IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC17-2235

RICHARD E. LYNCH,

Appellant

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA (CRIMINAL DIVISION)
Lower Tribunal No. 591999CF000881A000XX

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Defendant is in custody and under a sentence of death pursuant to a valid guilty plea entered on October 19, 2000, for two counts of First-Degree Murder, one count of Armed Burglary of a Dwelling, and one count of Kidnapping. On direct appeal, this Court summarized the facts as follows:

> The indictment was the result of events that occurred on March 5, 1999, culminating in the deaths of Roseanna Morgan ("Morgan") and her thirteen-year-old daughter, Leah Caday ("Caday")…
>
> **[T]he trial judge granted appellant's request to have the penalty phase conducted without a jury. [FN1]** During the penalty phase, the State produced a letter written by the appellant two days prior to the murders. In the letter...Lynch admitted to having a "long affair" with Roseanna Morgan...and asked his wife to send copies of cards Morgan had written to Lynch and nude pictures Lynch had taken of Morgan to Morgan's family in Hawaii. Lynch wrote: "I want them to have a sense of why it happened, some decent closure, a reason and understanding...."
>
> > [FN1] Because appellant requested and was granted a penalty phase conducted without a jury, **he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).** Therefore, we do not address this issue.
>
> The testimony elicited during the penalty phase... included a tape of a telephone call that appellant made to the "911"...Lynch is heard admitting to the 911 operator that he shot two people...that he had three handguns with him and that he shot Morgan in the back of the head to "put her out of her misery."...

As to Caday, appellant informed the 911 operator that he had held Caday at gunpoint while waiting for Morgan to return home. He related that she was terrified... Appellant admitted that he shot Caday, and said "the gun just went off into her back...she was still breathing for awhile and that's it."...

Morgan's neighbor...testified that she looked out of the peephole in her door after hearing the initial shots and saw Lynch dragging Morgan by the hands into Morgan's apartment...that Morgan was screaming and was bloody from her waist down...

After his arrest, appellant participated in an interview with police in which he confessed...

The defense presented only one witness, a mental health expert...she had diagnosed Lynch with schizoaffective disorder...Further, she testified that she did not believe the letter appellant wrote two days prior to the murders demonstrated an intent by Lynch to kill Morgan. She concluded that appellant was under the influence of an extreme mental and emotional disturbance on March 5, 1999, and that his psychotic process substantially impaired his capacity to conform his conduct with the requirements of the law...

The State's expert opined that Lynch suffered from a depressive disorder. The State's expert admitted that it was his opinion that on the day of the incident, appellant was suffering emotional distress, but it was not extreme, and Lynch did not lack the ability to conform his conduct to the requirements of the law. Finally, the State's doctor opined that the letter appellant wrote prior to the murders evidenced a murder-suicide plot.

[T]he judge sentenced appellant to death for the murders of Roseanna Morgan and Leah Caday. He found three aggravating factors as to the murder of Morgan: (1) the murder was cold, calculated, and premeditated ("CCP") (given "great weight"); (2) appellant had previously been convicted of a violent felony (given "moderate weight"); and (3) the murder was committed while appellant was engaged in committing one or more other felonies (given "little weight"). As to the

> murder of Caday, the judge found (1) that the murder was heinous, atrocious, or cruel ("HAC") (given "great weight"); (2) that appellant was previously convicted of a violent felony (given "great weight"); and (3) that the murder was committed while appellant was engaged in committing one or more other felonies (given "moderate weight"). He also found one statutory and eight nonstatutory mitigators as to each murder. [FN5]
>
> > [FN5] The statutory mitigating factor found was that Lynch had no significant history of prior criminal activity (moderate weight). The eight nonstatutory mitigators were: (1) the crime was committed while defendant was under the influence of a mental or emotional disturbance (moderate weight); (2) the defendant's capacity to conform his conduct to the requirements of law was impaired (moderate weight); (3) the defendant suffered from a mental illness at the time of the offense (little weight); (4) the defendant was emotionally and physically abused as a child (little weight); (5) the defendant had a history of alcohol abuse (little weight); (6) the defendant had adjusted well to incarceration (little weight); (7) the defendant cooperated with police (moderate weight); (8) the defendant's expression of remorse, the fact that he has been a good father to his children, and his intent to maintain his relationship with his children (little weight).

Lynch v. State, 841 So. 2d 362, 365-368 (Fla. 2003) (emphasis added). This Court affirmed the convictions and sentences of death. *Id.*, at 379. The United States Supreme Court denied certiorari review. *Lynch v. Florida*, 540 U.S. 867, 124 S.Ct. 189, 157 L.Ed.2d 123 (2003).

Defendant sought post-conviction relief in State court. Following an evidentiary hearing, the collateral proceeding trial court denied all relief. This Court affirmed the denial of relief. *Lynch v. State*, 2 So. 3d 47 (Fla. 2008).

Defendant petitioned the United States District Court for a writ of habeas corpus. The district court also found that there was no ineffectiveness of counsel at the penalty phase. *Lynch v. Secretary, Dept. of Corrections*, 897 F. Supp.2d 1277, 20 (M.D. Fla. 2012). However, the District Court found ineffectiveness of counsel for recommending to Defendant that he waive the penalty phase jury and proceed with a judge-only penalty phase. The United States Court of Appeals for the Eleventh Circuit reversed the part of the District Court's judgement granting Defendant relief and affirmed the part denying relief. *Lynch v. Sec'y, Florida Dept. of Corr.*, 776 F. 3d 1209, 1217 (11th Cir. 2015), cert. denied sub. nom. *Lynch v. Jones*, 136 S. Ct. 798 (2016).

On October 3, 2017, Defendant filed a successive 3.851 motion claiming he should be entitled to relief due to *Hurst v. Florida*, 136 S. Ct 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). On November 21, 2017, the lower court summarily denied Defendant's motion based on his waiver of the penalty phase jury. Defendant then appealed the ruling and on February 9, 2018, this Court issued an order directing the parties to

file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016).

SUMMARY OF THE ARGUMENT

Argument I- The lower court properly summarily denied Lynch's successive motion for postconviction relief. Lynch claims his case should not be controlled by *Mullens* because his penalty phase waiver was invalid and based on incompetent advice. This is merely a repackaging of arguments previously denied. *Mullens* is controlling. As stated therein, a defendant may not "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 40. This Court should affirm the lower court's order denying postconviction relief.

Argument II- The lower court properly summarily denied Lynch's successive motion for postconviction relief. Lynch claims he is entitled to re-evaluation of his previously denied claims. *Hendrix* is controlling and dictates that Appellant is procedurally barred from relitigating such claims.

STANDARD OF REVIEW

The trial court's summary denial of Lynch's successive motion for postconviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to

the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. *Walton v. State*, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT
ISSUE I

THE LOWER COURT PROPERLY DETERMINED LYNCH WAS NOT ENTITLED TO RELIEF PURSUANT TO *HURST V. FLORIDA*, 136 S. CT. 616 (2016), WHEN HE KNOWINGLY, INTELLIGENTLY, & VOLUNTARILY WAIVED HIS RIGHT TO A PENALTY PHASE JURY.

On October 19, 2000, Lynch pled guilty to all counts and waived a penalty phase jury. ROA 2/285-86, 366-93. Now, over fifteen years after knowingly and voluntarily waiving his right to a penalty phase jury, Lynch argues he is entitled to a new penalty phase before a jury based on the United States Supreme Court's recent decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), finding Florida's capital sentencing scheme unconstitutional. Lynch claims that this Court's precedent in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), should not control because Lynch could not have knowingly waived a right not yet recognized by the courts and because said waiver was the result of incompetent advice. Lynch's argument is without merit and should be rejected by this Court. (It should also be noted, that this Court already clearly answered this question on direct appeal when it stated, "[FN1] Because appellant requested and

was granted a penalty phase conducted without a jury, he has not and **cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).**" *Ring*, of course, is the case upon which the *Hurst* decision was based. Further discussion regarding Lynch's previously denied claims is found under Argument II and incorporated herein by reference.)

In *Mullens v. State*, 197 So. 3d 16, 38-40 (Fla. 2016), this Court rejected a *Hurst* claim in a case where the defendant waived his penalty phase jury. Mullens, like Lynch, plead guilty to two counts of first-degree murder and one count of attempted first-degree murder and waived his right to a penalty phase jury. This Court observed that, regardless of the exact scope and nature of the rights established in *Hurst*, the defendant was entitled to no relief because he waived the penalty phase jury. *Mullens*, 197 So. 3d at 38.

This Court observed that the United States Supreme Court in *Hurst v. Florida* "said nothing" about waiving the rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), but the United States Supreme Court, in the non-capital context, had stated that "nothing prevents a defendant from waiving his *Apprendi* rights"

and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id.* at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). This Court wrote that "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." *Id.* at 40.

Following *Mullens*, this Court has repeatedly denied *Hurst* relief in cases involving a waiver of the penalty phase jury. *See Quince v. State*, 2018 WL 458944 (Fla. January 18, 2018) ("[B]ecause Quince waived his right to a penalty phase jury, he is not entitled to *Hurst* relief."); *Allred v. State*, 230 So. 3d 412 (Fla. 2017); *Dessaure v. State*, 230 So. 3d 411 (Fla. 2017); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017); *Covington v. State*, 228 So. 3d 49 (Fla. 2017); *Robertson v. Florida*, ___ So. 3d ____, 2016 WL 7043020 (Fla. Dec. 1, 2016); *Knight v. State*, 211 So. 3d 1 (Fla. 2016); *Brant v. State*, 197 So. 3d 1051 (Fla. 2016); *Davis v. State*, 207 So. 3d 177 (Fla. 2016); *Wright v. State*, 213 So. 3d 881 (Fla. 2016) ("Wright contends that he waived his right to an advisory jury, rather than the jury required by the Sixth Amendment under *Hurst v. Florida*...Wright is not entitled to relief pursuant to *Hurst v. Florida*.").

Lynch's argument that a defendant cannot knowingly and intelligently waive a constitutional right which had not yet been recognized by the courts is incorrect and without merit as it is the same argument this Court rejected in *Mullens* and the previously-cited cases, particularly *Wright*. Contrary to Lynch's attack on the validity of his waiver, subsequent changes in the law do not render a prior waiver invalid.

As the United States Supreme Court has explained, a defendant who waives a proceeding or right does so under the current law, and those waivers remain valid regardless of later developments in the law. In *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), the defendant argued that his plea was involuntary when a new decision regarding coerced confessions was issued by the United States Supreme Court. The United States Supreme Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary. The Supreme Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Id.* at 774. The Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided cases been the law at the time of the plea, "he is bound by his plea." *Id.* The Court noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis

for claiming a plea was involuntary. *See also Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not anticipate a change in the law "does not impugn the truth or reliability of his plea"); *United States v. Ruiz*, 536 U.S. 622, 630 (2002) (stating that "the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor" including a defendant's failure "to anticipate a change in the law regarding relevant punishments").

Here, Lynch waived the right to a penalty phase jury proceeding and requested that the judge make the sentencing decision. Like the situation in *Mullens*, Lynch should not be able to subvert the right to jury factfinding by knowingly waiving that right and then, over fifteen years later, complain that subsequent developments in the law have undermined his sentence. Accordingly, this Court should follow *Mullens* and affirm the lower court's summary denial of Lynch's *Hurst* claim given his waiver of the penalty phase jury.

ISSUE II

THE LOWER COURT PROPERLY DETERMINED *HURST V. FLORIDA*, 136 S. CT. 616 (2016), DID NOT ENTITLE LYNCH TO RELITIGATE HIS PREVIOUSLY DENIED CLAIMS.

Appellant argues he is entitled to a re-evaluation of his previously presented claims. *Hurst*, a Sixth Amendment right-to-a-jury-trial case, does not operate to breathe new life into previously denied due process claims. Further, Appellant may not use a successive postconviction motion to relitigate his claim that has been raised and rejected on direct appeal. *Hendrix v. State*, 136 So. 3d 1122, 1124 (Fla. 2014) (citing *Pardo v. State*, 108 So. 3d 558, 567 (Fla. 2012). "Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion."; *Marek v. State*, 8 So. 3d 1123, 1129 (Fla. 2009)). Lynch is not entitled to relitigate any of the prior litigated issues.

Appellant mistakenly concludes that the new requirements for jury unanimity would impact the prejudice prong of his previously litigated *Strickland v. Washington*, 466 U.S. 668 (1984) claim because he would allegedly be more likely to receive relief. This argument assumes that his claims can be resurrected, when they cannot. This analysis is also flawed because it disregards the fact that any claim of prejudice must be related to and resulting from his counsel's errors. Thus,

even if Lynch could relitigate his previously disposed-of claims, he would be entitled to no relief because the prejudice prong requires a showing that he was prejudiced by his counsel's errors, not by a Sixth Amendment fact-finding error. *Strickland*, 466 U.S. at 695.

Even if Appellant could relitigate his previously litigated claims, which he cannot, his successive motion would still fail as both the trial court and this Court have already found there is no basis for prejudice. Lynch sought post-conviction relief raising numerous claims. Following an evidentiary hearing, the collateral proceeding trial court denied relief. With respect to the claim at issue here, that State court held:

> This claim also asserts that Lynch "would not have waived his right to a jury trial in the penalty phase portion of his capital trial" had he been properly advised by counsel. There is no evidence of this assertion presented by Lynch through testimony anywhere in the record, and this claim should be rejected for that reason alone.

(RE, E at p. 21). This Court affirmed stating:

> This claim primarily consists of a recrafted version of Lynch's first guilt-phase ineffectiveness subclaim combined with allegations related to mental-health mitigation, through which Lynch contends that he would not have waived a penalty-phase jury had counsel adequately informed him of the elements of and defenses to the charged offenses along with his diagnosis of "mild cognitive impairment." However, as previously stated, trial counsel did discuss the elements of and legal defenses to first-degree murder, armed burglary, and kidnapping with Lynch. Competent,

> substantial evidence supports the conclusion that no valid defenses existed...Lynch's "mild cognitive impairment" has not affected his ability to lead an otherwise normal life, he is of average overall intelligence, and he has never connected this "impairment" to his actions on March 5, 1999, or his decisions with regard to how to best proceed in this case...Lynch's asserted ignorance of hypothetical, unsupported defenses and a comparatively minor mental-health diagnosis could not have affected his decision to waive a penalty-phase jury. Moreover, Mr. Figgatt testified that he discussed potential aggravators with Lynch before Lynch pled guilty and waived a penalty-phase jury. Second-chair trial counsel, Mr. Caudill, corroborated this statement. As explained above, trial counsel's less than complete guilt-phase factual proffer did not prejudice Lynch because both he and trial counsel were well aware of the fact that the State possessed the necessary evidence to prove his guilt for each charged offense...
>
> Counsel were justifiably concerned that this case involved a thoroughly planned and executed murder of a former lover and the accompanying murder of her minor daughter. Trial counsel's recommendation was a strategic decision to conduct the penalty phase with the court sitting as the factfinder. In the words of trial counsel, they were "presenting this to a judge who wasn't going to be emotional about the fact that there was a death of a child, and the jury was going to be." **Lynch has not demonstrated prejudice, and it is unclear how further discussion of hypothetical defenses, which did not exist in this case, and a comparatively minor mental-health diagnosis would have altered his decision to forgo a penalty-phase jury in favor of a potentially less emotional, highly experienced jurist.**
>
> Accordingly, we deny relief on this subclaim.

Lynch v. State, 2 So. 3d 47, 70-71 (Fla. 2008) (emphasis added). In the same prior proceeding, Appellant also raised a separate claim of ineffectiveness of counsel at the

penalty phase of his trial. This Court found Lynch was not prejudiced by his counsel's performance stating as follows:

> Even if we fully accepted the testimony of his postconviction mental-health experts, there has been little to no testimony establishing that any impairment or schizoaffective symptoms contributed to his actions on March 5, 1999. Lynch had no prior history of criminal activity but by all defense accounts has always had this condition. Furthermore, he thoroughly planned and carried out his memorialized intent to murder Roseanna Morgan and then demonstrated critical impulse control by refusing to commit suicide. *Cf., e.g., Hoskins v. State*, 965 So. 2d 1, 17-18 (Fla. 2007) (affirming death sentence and stating, "the facts show an element of planning [and] are inconsistent with a claim that [the defendant] was under the influence of an extreme mental or emotional disturbance.... [Further,] there was no evidence that because of the frontal lobe impairment [the defendant] could not appreciate the criminality of his conduct at the time of the murder."); *Robinson v. State*, 761 So. 2d 269, 277-79 (Fla. 1999) (affirming death sentence despite evidence of mild brain damage where no evidence existed that the defendant committed the murder as a result of his condition).
>
> Consequently, we deny relief with regard to this subclaim because **Lynch has not demonstrated that the mitigation investigation and penalty-phase presentation of trial counsel prejudiced him...The death sentences imposed by the trial court remain legally sound even after careful consideration of the mitigation evidence presented during both the penalty-phase and postconviction proceedings.**

Lynch v. State, 2 So. 3d at 77 (emphasis added). Given the findings previously made that "Lynch's asserted ignorance of hypothetical, unsupported defenses and a comparatively minor mental-health diagnosis could not have affected his decision to waive a penalty-phase jury" and that the "death sentences

imposed by the trial court remain legally sound even after careful consideration of the mitigation evidence presented during both the penalty-phase and postconviction proceedings", any further litigation regarding Appellant's claim of ineffective assistance of counsel would be procedurally barred as nothing more than a repackaging of the identical claim litigated in Appellant's prior postconviction proceedings. Summary denial was therefore appropriate. *Van Poyck v. State*, 116 So. 3d 347, 355 (Fla. 2013) (upholding summary denial of newly discovered evidence claim where variation of the issue was raised in prior motion); *Marek v. State*, 8 So. 3d 1123, 1124 (Fla. 2009) (precluding re-litigation of IAC claim).

Appellant's contention that he should have been given an evidentiary hearing is meritless. Lynch fails to demonstrate how presentation of evidence could contribute to an analysis focused on a purely legal question. This case should be analyzed based on the record before this court; it is not a matter for evidentiary development. Additionally, Appellant's counsel cannot be held ineffective for failing to anticipate changes in the law. *Hitchcock v. State*, 991 So. 2d 337, 348 (Fla. 2008).

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant postconviction relief. The State objects to oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 8th day of March, 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Lisa Marie Bort, Maria Christine Perinetti and Raheela Ahmed, Assistant CCRC-M, Office of the Capital Collateral Regional Counsel, Middle Region, 12973 North Telecom Parkway, Temple Terrace, Florida 33637, bort@ccmr.state.fl.us, perinetti@ccmr.state.fl.us, ahmed@ccmr.state.fl.us and support@ccmr.state.fl.us.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/ Donna M. Perry
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