OF APPELLANT has been transmitted to the Clerk of the Supreme Court of Florida, through the Florida Courts E-Filing Portal, which will serve a Notice of Electronic Filing to: Vivian Singleton, Assistant Attorney General, Office of the Attorney General at Vivian.Singleton@myfloridalegal.com and capapp@myfloridalegal.com, and to Anna Valentini, Assistant State Attorney, Office of the State Attorney at avalentini@sa18.org and SemFelony@SA18.state.fl.us. A hard copy will be sent by first class U.S. Mail to Andrew Allred, DOC #130930, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 31st day of July, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Initial Brief of Appellant was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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