

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-7

WILLIAM ROGER DAVIS, III,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL
CIRCUIT IN AND FOR SEMINOLE COUNTY, STATE OF FLORIDA
Lower Tribunal No. 592009CF005140A000X**

**REPLY BRIEF OF THE APPELLANT PURSUANT TO FLORIDA RULE OF
CRIMINAL PROCEDURE 3.851(i)(8)(B)**

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PRELIMINARY STATEMENT

The defendant, William Roger Davis, III (hereinafter referred to as “Davis”) by and through undersigned counsel files this reply brief in accordance with Florida Rule of Criminal Procedure 3.851(i)(8). *See* Fla. R. Crim. P. 3.851(i)(8)(B). Davis relies on his Initial Brief (referenced to as “*IB*”) for all purposes, and offers the following reply to the Answer Brief of Appellee filed on February 13, 2018.

ARGUMENT AND CITATIONS OF AUTHORITY

The Appellee on page 8 of its Answer Brief states the following:

However, Appellee notes that *Davis's counsel* requested to remain on Davis's case as appointed counsel for purposes of any future litigation arising from a warrant being signed for his execution. The discharge of collateral counsel appears to be the routine procedure under rule 3.851 (i), of the Florida Rules of Criminal Procedure, when postconviction proceedings are dismissed. The rule expressly states that it applies "only when a prisoner seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel." § 3.851 (i) Fla. R. Crim. P.

It is clear from the record below that Davis withdrew his pending postconviction motion with the understanding and express wish that collateral counsel would remain on the case.

Davis has never wavered on his request not to discharge collateral counsel. Davis' written letter filed by collateral counsel with the lower only asked "to withdraw [his] entire pending rule 3.851 motion". P1302-1306 (emphasis in original).¹ His reasons for withdrawing his motion were clear:

The reasons are very simple. If I were to be given a new trial – a big if –it would then subject the Malave family to the whole thing all over again. I am not willing to do that. Nor am I willing to subject my family to that. Add to that the possibility of a life sentence that I don't want, and the choice is a clear one.

¹ Please note that the citation in the Appellant's Initial Brief on page 6 to this Notice of Filing is incorrect. It is incorrectly cited as P1132-1135. The correct citation to the Notice of Filing with Davis' letter is at P1302-1306.

P1305. Davis did not request to discharge collateral counsel. P1305. In fact, Davis discussed the contents of his letter with collateral counsel prior to counsel filing the letter with the court. P1302; P1337-1338.

At a status conference on September 20, 2017, collateral counsel addressed with the lower court Davis' wish to withdraw his pending 3.851 motion, as he expressed in his letter. Collateral counsel suggested that Florida Rule of Criminal 3.851 (i) is the procedure to follow, as Davis wished to dismiss his pending 3.851 proceedings. P1337-1338. Although there was no request by Davis to discharge collateral counsel, the State of Florida did not object to following this rule. P1336-1342.

Moreover, during the November 9, 2017, hearing regarding the voluntariness of Davis' dismissal of his pending postconviction proceedings, Davis and his counsel specifically told the Court that Davis wishes to withdraw his 3.851 motions, but *he does not wish to discharge collateral counsel*. P1356-1358. The lower court expressed that he did not have any problem with allowing collateral counsel to remain as counsel for future potential issues such as competency, method of execution, warrant-related issues, potential retroactive issues (i.e. *Atkins*), or federal issues.² P1357; 1367-1372; P1389-1390. The lower court specifically stated during

² This Court has held that a number of these issues would not even be ripe for litigation until a warrant is signed. *See e.g. Schwab v. State*, 969 So. 2d 318, 321-322 (Fla. 2007); *see e.g. Israel v. State*, 985 So. 2d 510, 521-522 (Fla. 2008); *see*

the colloquy to Davis that it “won’t discharge [Davis’s] lawyers.” P1367. Hence, the detailed colloquy focused on the waiver of the current 3.851 postconviction proceedings. Davis was aware that he was waiving his right to a new penalty phase under *Hurst v. Florida*,³ that he was waiving “the right to have the Court relook at [his trial] counsel’s representation in the lower court, [and] to potentially have a new guilt phase in your trial,” and that he was “giving up every right to challenge the fact that [his] death sentence has been imposed and will continue forward.” P1389. However, Davis was expressly advised that the lower court was allowing Davis to keep “his counsel of record to deal with any post-warrant signing issues that may come up”. P1389. Further, the lower court specifically told Davis that he is not giving up the right to challenge the method of execution. P1367-1369. The lower court clearly addressed that Davis does not want to waive any warrant-related litigation, mental health challenges, or potential execution-related issues that may be applicable to him should the law change. P1370-1372. Collateral counsel also stated clearly that Davis is not consenting to being tortured to death, or to waiving any kind of warrant litigation (for example related to his mental illness or competency), which is why appointed counsel is important. P1369-1372; *see Darling v. State*, 45 So.3d 444 (Fla. 2010) (Collateral counsel is permitted to represent a death-sentenced

e.g. Barnes v. State, 124 So. 3d 904, 918 (Fla. 2013); *see e.g. Phillips v. State*, 894 So. 2d 28, 36 (Fla. 2004); *see Fla. R. Crim. P.* 3.811.

³ *Hurst v. Florida*, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)

individual in a 42 U.S.C. § 1983 injunctive claim when challenging the State's method of execution). The colloquy demonstrated clearly what Davis was waiving and not waiving. *See generally, Class v. U.S.*, 2018 WL 987347 (U.S. Feb. 21, 2018). Further, no objection or issue was raised below by counsels for the State of Florida (Office of the State Attorney and the Office of the Attorney General) at the hearing on Davis' waiver of his current postconviction proceedings. The State of Florida was given an opportunity to have the lower court ask further questions of Davis, which they declined. P1382-1383. Further, after Davis was put under oath to go over the colloquy again, the lower court reiterated that Davis is not waiving any issues regarding challenged to the method of execution, any warrant-related challenges, or challenges regarding his mental state. P1389-1390. Finally, in accordance with the lower court's oral rendition at the hearing, the final order dismissing the current postconviction proceedings did not discharge collateral counsel. The lower court's order focused on and granted Davis' sole request to "dismiss his pending motions." P1402. It cannot be clearer that Davis did not wish to discharge his collateral counsel, and neither the lower court nor the State of Florida at the hearing had any objections to this request.

The Appellant recognizes that the language in Florida Rule of Criminal Procedure 3.851 (i) encompasses both the waiver of postconviction proceedings and the waiver/discharge of postconviction counsel. *See IB* at p.10-11. The Appellant, in

light of the strict language of the rule, made it very clear to the lower court and the State of Florida that Davis did not wish to waive counsel. *See* p.3 *supra*; *see also IB* at p.7-12; P1295-1296; P1132-1135; P.1337-1338; P1132-1135. There were no objections or issues with the lower court's oral ruling not to discharge collateral counsel. P1382-1383.

This certainly is a case of first impression where the defendant does not wish to discharge counsel for very valid reasons, and only waive his current postconviction proceedings. Evolving standards of decency and the Eighth Amendment would be violated should this Court prevent defendants from litigating potential subsequent postconviction issues such as but not limited to the constitutionality of how they are executed and the constitutionality of executing a mentally ill/incompetent person. Davis has chosen to waive his pending postconviction proceedings and accept responsibility for his crime in an attempt to spare both the family of the victim and his own family the additional anguish of a retrial in his case. P1305. To construe this act as consent to be executed in whatever manner the State wishes, even if it amounts to cruel and unusual punishment, or to be executed while incompetent, without the assistance of counsel, is clearly wrong and not what Davis intended. If this Court holds that in order to waive his postconviction proceedings Davis must also dismiss his counsel and waive all subsequent proceedings, then this case must be remanded back to the lower court to

re-address Davis' waiver. Further, if this Court holds that Davis' waiver of his current 3.851 motions waives all or any of the issues that he specifically did not request to waive, then again this case needs to be remanded to the lower court to re-address his waiver.

Finally, the Appellee points this Court to *James v. State*, 974 So. 2d 365 (Fla. 2008) and *State v. Silvia*, 2018 WL 654715 (Fla. February 1, 2018) on page 9 of its Answer Brief to support its position "that by dismissing his postconviction motion and waiving his right to postconviction relief, Davis has waived his right to subsequent state proceedings." It should be noted that unlike Davis, James⁴ and Silvia not only waived their postconviction proceedings, they also specifically requested to discharge or waive collateral counsel. *See James*, 974 So. 2d at 366; *see Silvia*, 2018 WL 654715 at *1. *James*, dealt with the specific issue of whether a defendant can ask for reappointment of collateral counsel⁵ after he requested that collateral counsel be discharged in his original postconviction proceedings. *See James*, 974 So. 2d at 366. Davis has unequivocally not requested to discharge collateral counsel, nor did he specifically waive his right to subsequent state proceedings. *See p.2-5 supra*. The record below clearly shows that Davis is not

⁴ James asked collateral counsel to be reinstated more than two and a half years after his request for discharge of collateral counsel and dismissal of his postconviction proceedings. *See James*, 974 So. 2d at 366-367.

⁵ This Court concluded that James merely changed his mind as a basis for setting aside his initial waiver.

waiving any future potential issues such as competency, method of execution, warrant-related issues, potential retroactive issues (i.e. *Atkins*), or federal issues. P1357; 1367-1372; P1389-1390 P1357; 1367-1372; P1389-1390; *see generally*, *Class v. U.S.*, 2018 WL 987347; *see* p.3-4 *supra*. The lower court had no issues regarding Davis' request for continued representation by collateral counsel in subsequent postconviction proceedings. Further the State of Florida did not object or ask additional questions regarding the continued representation by collateral counsel in subsequent postconviction proceedings. P1382-1383. Davis specifically waived his current 3.851 motions and understood the potential consequences of waiving as relayed to him by the lower court of waiving his current postconviction proceedings. *See IB* at p.7-10; P1353-1391.

The Appellee wants to argue *Silvia now*, when it was not decided at the time of Davis' waiver of his current postconviction proceedings. *See Silvia*, 2018 WL 654715. *Silvia* cannot have a retroactive application on Davis' waiver; it certainly changes the forthcoming conversations that collateral counsels will have with their death-sentenced clients about the dire consequences of waiving original postconviction proceedings. The lower court could not address the effect of *Silvia* with Davis on his decision not to discharge collateral counsel for future postconviction proceedings. Unlike in Davis' case, *Silvia* was told by the postconviction court that "he was losing permanently his right to take advantage of

any changes that may occur in the law” *Id.* at *2 (emphasis in original). In Davis’ colloquy the effect of retroactivity was brought up but without the foresight of the consequential effect of this Court’s decision in *Silvia* in subsequent postconviction proceedings. P1370-1371. The colloquy below demonstrates that Davis understood that he is waiving his current 3.851 motions and not future postconviction court proceedings should the law change.

CONCLUSION

It is clear that Davis made a deliberate decision not discharge collateral counsel for his future postconviction proceedings. Davis' waiver was predicated on the belief that if he waived his pending postconviction proceedings, collateral counsel would remain on the case, and also that he was not waiving the right to raise certain future claims as discussed above. If this belief was incorrect, then Davis' waiver was not knowing, intelligent, and voluntary, and a remand would be necessary for a new hearing/colloquy. To preserve Davis' due process rights pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States, Davis should be entitled to an entire new review of his decision by the lower court to waive his postconviction proceedings and/or discharge collateral counsel in light of the concerns raised by the Appellee for the first time in its Answer Brief. Certainly, if Davis's waiver is not valid due to his decision not to discharge collateral counsel for his future postconviction proceedings, then his original 3.851 motions must be reinstated. Directions to the lower court and counsel would be appropriate to address all of the foregoing issues in this Reply Brief and the Appellee's Answer Brief.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla. R. App. P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 5th day of March, 2018.

I HEREBY CERTIFY that a copy of the foregoing has been served through the Florida Courts E-Filing Portal to **Christina Z. Pacheco**, Assistant Attorney General, Office of the Attorney General, on this 5th day of March, 2018.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Mr. William Roger Davis, III**, DOC# H17413, Florida State Prison, P.O. Box 800, Raiford, Florida 32083, on this 5th day of March, 2018.

Respectfully submitted

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