IN THE SUPREME COURT OF FLORIDA

ANDREW RICHARD ALLRED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC17-846

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida and the prosecutor in the trial court, will be referenced in this brief as Appellee, the prosecution, or the State. Appellant Allred, the defendant in the trial court, will be referenced in this brief as Appellant or by proper name.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On April 30, 2008, the Appellant pled guilty to the first-degree murders of Michael Ruschak and Tiffany Barwick, who were shot to death on September 24, 2007. *Allred v. State*, 55 So. 3d 1267, 1271 (Fla. 2010). The shooting happened a month after Allred's 21st birthday party where his relationship with Barwick came to an end. *Id*. at 1272. A few days later, Allred bought a Springfield XP .45 caliber handgun. Because of the legal waiting period, however, he did not take possession of it until September 7. On that day, he used pictures of Barwick for target practice and subsequently emailed Barwick a photo of the bullet-riddled pictures that were hanging on the wall of his room. *Id*.

Witness testimony and digital messaging indicated that in the days shortly before the murders, Allred discovered that—subsequent to the breakup—Ruschak and Barwick had sexual intercourse. *Id*. Allred became angry and sent threatening

messages to his "ex-best friend" and his ex-girlfriend. *Id*. On the day of the murders, Allred drove to Ruschak's house where several people, including Barwick, were in attendance. *Id*. at 1273. Allred entered the home after firing a shot into the sliding glass door, shattering it. *Id*. He shot Ruschak several times in the kitchen. *Id*. at 1274. Allred admitted to entering a bathroom and firing several shots into Barwick, who collapsed in the tub and died. *Id*.

After leaving the crime scene, Allred called 911 and reported that he had killed two people and threatened to commit suicide. *Id*. Allred told a deputy who responded to Allred's home, "I'm the guy you're looking for." After the officer secured him, Allred asked "if the people were dead," but the officer told him he could not provide that information. *Id*. Then, in the patrol car, Allred stated, "I knew I killed someone, I shot fourteen times." Allred, who was turned over to the Oviedo Police Department, was interviewed by two detectives after he was advised of his *Miranda* rights. *Id*. He admitted firing fourteen shots during the incident, emptying the clip, but he denied sending any threatening messages. Allred acknowledged using Barwick's picture for target practice earlier in the month, but he claimed that he did not think of killing her until the night of the murders. He denied, however, that he went to the house that night with the intent to shoot Barwick and Ruschak and stated that he went there solely to ram her car. *Id*. at 1274-5.

After Allred entered written and oral guilty pleas to all charges, the trial court conducted a plea colloquy of the defendant and accepted the guilty plea. *Id*. at 1271. The next month, against 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. *Id*.

During the colloquy, the trial court explained to Allred the penalty phase procedure in a capital case. After telling Allred that the court was not bound by the jury's sentence recommendation, the trial court informed the defendant that if the jury recommended the death penalty, he would determine the aggravating and mitigating circumstances and weigh them. (PP, R493).

> THE COURT: On the other hand, if the jury comes back and recommends life in prison - - I'm going to tell you right now if they did that, I would sentence you to life, do you understand that?
>
> MR. ALLRED: Yes.
>
> THE COURT: So in other words, the advantage that you would have by having a jury make the recommendation is there is a chance that they might come back for a life recommendation and then I wouldn't even consider the death penalty? Do you understand that?
>
> MR. ALLRED: Yes.

(PP, R494).

The trial court also explained to Allred the future impact of the waiver of his right to a jury during the penalty phase.

THE COURT: If you waive a jury, then you're going to give up your right to take appeals involving those issues. Do you understand that?

MR. ALLRED: Yes.

(PP, R494).

- - - -

THE COURT: You understand if I accept your request and I allow you to waive a jury, I'm not going to let you change your mind?

MR. ALLRED: Yes.

THE COURT: You've thought about it over these last several days, I'm sure?

MR. ALLRED: Yes.

THE COURT: Are you absolutely positive this is what you want to do?

MR. ALLRED: I'm positive.

(PP, R495).

After determining that Allred understood the consequences of the waivers of a jury in the penalty phase and to be present during the proceedings, the trial court overruled the State's objection and granted Allred's requests. *Allred*, 55 So. 3d at 1271. On November 19, 2008, the trial court sentenced Allred to death. *Id*. at 1277.

The Appellant's convictions and sentence were affirmed on direct appeal. *Id*. at 1284. Allred's convictions became final on Oct. 3, 2011 when the Supreme Court

of the United States denied his petition for writ of certiorari. *Allred v. Florida*, 132 S. Ct. 181 (2011).

Following the United States Supreme Court ruling in *Hurst v. Florida*, 136 S. Ct. 616 (2016) and this Court's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), Allred filed a motion before the trial court asking for postconviction relief pursuant to *Hurst*.

The trial court ruled that Allred was not entitled to relief due to waiving his right of a penalty phase jury, citing *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016) and *Mullens v. Florida*, 137 S. Ct. 672 (2017), *cert. denied*. The trial court stated the following:

> Even Counsel for Defendant had to acknowledge the Florida Supreme Court's decision in *Mullens*, wherein a defendant who knowingly and voluntarily waives the right to a penalty phase jury, as the Defendant did in this instance, is not entitled to relief under *Hurst I*. Since *Mullens*, the Florida Supreme Court has consistently concluded a defendant who waived a penalty phase jury is not entitled to *Hurst* relief. *Knight v. State*, 41 Fla. L. Weekly S612, 2016 WL 7242640, at *1 n.2 (Fla. Dec. 15, 2016); *Robertson v. State*, SC16-1297, 2016 WL 7043020, at *1 n. 1 (Fla. Dec. 1, 2016); *Davis v. State*, 207 So. 3d 177, 211-12 (Fla. 2016), *reh'g denied*, SC13-1, 2017 WL 57010 (Fla. Jan. 5, 2017); *Wright v. State*, 41 Fla. L. Weekly S561 (Fla. Nov. 23, 2016); *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016), *reh'g denied*, SC14-2278, 2016 WL 4446453 (Fla. Aug. 23, 2016). For the aforementioned reasons, this Court finds that the Defendant is not entitled to relief pursuant to *Hurst*.

(R151-2).

SUMMARY OF ARGUMENT

The Appellant made a knowing, voluntary and intelligent waiver of his right to have a jury recommend a sentence during the penalty phase. As a result, he is not entitled to relief pursuant to *Hurst v. State* or *Hurst v. Florida*. The trial court correctly denied Allred's motion for postconviction relief and this Court's precedence in *Mullens* should be followed.

ARGUMENT

The Appellant argues that this Court's decision in *Mullens* was wrongfully decided and that his waiver was invalid. Allred contends that his waiver could not have been knowing and intelligent at the time in which it was made. *I.B.* at 4. These arguments should be rejected because the *Mullens* ruling was proper and the Appellant rendered a valid waiver of his right to have a jury participate in penalty phase proceedings.

The trial court's denial of Allred's postconviction motion is ultimately a legal question subject to *de novo* review. The factual findings made by the trial court should be accepted where supported by substantial, competent evidence to guide the *de novo* review. *Jackson v. State*, 64 So. 3d 90, 92 (Fla. 2011).

In the *Initial Brief*, Allred concedes that under *Mullens*, the fact that he waived his right to have a penalty phase jury hear his case would preclude *Hurst* relief. *I.B.*

at 4. However, Appellant argues that this Court's reasoning is flawed. *I.B.* at 4. Allred also argues that he cannot waive a right not yet recognized by the courts.

Allred provides no support for this position. In *Mullens*, the defendant argued that he should be resentenced to life following the Supreme Court's ruling in *Hurst v. Florida*. Recognizing that Mullens had waived his right to jury penalty phase sentencing, this Court denied relief, holding that "[a] subsequent change in the law regarding the right to jury sentencing did not render that initial waiver involuntary." *Mullens*, 197 So. 3d at 39 (citing *State v. Murdaugh*, 97 P. 3d 844, 853 (Ariz. 2004) and *Brady v. United States*, 397 U.S. 742 (1970)). This Court noted that "[a]though the United States Supreme Court has not directly addressed whether a defendant can waive his or her rights to jury factfinding in the specific context of capital sentencing, the Court has concluded that defendants are free to waive the general right to jury factfinding that was recognized in *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000)]." *Mullens*, 197 So. 3d at 38. This Court referenced other states that reached similar conclusions in the context of capital sentencing and that in states where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing, courts have held that *Ring v. Arizona*, 536 U.S. 584 (2002) did not invalidate their guilty plea and associated waiver of jury factfinding. *Id.*

This Court's analysis in *Mullens* is akin to the reasoning of other state and federal courts when defendants have waived rights before a later change in the law,

such as in *McMann v. Richardson*, 397 U.S. 759, 773-4 (1970) (defendants sought to withdraw guilty pleas following a new court ruling) and *United States v. Vela*, 740 F.3d 1150 (7th Cir. 2014) (defendant asked that sentence be vacated following subsequent Supreme Court ruling despite having waived his right to appeal). In *Brady*, the Supreme Court held that the fact that a law to which Brady had pled guilty was later found to be unconstitutional "do not require us to set aside Brady's conviction." *Brady*, 397 U.S. at 756. The Court reasoned that there are a number of factors that influence a defendant's decision to enter a plea.

Thus, the *Mullens* ruling is analogous to other courts. As further proof that the analysis in *Mullens* was correct, the Supreme Court denied Mullens' petition for writ of certiorari in which the question presented focused on this Court's factual finding as to the knowing nature of his waiver. Consequently, the Appellant's argument that this Court's reasoning in *Mullens* is flawed fails.

Allred also argues that the waiver was invalid because it could not have been knowing and intelligent at the time it was made and that the lower court's colloquy and counsel's advice about the applicable law were incorrect. *I.B.* at 4. Appellant argues that the colloquy made it clear that he was waiving a jury recommendation. not a jury determination of any aggravating circumstances and not a unanimous jury recommendation. This argument is meritless because the colloquy was correct based upon the law at the time in which Allred waived his right to jury penalty phase

sentencing. *See Brady*, 397 U.S. at 757 ("A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.").

The trial court's extensive plea colloquy illustrates that Allred knowingly waived his right to jury sentencing. The trial court explained the sentencing procedure for capital cases, asked Allred if he had spent several days thinking about his decision, inquired if waiving jury sentencing was what he wanted to do, and told Allred that he could not later change his mind. The trial court also informed him that he was giving up his right to appeal the waiver. Despite Allred's arguments in the *Initial Brief*, the record shows that he knowingly, voluntarily and intelligently waived the right to have a jury participate in the penalty phase of his trial.

Furthermore, Allred possessed an advantage most defendants in capital cases do not have - knowing what his ultimate sentence would be if the jury recommended a life sentence. While the trial court was not required to follow the jury's recommendation, the trial court informed Allred that if the jury recommended a life

sentence, that he would grant the defendant a life sentence. Nevertheless, even with that knowledge, Allred chose to forgo using a jury during the penalty phase.

Allred also argues that the waiver was not knowing, voluntary and intelligent because it did not consider the possibility that Florida's death-sentencing scheme would be found unconstitutional. *I.B.* at 6. However, in *Brady* the Supreme Court ruled that a change in the law does not affect the voluntariness of a defendant's decision. "It is true that Brady's counsel advised him that s 1201(a) empowered the jury to impose the death penalty and that nine years later in *United States v. Jackson*, *supra*, the Court held that the jury had no such power as long as the judge could impose only a lesser penalty if trial was to the court or there was a plea of guilty." *Brady*, 397 U.S. at 756. Further, the Court stated that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Id.* at 757. The Court noted that the fact that Brady did not anticipate *United States v. Jackson* does not impugn the truth or reliability of his plea. *Id*. Similarly, a change in Florida's death penalty statute does not invalidate the fact that Allred chose to give up his right to have a jury participate in the penalty phase of his trial.

Allred's argument that a defendant cannot waive a right not yet recognized by the courts is flawed. Allred's reliance upon *Halbert v. Michigan*, 545 U.S. 605 (2005) is misplaced. *Halbert* is distinguishable because it involved the prohibition

of the appointment of counsel to indigent defendants who pleaded guilty or no contendere. The Court noted that when Halbert entered his plea, he had no recognized right to appointed counsel that he could elect to forgo. *Id.* at 623. The waiver in *Halbert* was an implicit waiver of appellate counsel that flowed from his plea rather than an explicit waiver to have a jury participate in sentencing as is the case with Allred, who emphatically did not want a jury penalty phase. Furthermore, Halbert was not informed that his plea would result in a complete denial of appointed appellate counsel whereas Allred was told by the trial court that his waiver would prevent him from appealing the issue. The Appellant was fully aware of what he was doing when he knowingly waived the right to have a jury take part in any of the sentencing procedure. The *Hurst* decision does not change the fact that Allred did not want a jury present for the penalty phase.

Moreover, as the dissent pointed out in *Halbert*, the implication 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." *Id*. at 640. (Thomas, J. dissenting).

Lastly, Allred argues that fairness and unanimity in the adjudication of capital cases calls for *Hurst* relief. The fact that some capital defendants who did not waive jury penalty phase sentencing have benefited from *Hurst* is not relevant when Allred chose to waive a right that belongs to each capital defendant, even after being told

that he could not appeal the issue. He had the same rights as other defendant, he simply chose to give up that right. What fairness calls for, however, is that the victim's family not be forced to endure another penalty phase proceeding simply because Allred has had a change of mind.

The Appellant now seeks to benefit from *Hurst* although he previously abandoned his right to have a jury take part in the penalty phase. Allred should not be permitted to recapture a right that he knowingly waived. The trial court correctly denied Allred's motion and this Court should follow its precedence in *Mullens*. As noted by the trial court, this Court has followed *Mullens* in other cases where the defendant waived a penalty phase jury including *Knight v. State*; *Robertson v. State*; *Davis v. State*; *Wright v. State*; and *Brant v. State*. Those cases are similar to the instant case and the holding in *Mullens* should be followed.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm the trial court's denial of the Appellant's Successive Motion to Vacate Judgments of Conviction and Sentence.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by E-Mail to Mark Gruber, Assistant CCRC, Gruber@ccmr.state.fl.us and Julie Morley, Morley@ccmr.state.fl.us; and support@ccmr.state.fl.us, CCRC-Middle, 12973 N.

Telecom Parkway, Temple Terrace, FL 33637, the attorneys for the Petitioner on August 10, 2017.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted,

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/s/ Vivian Singleton

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