No. _____

In The
Supreme Court of the United States

October Term, 2017

Edward Allen Covington,

Petitioner,

v.

State of Florida,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Florida denied Petitioner his Sixth and Fourteenth Amendment right to specific jury fact-finding as to each element necessary to impose the death penalty, as required by this Court in Ring v. Arizona, 536 U.S. 584, 536 U.S. 584, 122 S.Ct. 2428 (2002), and Hurst v. Florida, --- U.S. ---, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), based on the fact that he waived an advisory jury "recommendation" for penalty phase, a scheme declared unconstitutional in Hurst while Petitioner's direct appeal was pending, when there is no record evidence Petitioner waived specific jury fact-finding as to the necessary elements because, at the time of the waiver, Florida did not provide that right.

LIST OF PARTIES

All parties appear in the caption of the case.

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The opinion of the Supreme Court of Florida was rendered on August 31, 2017, and is reported as Covington v. State, 228 So. 3d 49 (Fla. 2017).

JURISDICTION

The Supreme Court of Florida entered its opinion on August 31, 2017. Petitioner filed a timely motion for rehearing on September 15, 2017. The motion for rehearing was denied on October 11, 2017. Covington v. State, 2017 WL 4535061 (Fla. October 11, 2017) (App. 42). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Section 921.141, Florida Statutes (2011), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence" provides in relevant part:

> (2) **Advisory sentence by the jury**. – After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) **Findings in support of sentence of death**.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5) and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

STATEMENT OF THE CASE

On May 29, 2008, the Grand Jury for Hillsborough County, Florida, filed a seven-count indictment charging Petitioner, Edward Allen Covington, with three counts of first-degree murder, three counts of abuse of a dead body, and one count of cruelty to an animal arising from the May 11, 2008, murders of his girlfriend, Lisa Freiberg, and her two children, two-year-old Heather Savannah Freiberg and seven-year-old Zachary Freiberg.

On February 11, 2010, Petitioner filed a motion to declare section 921.141, Florida's death penalty statute, unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). In the motion Petitioner argued that Florida's death penalty scheme was unconstitutional under both the United States and Florida Constitutions because the jury was not required to determine aggravating circumstances and because the jury's advisory sentence was not unanimous. The court held a hearing and denied the motion on August 20, 2010.

Petitioner's jury trial began on October 22, 2014. Opening statements made it clear that Petitioner intended to pursue a defense of "not guilty by reason of insanity." However, on October 23, 2014, during the testimony of a witness, Petitioner became agitated and the proceedings were stopped. After a recess, Petitioner told the court that he was dissatisfied with counsel's cross-examination and that he fired his legal team and wanted to represent himself. Petitioner also announced that he wanted to change his pleas to guilty and waive an advisory jury for the penalty phase. The trial court would not accept Petitioner's guilty pleas at that time but instead appointed two experts to evaluate his competency to plead guilty. The evaluations and the doctors' reports were completed that evening.

When the court reconvened the next morning, Petitioner reaffirmed his desire to plead guilty and waive a penalty phase jury, and his counsel agreed. Petitioner entered a guilty plea to all of the charges, and the court accepted the pleas. During the colloquy for the waiver of the advisory jury, Petitioner asked the judge if the jury's recommendation had to be unanimous, and the judge told him that "[a]t least seven would have to recommend death for that to constitute a recommendation of death." Petitioner asked the judge what would happen if the recommendation were "six and six," and the judge replied that it would "constitute a recommendation of life as a matter of law." The judge did not mention Petitioner's Ring motion during the colloquy and the standard written jury waiver signed by Petitioner does not mention the Ring motion.

A penalty phase hearing took place on November 3, 2014. On May 29, 2015, the trial judge filed a sentencing order sentencing Mr. Covington to death for all three murders. Petitioner filed a notice of appeal to the Florida Supreme Court.

On appeal Petitioner argued that there could be no waiver of his Sixth Amendment right to a jury determination of all facts necessary to sentence him to death, as defined by Hurst v. Florida, 136 S.Ct. 616, Ring v. Arizona, 536 U.S. 584, and Apprendi v. New Jersey, 530 U.S. 466 (2000), because there could be no waiver of a right that did not exist at the time. Petitioner argued that even though Florida law was settled, Florida's death penalty statute was unconstitutional at the time of the waiver, and Petitioner did not specifically waive any rights he had under Ring and Apprendi.

On August 31, 2017, the Florida Supreme Court affirmed Petitioner's sentence. The opinion summarized the trial court's sentencing order:

> As to the murder of Lisa Freiberg, the trial court concluded that three aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); and (3) the capital felony was committed while Covington was on felony probation (minimal weight).
>
> As to the murder of Zachary Freiberg, the trial court concluded that four aggravating circumstances were proven beyond a reasonable doubt: (1) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (2) the victim of the capital felony was a person less than twelve years of age (great weight); (3) the capital felony was committed while Covington was on felony probation (minimal weight); and (4) the victim of the capital felony was particularly vulnerable

> because Covington stood in a position of familial or custodial authority over the victim (great weight).
>
> As to the murder of Heather Savannah Freiberg, the trial court concluded that five aggravating circumstances were proven beyond a reasonable doubt: (1) the capital felony was especially heinous, atrocious, or cruel (great weight); (2) Covington was previously convicted of another capital felony or of a felony involving the use or threat of violence (great weight); (3) the victim of the capital felony was a person less than twelve years of age (great weight); (4) the capital felony was committed while Covington was on felony probation (minimal weight); and (5) the victim of the capital felony was particularly vulnerable because Covington stood in a position of familial or custodial authority over the victim (great weight).
>
> The trial court found that two statutory mitigating circumstances were established: (1) the capital felony was committed while Covington was under the influence of extreme mental or emotional disturbance (moderate weight); and (2) Covington has no significant history of prior criminal activity (moderate weight). The trial court also found that twenty-four nonstatutory mitigating circumstances were established . . . .

Covington, 228 So. 3d at 60.

The Florida Supreme Court held that Hurst did not apply to Petitioner's case because he waived a jury for penalty phase:

> Covington asserts that he is entitled to relief under Hurst v. Florida, — U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). We disagree. A defendant like Covington who has waived the right to a penalty phase jury is not entitled to relief under Hurst. See Mullens v. State, 197 So. 3d 16, 40 (Fla. 2016) (concluding that defendant who waived penalty phase jury was not entitled to relief under Hurst because 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"), cert. denied, — U.S. ——, 137 S.Ct. 672, 196 L.Ed.2d 557 (2017); see also Brant v. State, 197 So. 3d 1051, 1079 (Fla. 2016) (relying on

Mullens to deny Hurst relief in a postconviction context where the defendant waived a penalty phase jury).

Covington, 228 So. 3d at 69.

REASONS FOR GRANTING THE WRIT

Florida denied Petitioner his Sixth Amendment right to a jury determination of every single element necessary to impose a sentence of death under Florida law as dictated by this Court in Hurst v. Florida, 136 S.Ct. 616. Florida's death penalty statute in effect at the time Petitioner was sentenced violated the Sixth and Fourteenth Amendments. Nevertheless, the Florida Supreme Court justified the denial of a unanimous fact-finding jury by assuming a non-existent waiver of a right that defendants in Florida did not have at the time Petitioner waived a jury and was sentenced.

Petitioner waived an advisory jury "recommendation" on October 24, 2014, after the trial court denied his motion to declare Florida's death penalty statute unconstitutional under Ring. There could be no waiver whatsoever because, at the time of the purported waiver, Florida provided no Hurst/Ring/Apprendi right to jury fact-finding in capital sentencing which Petitioner could have elected to waive. The rights supposedly "waived" in this case were granted only after this Court's decision in Hurst v. Florida, which was issued in January of 2016, while Petitioner's case was pending on direct appeal. Prior to Hurst v. Florida, Florida provided absolutely no fact-finding by a jury in a capital penalty phase.

During the colloquy where Petitioner waived a jury for penalty phase, Petitioner was not told that he was relinquishing his right to a unanimous jury verdict -- not only as to the ultimate penalty, but also as to the aggravating factors, whether the aggravating factors were sufficient, and whether the aggravating factors outweighed the mitigating factors. The court did not ask Appellant whether or not he waived his Ring motion; nor did the court advise him that, by waiving the penalty-phase jury, he was waiving his Ring motion.

In Hurst v. Florida, this Court held, by an eight-to-one vote, that Florida's death penalty scheme was unconstitutional because it violated the Sixth Amendment as explained in Ring. See Hurst, 136 S.Ct. at 621. This Court delared: "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619.

The Hurst Court recognized that "[t]he jury's function under the Florida death penalty statute is advisory only." 136 S.Ct. at 622 (quoting Spaziano v. State, 433 So. 2d 508, 512 (Fla. 1983)). This Court reasoned that Ring applied equally to Florida because "[l]ike Arizona at the time of Ring, Florida does not require the jury to make the critical findings necessary to impose the death penalty." Id. at 621-22.

> Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances

> and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton v. Arizona, 497 U.S. 639, 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); accord, State v. Steele, 921 So. 2d 538, 546 (Fla. 2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").

Id. at 622.

Thus, it follows that in this case that there could be no waiver of an actual penalty-phase "jury" because, when Petitioner waived his right to an advisory jury recommendation, the procedure he waived was one that was no more than the legal equivalent of fact-finding by the judge and not fact-finding by any jury. Because there was no waiver, Florida must afford Petitioner the right to specific jury fact-finding for a new sentencing proceeding.

As further evidence of the impossibility of waiver, it should be noted that, while this case was on direct appeal on October 14, 2016, on remand of Hurst in the Florida Supreme Court, the court invalidated Florida's amended statute, which required a jury vote of ten-to-two or more to impose death. See Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).[1] The court determined that, as required by Florida law and the Florida Constitution, a penalty-phase jury must make unanimous findings, not only as to the ultimate sentence, but also as to each aggravating factor. The court established that Florida law requires a unanimous verdict as to the additional elements that "the aggravators are sufficient" and "the aggravating factors outweigh the

[1] On May 22, 2017, this Court denied the State's petition for writ of certiorari. See Florida v. Hurst, 137 S. Ct. 2161 (2017).

mitigating circumstances." See id. at 44, 53-54. The court also held that the Eighth Amendment requires juror unanimity with regard to the imposition of the death penalty. See Hurst, 202 So. 3d at 59–62 ("In addition to the requirements of unanimity that flow from the Sixth Amendment and from Florida's right to trial by jury, we conclude that juror unanimity in any recommended verdict resulting in a death sentence is required under the Eighth Amendment.").

In this case, the Florida Supreme Court based its decision on a prior decision in Mullens v. State, 197 So. 3d 16, 40 (Fla. 2016). In Mullens, the court held that Mullens could not "avail himself of relief" pursuant to Hurst v. Florida because he waived an advisory jury recommendation for penalty phase and elected to be sentenced by the judge. See Mullens, 197 So. 3d at 38–40. The court cited Blakely v. Washington, 542 U.S. 296, 310 (2004), and concluded, "[N]othing prevents a defendant from waiving his Apprendi rights . . . . If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." 197 So. 3d at 38. In Mullens, the Florida Supreme Court cited cases from other jurisdictions in which defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing. In those cases the courts held "that Ring did not invalidate their guilty plea and associated waiver of jury factfinding" 197 So. 3d at 38 (citations omitted). The Mullens court concluded:

> If a defendant remains free to waive his or her right to a jury trial, even if such a waiver under the previous law of a different jurisdiction automatically imposed judicial factfinding and sentencing, we fail to see how Mullens, who

> was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right, can claim error. As our sister courts have recognized, 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. [State v. Piper, 709 N.W.2d 783, 808 (S.D. 2006)] (citing People v. Rhoades, 323 Ill.App.3d 644, 257 Ill.Dec. 342, 753 N.E.2d 537, 544 (2001)). This we refuse to permit. Accordingly, 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.

Mullens, 197 So. 3d at 39-40.

It should be noted that during the colloquy for the waiver of the advisory jury, Petitioner specifically asked the judge if the jury's decision had to be unanimous, and the judge told him that "[a]t least seven would have to recommend death for that to constitute a recommendation of death." Petitioner asked the judge what would happen if the recommendation were "six and six," and the judge replied that it would "constitute a recommendation of life as a matter of law." The judge did not mention Petitioner's Ring motion during the colloquy, and the standard written waiver signed by Petitioner does not mention the Ring motion. Petitioner was not attempting to abuse the system, he was trying to discern his best course of action. Inasmuch as Hurst, as decided in this case and on remand, applied to his case, he was misadvised as to the law.

The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as this Court interprets them. Schriro v. Summerlin, 542 U.S. 348, 358 (2004).

A decision of this Court which results in a "new rule" applies to all cases pending on direct review. See id. at 351 (citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)). See also Murdaugh v. Ryan, 724 F.3d 1104, 1124 (9th Cir. 2013) (stating that that the "new rule" of Ring applied to criminal cases still pending on direct review).

Therefore, Florida is bound to enforce Petitioner's Sixth Amendment guarantee to a unanimous jury determination as to "each fact necessary to impose a sentence of death" because his case was pending on direct review when Hurst was decided in this Court. Florida cannot deny Petitioner his Sixth Amendment rights based on a purported waiver of a constitutionally infirm procedure, which did not give him those Sixth Amendment rights.

Whether Petitioner waived his Sixth Amendment right as defined in Ring, and now Hurst, is a federal question that is controlled by federal law. See Brookhart v. Janis, 384 U.S. 1, 4 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."). There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional abandonment of a known right. See id. at 4 (citations omitted).

Any waiver of Sixth Amendment rights must be knowing and voluntary. Bousley v. United States, 523 U.S. 614, 618 (1998); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a

known right or privilege." Zerbst, 304 U.S. at 464. In Zerbst, this Court stated that "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and that this Court does not "presume acquiescence in the loss of fundamental rights." Id. (footnoted omitted). "It is settled law that an inferred waiver of a constitutional right is disfavored." Brewer v. Williams, 430 U.S. 387, 412, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977) (Powell, J., concurring).

Because, at the time of the purported waiver, Petitioner had no recognized right to a unanimous jury verdict as to all of the elements necessary to impose death, he had no recognized right he could elect to forgo. In Halbert v. Michigan, 545 U.S. 605, 545 U.S. 605, 125 S.Ct. 2582 (2005), at the time that Halbert entered his no contest plea, Michigan denied the right to appointed counsel for first-level appeals to those defendants who pleaded guilty or no contest. After the plea, Halbert sought appointed counsel to assist him in petitioning for a discretionary appeal, which was denied. This Court determined that Michigan violated Halbert's constitutionally-guaranteed right to appointed counsel for a first appeal. The Court rejected Michigan's argument that Halbert waived his right to counsel by pleading no contest, writing: "At the time he entered his plea, Halbert, in common with other defendants convicted on their pleas, had no recognized right to appointed appellate counsel he could elect to forgo." 545 U.S. at 623.

In this case, at the time of the waiver, Appellant and other defendants in Florida had no recognized right they could elect to forgo. The argument that

there could be no waiver is more compelling in this case than in Halbert, because in Halbert, Michigan defendants did have a right to appointed counsel on appeal. It was only the fact of a guilty or "no contest" plea that waived the right to appointed counsel. In this case, there was absolutely no right to jury fact-finding in capital sentencing, either before or after a waiver of an advisory jury.

The law in Florida was not uncertain or "unsettled" at the time of Petitioner's waiver. The law was clear for over a decade that Ring did not apply to Florida's death penalty scheme. See Middleton v. State, 188 So. 3d 731, 760 (Fla. 2015) ("This Court has consistently rejected constitutional challenges under Ring to Florida's capital sentencing law, section 921.141, Florida Statutes."). Petitioner waived an advisory jury in 2014. This Court did not accept jurisdiction in Hurst v. Florida until March 9, 2015. 135 S. Ct. 1531 (2015).

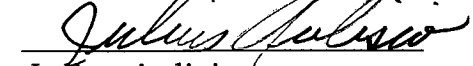
Hurst applies to Petitioner's case, and Florida cannot deny Petitioner relief through a finding of a waiver of a right to jury fact-finding that he never had. Therefore, this case flies in the face of this Court's decisions in Ring, Apprendi, and Hurst because Petitioner was denied his Sixth Amendment right to jury fact-finding on all elements necessary in order to impose the death penalty. This case also conflicts with Halbert v. Michigan, which held that such a waiver is impossible when the right is not recognized by the state at the time of the waiver. Finally, this issue impacts all defendants in Florida on direct appeal who waived an unconstitutional advisory jury determination.

CONCLUSION

This petition for a writ of certiorari should be granted in order to determine whether the State of Florida can deny Petitioner his Sixth and Fourteenth Amendment right to a binding jury determination of each essential fact necessary to impose the death penalty, as required by this Court in Ring and Hurst.

Howard L. "Rex" Dimmig, II
Public Defender

Respectfully submitted,



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