

**No. SC19-1587
L.T. No. 08-CF-18029
DEATH PENALTY CASE**

In the Supreme Court of Florida

STATE OF FLORIDA,
Appellant/Cross-Appellee,

v.

KHADAFY KAREEM MULLENS,
Appellee/Cross-Appellant.

*ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA*

**REPLY CROSS-APPEAL BRIEF
OF APPELLEE/CROSS-APPELLANT**

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PRELIMINARY STATEMENT

As in Mullens’s Answer and Initial Cross-Appeal Brief, citations to the record of the direct appeal of the trial, judgment, and sentence in this case are in the form “R[volume #]/[page #].” Citations to the postconviction record on appeal are in the form “PCR/[page #].” And citations to the postconviction court’s decision are in the form “Op. [page #] (PCR/[page #]),” where the first page number refers to the original pagination of the postconviction court’s order and the second page number refers to the pagination in the postconviction record on appeal.

Citations to the Mullens’s Answer and Initial Cross-Appeal Brief are in the form “Mullens Br. #.” Citations to the State’s Initial Brief are in the form “State Initial Br. #.” And Citations to the State’s Reply/Answer Brief are in the form “State Reply/Answer #.”

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should affirm the postconviction court's vacatur of Khadafy Mullens's death sentence for all the reasons set forth in Mullens's initial brief: trial counsel's woefully inadequate performance left crucial and undisputed mitigating evidence uncovered—including evidence of fetal alcohol spectrum disorder, intellectual disability, organic brain damage, horrific sexual abuse, and post-traumatic stress disorder—resulting in a mitigation presentation that that was incomplete and unpersuasive. Judge Federico was right to vacate his own prior sentence and to order Mullens resentenced.

Notwithstanding the correctness of that decision, the postconviction court separately erred in two important regards, which are the subject of Mullens's cross-appeal and this reply brief.

First, Mullens is intellectually disabled and thus categorically ineligible for the death penalty, and the postconviction court was wrong to summarily deny Mullens's intellectual disability claim without explanation—a point the State does not dispute. The State instead argues that Mullens's claim is waived, and so they can execute him even if he *is* intellectually disabled. That argument is wrong in every sense. Mullens was unable to raise his intellectual disability claim prior to postconviction proceedings for numerous reasons, including that trial counsel failed to uncover important evidence and that the governing law changed while his case

was still open on appeal. Under the circumstances, Mullens had more-than-good cause for raising his claim for the first time on postconviction review, and there was nothing stopping the postconviction court from deciding his claim.

As for the merits, the State's argument falls apart with even minimal scrutiny. The postconviction court found that Mullens put on a "persuasive case of intellectual disability," which the State did not rebut below. Op. 25 (PCR/2945). That took the form of substantial and unrebutted expert testimony establishing all three prongs for establishing intellectual disability under Florida law. And the State's response on appeal notably contains not a single citation to evidence in the record. There is thus no evidence supporting the postconviction court's summary denial of Mullens's claim of intellectual disability, and that decision must be reversed.

Second, the postconviction court should have vacated Mullens's guilty plea and jury waiver because they were not competent, intelligent, and voluntary. When Mullens pleaded guilty and waived his jury rights, he was reeling from the recent, sudden death of his sister and on high doses of antipsychotic medication that, according to extensive, unrebutted expert testimony, rendered Mullens unable to form coherent thoughts or make rational decisions. Trial counsel failed to uncover the evidence that would have proven Mullens's incompetence and failed to adequately inform Mullens of the consequences of pleading "open," without a negotiated plea deal with the State, and waiving his jury right. The State's arguments

in response are largely based on misunderstanding or mischaracterizing Mullens's claim. Put simply, postconviction review was the only opportunity Mullens had to raise this ineffectiveness claim; there is nothing preventing this Court from ruling on the merits; and the merits question is not even close. If counsel had uncovered all of the evidence of Mullens's incompetence or fully understood and explained the consequences, Mullens never would have pleaded open or waived his jury right.

This Court should reverse the postconviction court's denial of Mullens's intellectual disability claim and order the postconviction court to vacate Mullens's unconstitutional guilty plea and jury waiver.

ARGUMENT

I. THE POSTCONVICTION COURT SHOULD HAVE GRANTED MULLENS'S CLAIM OF INTELLECTUAL DISABILITY

The State *does not dispute* that Rule 3.851 requires the postconviction court to decide all of the legal and factual issues raised in Rule 3.851 motions and that, as a consequence, the postconviction court erred by summarily denying Mullens's intellectual disability claim without explanation. That alone is sufficient for this Court to decide Mullens's claim. Given the State's concession, and the postconviction court's finding that "Mullens presented a persuasive case of intellectual disability," Op. 25 (PCR/2945), this Court should (1) vacate Mullens's death sentence in light of his intellectual disability, or, at minimum, (2) reverse the postconviction court's summary denial of Mullens's claim and order the

postconviction court to appropriately weigh the evidence and make the requisite legal and factual finding as to whether his death sentence must be vacated in light of his intellectual disability. *See* Mullens Br. 119–20.

The State’s entire answer boils down to “waiver” (State Reply/Answer 45–51), followed by a half-hearted and conspicuously citation-free assertion that Mullens’s intellectual disability claim is “meritless” (*id.* at 52–53). But these arguments are insufficient to insulate the postconviction court’s errors from review. Mullens had good cause for not raising an intellectual disability claim at his original sentencing, and the postconviction court erred when it denied Mullens’s claim despite finding that Mullens made a “persuasive” and *unrebutted* showing that he suffers from intellectual disability.

A. Mullens’s intellectual disability claim is fully preserved.

The State is flat wrong that because Mullens’s ineffective trial counsel did not raise an intellectual disability claim at his original sentencing hearing that means Mullens “waived” his right to raise an intellectual disability claim on postconviction review. State Reply/Answer 45–46. As the State concedes, waiver will not be found under Fla. R. Crim. P. 3.203(f) where there is “good cause” for failing to timely raise a claim. *See id.* at 46 (quoting Fla. R. Crim. P. 3.203(f)); *see also id.* at 49 (stating that the relevant question is whether “Mullens [has] good cause to raise an untimely intellectual disability claim.”). And, as Mullens explained in his initial brief, he had

good cause not to raise this claim for three different and independently sufficient reasons: (1) because his counsel was ineffective; (2) because Florida law at the time of his plea and penalty-phase proceedings *categorically precluded* him from raising an intellectual disability claim because he did not have a low enough IQ score; and (3) this proceeding was Mullens first opportunity to present his intellectual disability claim under *Hall v. Florida*, 572 U.S. 701, which was decided during the pendency of his appeal. Mullens Br. 117.

The State's counterarguments all fail.

First, the State is incorrect that because Mullens has not brought a freestanding ineffective assistance claim for his trial counsel's failure to raise the intellectual disability claim at his sentencing, that means his trial counsel's ineffectiveness is irrelevant to determining whether he has "good cause" to raise his intellectual disability claim now. State Reply/Answer 46–47. Mullens's counsel was constitutionally ineffective, requiring vacatur of his sentence. Mullens Br. 38–115. But trial counsel's ineffectiveness did not merely taint Mullens's sentence. It pervaded the entire case, including counsel's inadequate pretrial investigations and his incompetent expert witness. Especially relevant (and devastating) here, trial counsel's ineffectiveness produced an obviously inflated IQ score, which made any attempt to raise an intellectual disability claim futile. Counsel's ineffectiveness thus provides more-than-sufficient "good cause" to excuse Mullens's failure to raise an

intellectual disability claim. *Id.* at 124–25. Indeed, if this Court were to adopt the State’s argument that Mullens is categorically and forever barred from raising his intellectual disability claim because his counsel failed to preserve it, it would be unconscionable *not* to deem his counsel prejudicially ineffective for failing to preserve it. The Court should reject the State’s cynical attempt to have its cake and eat it too.

Second, the State admits that it would have been futile for Mullens to raise his intellectual disability claim, but insists he was required to raise it anyway to preserve it. State Reply/Answer 47. According to the State, although controlling law “may have precluded *relief* on the claim,” because “[c]ontrolling law did not preclude *raising* the claim” that means Mullens waived this claim under Rule 3.203(f) of the Florida Rules of Criminal Procedure by failing to raise it. Resp. 47 (emphasis added) That argument has no foundation in law or logic.

As a matter of law, it is inconsistent with the very notion of *waiver*. “[W]aiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege,” and “courts indulge every reasonable presumption against waiver of fundamental constitutional rights and ... do not presume acquiescence in the loss of fundamental rights.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A defendant cannot intentionally and knowingly abandon a right he does not have or know he has. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967) (“[T]he mere

failure to [raise] a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.”).

As a matter of logic, that State’s rule would compel capital defendants to raise every conceivable argument against imposition of the death penalty at sentencing even if relief on those claims is clearly precluded by controlling law. Resp.47. That rule would waste the resources of the defendants, the State, and the courts on futile claims—all to avoid future hypothetical claims of “waiver” in future hypothetical postconviction proceedings. That makes little sense. And it is not the law. As this Court and its sister courts have long held “it would seem to be an unnecessary adherence to the technicalities of procedure to hold that the defendant must make [a] useless gesture ... in order to avoid a charge of ‘waiver.’” *6551 Collins Ave. Corp. v. Millen*, 104 So. 2d 337, 341–42 (Fla. 1958); *see Miller v. Drexel Burnham Lambert, Inc.*, 791 F.2d 850, 854 (11th Cir. 1986) (“A litigant [need not] engage in futile gestures merely to avoid a claim of waiver.”), *abrogated on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988).

Third, the State’s puzzling argument that *Hall v. Florida*, 572 U.S. 701 “would not apply to [Mullens’s] case,” State Reply/Answer 48, is simply nonresponsive. The State argues that Mullens’s measured IQ score at the time of his sentencing was too high for him to win relief under *Hall*. *Ibid*. But whether Mullens’s original IQ score would have qualified for relief under *Hall* has nothing

to do with whether *Hall* “furnished the rule of decision for an intellectual disability claim in his case.” *Id.* at 47 (quoting Mullens Br. 116). It clearly did and clearly does. The State’s argument that Mullens’s original IQ score would not have qualified for relief under *Hall* is beside the point: Mullens established that his original ineffective counsel procured an incorrectly measured IQ score and that his accurately measured IQ score *is* consistent with intellectual disability under *Hall*, which required for the first time that courts consider an IQ test’s standard error of measurement. *See* Mullens Br. 68–69, 121; Op. 10–11, 24 (PCR/2931–33, 2944). The State’s argument serves only to highlight the ineffectiveness of Mullens’s trial counsel. It offers no answer to Mullens’s argument that *Hall* is the controlling law that the postconviction court was bound to apply in this proceeding nor that this proceeding was his first opportunity to raise a claim under it. Mullens Br. 116.

Fourth, the State’s unexplained and citationless assertion that *Hall* and *Moore v. Texas*, 137 S. Ct. 1039 (2017)—though both are intervening changes in controlling law—do not provide “good cause” under Rule 3.203(f) is utterly incorrect. *See* State Reply/Answer 49. The State does not dispute that when the law changes, the changed law applies to “all cases still open on direct review” at the time. *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (applying retroactivity as a matter of federal law); *State v. Johnson*, 122 So. 3d 856, 861 (Fla. 2013); *Smith v. State*, 598 So. 2d 1063, 1066 (Fla. 1992) (same rule for Florida law). The State does not dispute

that Mullens’s case was open on direct review when the Supreme Court decided *Hall*, and this postconviction proceeding was his first chance to take advantage of that change in the law. And it is blackletter law that a party does not waive an argument that arises from a significant change in law during the pendency of an appeal. *See Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941) (holding an exception to the waiver rule exists in “those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result”). The State’s tacit concessions are thus more than enough to dispose of the State’s argument that *Hall* and *Moore* do not provide Mullens with the requisite “good cause” to raise his intellectual disability claim on postconviction review. Holding otherwise would be both manifestly unjust and inconsistent with more than two centuries of precedent. *See, e.g., United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (explaining that “if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed”).

Fifth, the State’s lengthy disquisition on *Phillips v. State*, 299 So. 3d 1013 (2020), *see* State Reply/Answer 49–51, only highlights that, as the State concedes, “this case is nothing like *Phillips*,” *id.* at 49 (quoting Mullens Br. 127). Indeed, the State acknowledges the crucial difference between *Phillips* and this case: In *Phillips*

the defendant had already made a claim of intellectual disability ten years before the U.S. Supreme Court's decision in *Hall* and that issue had been finally decided against him. *See* State Reply/Answer 51. In this case, Mullens never made a claim of intellectual disability because it would have been futile to do so, but a significant change in controlling law occurred during the pendency of his appeal, and his postconviction motion was his first opportunity to take advantage of that intervening change in law. Mullens Br. 124–27. The two cases could hardly be more different, and the holding in *Phillips* could hardly be more irrelevant.

B. The postconviction court found that Mullens made a “persuasive” showing of intellectual disability, which the State did not rebut.

The State made no attempt to rebut Mullens's persuasive case for intellectual disability. *See* Mullens Br. 120–24; Op. 25 (PCR/2945). As explained in Mullens's opening brief (at 120–21), because there is no “competent substantial evidence” supporting the postconviction court's denial of Mullens's claim of intellectual disability, *Spann v. State*, 985 So. 2d 1059, 1065 (Fla. 2008), the decision should be reversed, and the Court should direct the postconviction court to hold that Mullens is intellectually disabled and ineligible for the death penalty.

In its answer, the State baldly asserts that Mullens's “assertion that the intellectual disability claim went un rebutted is incorrect.” State Reply/Answer 52. But the State provides not a single citation to any evidence in the record that would refute Mullens's expert evidence showing that he is intellectually disabled. Not one.

See State Reply/Answer 52–53. The State is mistaken that it can overcome a “persuasive case of intellectual disability,” Op. 25 (PCR/2945), backed by significant expert evidence, by simply suggesting that there is some contrary evidence (without even bothering to back it up with any citations). Nor can the State now rehabilitate its abject failure to put on any case in the postconviction hearing by cobbling together two paragraphs of insinuations that there is some reason to disbelieve Mullens’s experts.

The State’s attempt to brush off the overwhelming evidence of intellectual disability that Mullens’s postconviction counsel adduced in the postconviction hearing fails. At the evidentiary hearing Mullens put on powerful evidence establishing all three of the prongs necessary to prove that he is intellectually disabled. *See* Op. 24– 25 (PCR/2944–45). As for the first prong, Mullens put on evidence establishing that he has an IQ consistent with a diagnosis of intellectual disability. Op. 10–11 (PCR/2930–31). The only valid and reliable IQ test in the record demonstrates that Mullens has an IQ of 73. Op. 11, 24 (PCR/2931; PCR/2944). And based on that properly administered test, neuropsychologist Dr. Robert Ouaou concluded that Mullens likely has an IQ consistent with intellectual disability. Op. 11, 24 (PCR/2931; PCR/2944). The State put on no evidence rebutting Dr. Ouaou’s conclusion. Op. 25 (PCR/2945). And the State concedes that it did not put on its own expert, much less produce a properly administered IQ test

on which Mullens had scored higher than 73. State Reply/Answer 52. Instead, the State insists that the postconviction court should have relied on the botched pretrial score because it is “consistent with” some other (informal) assessments and school grades. *Ibid.*¹ But, again, the State cites *zero evidence* to support that assertion because it put on *zero evidence* at the postconviction hearing. Op. 25 (PCR/2945). Notably, the State does not dispute that Mullens satisfies the second and third prongs: that Mullens suffers from adaptive deficits, and that he experienced the onset of symptoms before he turned 18. *See* Fla. Stat. § 921.137(1).

Finally, the State attempts to paper over its complete failure to put on a case, arguing “it is entirely the defendant’s burden” to prove intellectual disability. Mullens met his burden. *See* Op. 25 (PCR/2945); Mullens Br. 120–24. And he was

¹ The State also suggests that Dr. Ouaou’s conclusions can be discarded wholesale because he considered Dr. Joseph Wu’s analysis of Mullens’s brain scans, which in turn supported the conclusion that Mullens suffers from fetal alcohol spectrum disorder. *See* State Reply/Answer 52. That is wrong and irrelevant. Dr. Ouaou’s conclusion that Mullens has an IQ consistent with intellectual disability was based on his proper administration of the Weschler Adult Intelligence Scale IV (WAIS-IV). Op. 11, 24 (PCR/2931; PCR/2944). It is true that Dr. Ouaou also opined that Mullens’s intellectual disability could have been caused by fetal alcohol spectrum disorder, which was corroborated by Dr. Wu’s brain scan analysis. But even putting that evidence aside, the postconviction court still found that Mullens suffers from fetal alcohol spectrum disorder (FASD). Op. 23 (PCR/2943). And “the State *does not contest* that Mullens suffers from Fetal Alcohol Spectrum Disorder.” State Reply/Answer 38 (emphasis added). The fact that the State’s argument about Mullens’s IQ relies on nitpicking Mullens’s *conceded* FASD diagnosis shows how empty its case is.

entitled to have the postconviction court determine his intellectual disability claim. *See Mullens Br. 119–20.* This Court therefore should vacate Mullens’s death sentence in light of his intellectual disability, or, at minimum, reverse the postconviction court’s summary denial of Mullens’s claim and order the postconviction court to appropriately weigh the evidence and make the requisite legal and factual finding as to whether his death sentence must be vacated in light of his intellectual disability.

II. THE POSTCONVICTION COURT SHOULD HAVE GRANTED MULLENS’S CLAIM THAT HIS PLEA AND JURY WAIVER WERE INVALID

Defense counsel acted ineffectively by advising Mullens to plead guilty without a negotiated sentence and to waive his right to a sentencing jury. Trial counsel encouraged Mullens to go forward with these waivers in the face of multiple red flags about Mullens’s capacity to enter a voluntary plea; despite having not investigated critically important mitigating evidence that could have been presented to the jury; based on representations that the trial judge would not impose a death sentence, which turned out to be grievously wrong; and ignoring that waiving a sentencing jury meant forgoing any possibility of relief should the law governing sentencing juries change, as it did just two years later in *Hurst*. Advising Mullens to waive his rights in these circumstances amounted to ineffective assistance of counsel and caused severe prejudice. *See Mullens Br. 127–39.*

A. Mullens’s ineffective-assistance claim is fully preserved.

Nothing in this Court’s direct-appeal decision renders this claim “procedurally barred.” State Reply/Answer 54. On direct appeal, this Court fulfilled its “independent obligation to review the record for competent, substantial evidence that supports [Mullens’s] convictions.” *Mullens v. State*, 197 So. 3d 16, 37 (Fla. 2016). As part of that obligation, the Court considered “whether [his] plea was knowing, intelligent, and voluntary,” and in doing so described his colloquy with the court during his competency hearing and jury waiver. *Id.* at 37, 39–40. But Mullens on direct appeal did *not* argue, and this Court did *not* consider, the primary argument Mullens has raised in this postconviction proceeding: that counsel failed to investigate and present key evidence of Mullens’s mental state that would have shown him to be incompetent to enter a guilty plea or jury waiver notwithstanding anything he said during the plea colloquy. Mullens Br. 130–35. The Court’s *sua sponte* consideration of the limited record on appeal cannot possibly substitute for the in-depth, fact-based, and extra-record review of trial counsel’s performance inherent in adjudicating the constitutional adequacy of counsel; if it could, then *no* defendant could assert ineffective assistance of counsel on collateral review.

And to that point: Raising this ineffective-assistance argument for the first time in postconviction proceedings was entirely proper. Indeed, “a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct

appeal.” *Bruno v. State*, 807 So. 2d 55, 63 (Fla. 2001); *see, e.g., Ellerbee v. State*, 232 So. 3d 909, 916-17 (Fla. 2017). And the State acknowledges that “Florida courts ... recognize a ‘narrow’ claim of ineffective assistance of counsel for failure to raise a defendant’s alleged incompetency.” State Reply/Answer 54 (quoting *Thompson v. State*, 88 So. 3d 312, 316 (Fla. 4th DCA 2012)); *see also Baker v. State*, 879 So. 2d 663, 664 (Fla. 5th DCA 2004) (counsel “misinformed the defendant as to sentencing rights or options, thus establishing that the defendant did not enter a knowing and voluntary plea”). The claim is fully preserved.

B. Counsel failed to investigate and present important evidence showing that Mullens was incompetent to voluntarily plead guilty and waive the sentencing jury.

On the merits, the State largely fails to respond to Mullens’s central claim of ineffective assistance: that trial counsel did not investigate—let alone bring to the trial court’s attention—key medical, psychological, or disciplinary records from the Pinellas County Jail from after October 2012, which would have raised glaring red flags about Mullens’s competency. Mullens Br. 130–35. That undiscovered evidence would have revealed to diligent counsel that Mullens was under extreme psychological distress at the time, following the sudden death of his sister, *id.* at 130, and that he had been drugged out of his mind on perphenazine—“an incredibly powerful mind-altering sedative” used to treat psychosis, *id.* at 131 (quoting PCR/2223–24).

Critically, the State does not dispute that *if* counsel acted unreasonably by failing to investigate and present this information, that unreasonable conduct was prejudicial—*i.e.*, that there “is a reasonable probability that, but for counsel’s errors,” the defendant “would not have pleaded guilty,” *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000), and would not have “deci[ded] to forgo a penalty-phase jury.” *Lynch v. State*, 2 So. 3d 47, 71 (Fla. 2008), *as revised on denial of reh’g* (Jan. 30, 2009). *See* Mullens Br. 138–39. That counsel failed to develop this key information before advising Mullens not just to plead guilty, but to take the incredibly unusual step of pleading *open*, without any certainty as to the sentence he would receive, *see* Mullens Br. 136, underscores that Mullens would not likely have taken the same step absent counsel’s failure. Based on the extensive, unrebutted testimony that Mullens was not competent to proceed; trial counsel’s failure to investigate and present key information demonstrating Mullens’s incompetency; and the State’s failure to meaningfully contest prejudice, the record here conclusively establishes ineffective assistance of counsel.

The State attempts to sidestep this conclusion by mischaracterizing Mullens’s claim. Mullens has not argued that trial counsel failed to raise *any* “concerns about his competency,” State Reply/Answer 55, or failed to conduct *any* “evaluat[ion] for competency,” *id.* at 56. Nor is the question whether counsel “was deficient for failing to ask for *another* competency hearing” in addition to the one the court held. *Id.* at

55. What amounted to ineffective assistance here was counsel’s failure to develop key information about Mullens’s mental state that would have precluded him from pleading guilty and waiving his penalty-phase jury because it would have shown him to be obviously incompetent at the time of the plea and waiver. This crucial information was, by definition, unavailable to the court at the competency hearing because Mullens’s attorney himself was negligently unaware of it.

The State likewise repeats the postconviction court’s error of focusing narrowly on Mullens’s plea colloquy and on scattershot signals suggesting that Mullens may have understood the nature of the proceedings. Again, Mullens’s primary claim of ineffective assistance here is that there was significant *uninvestigated* evidence of Mullens’s incompetency and that a plea colloquy conducted without any consideration of that evidence could not possibly have been conclusive. That is especially true given the nature of Mullens’s incompetency: extensive, unrebutted postconviction testimony described how Mullens’s specific medication rendered him unable to render a voluntary waiver even though he may have appeared competent to third-party observers. Mullens Br. 133–34. Dr. Maher, for example, explained that “the pattern of responding in the affirmative ... about what he understood is not a confirmation of his competency” given Mullens’s “circumstances, his state of mind, his diagnoses, [and] his medication.” *Id.* at 132–33 (quoting PCR/2204–05). And while the State now suggests that “negative side

effects of the Perphenazine should have been noticeable” to those observing Mullens at the time, the State does not dispute (nor did it dispute below) Dr. Maher’s core conclusion: Given Mullens’s mental state and medication, any outward manifestations of his understanding could not be trusted. That unrebutted conclusion renders irrelevant the State’s evidence purporting to show that Mullens at times “appeared stable” or “able to provide accurate” information about his case. State Reply/Answer 57, 59.

Likewise, even if Mullens would have been even *less* competent without intense sedative medication, the question is whether given his *actual* state of mind he was able to understand the proceedings and able to provide an intelligent, voluntary waiver. The testimony established that he was not. Testimony indicating that Mullens was *better* able to communicate with counsel when on antipsychotic medication, State Reply/Answer 58, is thus irrelevant; as Mullens explained in his initial brief, competency is not a relative question. Mullens Br. 133.

C. Mullens could not have intelligently waived his right to a sentencing jury.

Even putting aside Mullens’s mental state, it was independently impossible for him to intelligently waive his right to a sentencing jury because trial counsel did not investigate key mitigating evidence, because counsel severely understated the risks of waiver, and because *Hurst* upended the consequences of waiver. Because Mullens’s invalid waiver is attributable to counsel’s deficient performance, these

claims are properly resolved here on postconviction review. Mullens Br. 129 (citing *Thompson v. State*, 88 So. 3d 312, 316 (Fla. 4th DCA 2012); and *Baker v. State*, 879 So. 2d 663, 664 (Fla. 5th DCA 2004)).

First, separate and apart from counsel’s failure to investigate and present important evidence undercutting Mullens’s competency, counsel’s failure to investigate key mitigating evidence necessarily renders his plea and jury waiver defective. Mullens Br. 134–35. While the State defends the adequacy of trial counsel’s investigation of mitigation evidence, it does not dispute that if counsel’s investigation *was* deficient—as the postconviction court held it was—that provides an additional, independent basis for holding that Mullens was unable to render a knowing, intelligent, and voluntary, given that the uninvestigated mitigation evidence would obviously have affected the strategic decision of whether to forgo a jury trial and *especially* of whether to forgo a sentencing jury that could have heard that evidence. *See* Mullens Br. 43; *Andrus v. Texas*, 140 S. Ct. 1875, 1883 (2020) (per curiam) (“Counsel’s failure to uncover and present ... voluminous mitigating evidence ... cannot ‘be justified as a tactical decision.’”); Am. Bar Ass’n, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (rev. ed. 2003), Guideline 10.7 cmt., in 31 Hofstra L. Rev. 913, 1021 (2003) (hereinafter “ABA Guidelines”), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf (“Counsel

cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation.”).

Second, trial counsel also rendered ineffective assistance by recommending that Mullens waive his right to a sentencing jury based in part on their assessment that the judge “had never given death.” Mullens Br. 136. The State asserts that trial counsel “made no promises” about Mullens’s likely sentence, State Reply/Answer 61, but ignores that counsel can be ineffective even absent such promises, *see* Mullens Br. 136 (citing *Costello v. State*, 260 So. 2d 198, 202 (Fla. 1972) (“It is unprofessional conduct for a lawyer intentionally to understate [or] overstate the risks, hazards or prospects of the case to exert undue influence on the accused’s decision as to his plea.”)).

Third, Mullens could not knowingly waive his right to be sentenced by a jury because he made that waiver before the U.S. Supreme Court’s decision in *Hurst v. Florida*, 577 U.S. 92 (2016). Trial counsel would not have advised Mullens to waive a jury had they known that the Supreme Court in *Hurst* would hold that a jury must unanimously find facts supporting the imposition of a death sentence, and had they believed they could have found at least one juror that would not have voted to impose a death sentence. Mullens Br. 137–38. And because trial counsel in anticipation of

Hurst specifically preserved an argument that Florida’s capital sentencing procedure violated the U.S. Constitution, counsel should not have advised Mullens to waive his penalty phase jury and to thereby foreclose Mullens’s only viable route to obtaining relief on appeal, even after *Hurst* was decided. *Ibid.*

The State again calls this argument “procedurally barred,” State Reply/Answer 62, but in doing so misconstrues Mullens’s argument about the effect of *Hurst*. This Court held on direct appeal that, as a general matter, a defendant is permitted to waive a sentencing jury even if he did so prior to *Hurst*. *See Mullens*, 197 So. 3d at 38–39. While Mullens disagrees with that ruling, Mullens Br. 138 n.27, it is neither here nor there. Mullens’s postconviction claim is that, under the circumstances of this case, counsel acted unreasonably by taking actions that would foreseeably hobble Mullens’s defense by making him unable to take advantage of anticipated changes in the law that counsel *themselves* were pressing for. Specifically, trial counsel in this case argued that Florida’s capital sentencing procedure was unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), and yet, by encouraging Mullens to waive a penalty phase jury, caused Mullens to forgo any chance of vindicating his own argument if—in fact, *when*—the law changed in his favor. Mullens Br. 137–38. For that reason, the State is simply incorrect that holding for Mullens here would *require* trial counsel to “anticipate ... change[s] in the law” or would sanction “abuse of the judicial process.” State Reply/Answer 61–62.

Rather, holding for Mullens would simply recognize that counsel's irreconcilable and self-defeating legal positions—undertaken without any strategic purpose—amounted to ineffective assistance.

III. MULLENS'S PRETRIAL AND SENTENCING PROCEEDINGS WERE TAINTED BY OVERWHELMING CUMULATIVE ERROR

Finally, the cumulative effect of counsel's numerous errors at both the guilt and penalty phases deprived Mullens of his constitutional right to a fundamentally fair proceeding, guaranteed under the Sixth, Eighth, and Fourteenth Amendments and corresponding provisions of the Florida Constitution. Mullens Br. 139–40. The State's only response is that Mullens's claims are procedurally barred or without merit. State Reply/Answer 63–64. That is wrong for the reasons above and those stated in Mullens's initial brief. The Court should therefore vacate Mullens's plea, jury waiver, and conviction, and order the postconviction court to grant Mullens a new trial.

CONCLUSION

Mullens respectfully requests the following alternative forms of relief:

(1) If the Court agrees that Mullens's trial counsel rendered unconstitutionally ineffective assistance of counsel at sentencing, then the Court should affirm the decision below in relevant part and remand for further proceedings.

(2) If the Court agrees that Mullens is intellectually disabled, then the Court should reverse the decision below in relevant part and remand with instructions to

enter an order holding that Mullens is intellectually disabled and ineligible for the death penalty.

(3) If the Court agrees that the postconviction court erred in failing to decide Mullens's intellectual disability claim on the merits, then the Court should reverse the decision below in relevant part and remand with instructions to make "detailed findings of fact and conclusions of law with respect to" this claim, as required by Rule 3.851(f)(5)(F).

(4) If the Court agrees that the postconviction court erred by denying Mullens's claim that his plea and jury waiver were invalid, the Court should reverse the decision below in relevant part and remand with instructions to enter an order vacating Mullens's plea, jury waiver, conviction, and sentence.

(5) If the Court agrees that cumulative error deprived Mullens of fair guilt and penalty phases, the Court should reverse the decision below in relevant part and remand with instructions to enter an order vacating Mullens's plea, jury waiver, conviction, and sentence.

November 24, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 24, 2020, this brief was electronically filed with the Clerk of the Court using the Florida Courts E-Portal Filing System, which will send a notice of electronic filing to counsel for the State:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210(a)(2), because it was prepared in 14-point Times New Roman.



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