No. SC17-2235

IN THE

Supreme Court of Florida

RICHARD E. LYNCH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of a final order by the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, denying the Appellant, Richard E. Lynch's ("Lynch") Successive Motion to Vacate Sentences of Death Pursuant to Florida Rule of Criminal Procedure 3.851 ("Successive Motion"). Page references to the record on appeal are designated with R[volume number]/[page number]. Page references to the supplemental record on appeal are designated with SR[page number]. Page references to the postconviction record on appeal are designated with P[volume number]/[page number]. Page references to the record on appeal regarding the Successive Motion are designated with S[page number]. All other references will be self-explanatory or otherwise explained herein. All emphasis is supplied unless otherwise noted.

QUESTION PRESENTED BY THE COURT

In its Order dated Friday, February 9, 2018, the Court directed the parties to file briefs addressing why the Court should not affirm the lower court's order in light of *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Lynch has provided a condensed brief per this Court's Order, but respectfully requests that this Court permit full briefing in this case in accordance with the strict rules of appellate practice to allow Lynch to produce a complete representation of the facts and case law applicable to these two arguments. *See* Fla. R. App. P. 9.210. As Lynch's life is at stake, depriving

Lynch of his opportunity for full briefing in this case would constitute an arbitrary deprivation of the vested state right to a mandatory plenary appeal in capital cases. *See Doty v. State*, 170 So. 3d 731, 733 (Fla. 2015) ("[T]his Court has a mandatory obligation to review all death penalty cases to ensure that the death sentence is imposed in accordance with constitutional and statutory directives."); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *see also Hicks v. Oklahoma*, 447 U.S. 343 (1980).

REQUEST FOR ORAL ARGUMENT

Lynch is currently incarcerated at Union Correctional Institution, 25636 NE SR-16, Raiford, Florida 32083, under a sentence of death. Given the gravity of the case and the complexity of the issues raised herein, Lynch, through counsel, respectfully requests that this Court permit an oral argument pursuant to Fla. R. App. P. 9.320. This appeal presents important issues regarding Lynch's futile attempts to secure a constitutional jury sentencing which led to his invalid waiver of a penalty phase jury. *See James v. State*, 615 So. 2d 668, 669 (Fla. 1993).

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STATEMENT OF THE CASE AND FACTS

(I) Trial and Direct Appeal Proceedings

Lynch was indicted on March 5, 1999, with two counts of first-degree murder, one count of armed burglary, and one count of kidnapping. R1/23-24. Lynch was represented by James Figgatt ("Figgatt") and Timothy Caudill ("Caudill") (collectively "counsel"). Prior to his trial, on December 1, 1999, Lynch filed multiple motions challenging the constitutionality of Florida's death penalty scheme. R1/125-35, 143-44, 147-50, 153-64. Notably, Lynch moved to declare Section 921.141 of the Florida Statutes unconstitutional due to only a bare majority of jurors being required to recommend a death sentence and a jury not being required to find sentencing factors. R1/134-35, 147-50, 153-54. He submitted an additional memorandum of law in support. R1/157-64. Lynch also made a motion to direct a potential penalty phase jury to return findings of fact as to aggravating and mitigating circumstances, such as on an interrogatory verdict form. R1/128-30, SR82-83. At the motion hearing challenging Florida's sentencing scheme, Figgatt argued the unconstitutionality of the bare majority jury recommendation. SR74-77. Figgatt stated, "We have a system in Florida where the jury makes a recommendation and the court either follows it or does not follow it as the court may see appropriate." SR74. He further argued that a bare majority jury recommendation, "the very foundation of that which [the judge is] to give great weight to[,] is constitutionally

infirm." SR77. Figgatt also argued that the procedure "is not constitutionally sound because this court ultimately will be making a decision based upon whatever that recommendation was irrespective of how many people voted which way. It's going to be the jury as a whole making a recommendation with respect to life or death." SR76-77. Judge Nancy F. Alley denied the motions on April 18, 2000. R2/267-68.

As detailed in Figgatt's affidavit and his 2005 evidentiary hearing ("EH") testimony, "[Figgatt] advised Lynch to waive his right to a penalty phase advisory jury" based on *Apprendi*[1] and the denial of the motions for a constitutional sentencing. S50, *see* P14/275-76. Accordingly, on October 19, 2000, acting upon the advice of counsel, Lynch pled guilty to all counts and waived a penalty phase advisory jury. R2/285-86, 366-93. At the start of the penalty phase bench trial in front of Judge O. H. Eaton, Jr., Lynch renewed his motions to declare Section 921.141 unconstitutional, but the motions were again denied. R4/9-12.

On April 3, 2001, the trial court imposed a sentence of death for both murders and independently made the findings below:

> [T]he trial court found three aggravating factors as to the murder of Morgan: (1) the murder was cold, calculated and premeditated (CCP) (great weight); (2) Lynch had previously been convicted of a prior violent felony (the murder of Caday) (moderate weight); and (3) the murder was committed while Lynch was engaged in one or more other felonies (little weight). As to the murder of Caday, the trial court also found three aggravating factors: (1) the murder was heinous, atrocious,

[1] *Apprendi v. New Jersey* issued on June 26, 2000 and specified that its holding did not apply to capital cases. 530 U.S. 466, 496 (2000).

> or cruel (HAC) (great weight); (2) Lynch had previously been convicted of a prior violent felony (the murder of Morgan) (great weight); and (3) the murder was committed while Lynch was engaged in one or more other felonies (moderate weight).
>
> With regard to mitigation, the trial judge found one statutory mitigator and eight nonstatutory mitigators: 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 [*but the disturbance was not extreme*] (moderate weight); (2) the defendant's capacity to conform his conduct to the requirements of law was impaired [*but not severely 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, 2 So. 3d 47, 53-54 (Fla. 2008), *as revised on denial of reh'g* (Jan. 30, 2009) (citations omitted, emphasis in original); R3/502-21, R9/1124-29. This Court summarized the facts of the trial proceedings in its direct appeal opinion. *See Lynch v. State*, 841 So. 2d 362, 366-67 (Fla. 2003).

> On [direct] appeal, Lynch argues that the trial court erred in finding the aggravating factor of HAC as to the murder of Caday and the aggravating factor of CCP as to the murder of Morgan. He also asserts that the trial court's sentencing order is unclear as to the findings of the mental health mitigators, and therefore this Court must either construe them as statutory mitigators or remand to the trial court for clarification. Finally, he contends that his death sentence is disproportionate and Florida's death penalty is unconstitutional on its face and as applied.

Id. at 368. All of Lynch's claims on direct appeal were denied, and the convictions and death sentences were affirmed. *Id*. Lynch filed a petition for writ of certiorari to

the United States Supreme Court, which was denied on October 6, 2003. *See Lynch v. Florida*, 540 U.S. 867 (2003). Accordingly, Lynch's sentences became final on this date.

(II) Initial State and Federal Postconviction Proceedings

In Lynch's initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, he raised an ineffective assistance of counsel ("IAC") claim regarding counsel's failure to adequately advise Lynch whether to waive a penalty phase jury and multiple IAC claims related to inadequately investigating mitigation. P1/40-108. The initial motion was denied after an EH, and affirmed on appeal. *See Lynch*, 2 So. 3d at 52, 54-55. This Court deemed counsel's performance deficient "in failing to address and utilize evidence related to Lynch's frontal-lobe and right hemispheric cognitive impairment," but prejudice was not found. *Id.* at 75-77. Lynch's petition for writ of habeas corpus was also denied. *Id*. at 52.

On September 25, 2012, the United States District Court for the Middle District of Florida granted in part and denied in part Lynch's petition for writ of habeas corpus under 28 U.S.C. § 2254. *See Lynch v. Sec'y, Dept. of Corr.*, 897 F. Supp. 2d 1277 (M.D. Fla. 2012), *aff'd in part, rev'd in part sub nom. Lynch v. Sec'y, Florida Dept. of Corr.*, 776 F.3d 1209 (11th Cir. 2015). The Middle District found:

In the instant case, both Dr. Cox[2] and Dr. Olander[3] had examined

[2] Clinical Neuropsychologist, David R. Cox, Ph.D., ABPP.
[3] Licensed Psychologist, Jacquelyn Olander, Ph.D.

> Petitioner *prior* to his waiver of a jury. Therefore, counsel were, or should have been, aware of potential cognitive impairment evidence at the time they advised Petitioner to waive a jury. It was unreasonable for counsel to advise Petitioner to waive a jury without first adequately investigating and advising him of the extent of available mental health mitigation, including his cognitive impairment, particularly given that counsel should have been aware of the potential existence of this powerful mitigation evidence as it was referenced by Dr. Cox in his report. In fact, Figgatt initially testified at the post-conviction hearing that if he had been able to present brain damage as mitigation, he likely would have advised Petitioner differently about waiving a jury because juries are more receptive to brain damage than to mental illness resulting from a person's upbringing. Accordingly, counsel rendered deficient performance by advising Petitioner to waive a jury at penalty phase prior to adequately investigating and advising him of a substantial mental health mitigating factor.

Id. at 1308 (citation and footnote omitted, emphasis in original).

> Given Figgatt's admission that *brain damage is a compelling mitigator for a jury to consider,* Petitioner's reliance on his mental health as the only weighty mitigating factor in his defense, and Petitioner's concern about Judge Eaton's potential harshness, a reasonable probability exists that Petitioner would not have waived a jury at sentencing had counsel adequately investigated Dr. Cox's original diagnosis and advised Petitioner of his cognitive impairment. *See Sears,* 130 S.Ct. at 3265[4] (noting the fact "that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory" resulted in prejudice). The Court concludes, therefore, that the state court's denial of this claim was an unreasonable application of *Hill.*[5] Accordingly, habeas relief is granted as to this claim.

Id. at 1309 (footnotes added). The United States Court of Appeals for the Eleventh Circuit reversed the part of the District Court's judgment granting Lynch relief and affirmed the part denying relief. *See Lynch*, 776 F.3d at 1217, *cert. denied sub*

[4] *Sears v. Upton*, 561 U.S. 945 (2010).
[5] *Hill v. Lockhart*, 474 U.S. 52 (1985).

nom. Lynch v. Jones, 136 S. Ct. 798 (2016). The Eleventh Circuit found that no prejudice existed and the analysis focused on whether the outcome likely would have changed if a jury had recommended the sentence to the judge, instead of the judge determining the sentence without a jury recommendation. *See id.* at 1229.

(III) Current Postconviction Proceedings

After the decisions in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), and *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017), and the enactment of Chapter 2017-1, Lynch filed his Successive Motion. S18-53. Lynch also filed an affidavit from lead counsel, Figgatt, in support. S46-53. Figgatt confirmed that his advice to Lynch to waive a penalty phase advisory jury relied on the unconstitutional law in effect in 2000. S50. Figgatt also acknowledged in his affidavit that Lynch's mitigation was not complete at the time he was advised to waive his right to a jury and Lynch was unable to make an informed decision as to waiving that right. S51-52. Further, Figgatt stated that "if *Hurst* had been the law in 2000, [he] would not have advised Mr. Lynch waive a penalty phase jury *at all*." S52.The State filed its response. S54-79. The lower court held a case management conference and heard argument from the parties, but orally denied Lynch an EH and relief. S103-14. A written order summarily denying relief was issued on November 21, 2017 and is the subject of this appeal. S89-93.

STANDARD OF REVIEW

As the lower court summarily denied Lynch's motion without conducting an EH, the ruling is subject to *de novo* review and this Court must accept Lynch's factual allegations as true to the extent they are not refuted by the record. *See Ventura v. State*, 2 So. 3d 194, 197 (Fla. 2009). Deference is given to factual findings "***supported by competent, substantial evidence***." *See Sochor v. State*, 883 So. 2d 766, 781 (Fla. 2004) (emphasis in original).

SUMMARY OF THE ARGUMENTS

Argument I: The lower court erred in denying Claim One of Lynch's Successive Motion. Lynch's death sentences are unconstitutional under *Hurst* and the Sixth, Eighth, and Fourteenth Amendments. Lynch's case differs from Mullens' in many ways, including that Lynch requested a constitutional jury sentencing and his penalty phase jury waiver was invalid. The waiver was not knowing, intelligent, and voluntary and was based on counsel's ineffective advice. An individualized harmless error review will show that the *Hurst* error is not harmless in Lynch's case.

Argument II: The lower court erred in denying Claim Two of Lynch's Successive Motion and finding that the claim was procedurally barred because it was raised and rejected previously. Denying Lynch the opportunity to have his postconviction claims adjudicated under the new constitutional Florida law is an obvious injustice. Particularly, Lynch's IAC claim should be reconsidered because the prejudice

analysis has evolved in light of *Hurst* and if counsel were not ineffective, Lynch would not have waived his penalty phase jury.

ARGUMENT AND CITATIONS OF AUTHORITY

ARGUMENT I
THE LOWER COURT ERRED IN DENYING LYNCH'S CLAIM THAT HIS DEATH SENTENCES ARE UNCONSTITUTIONAL UNDER *HURST* AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Lynch's sentences became final on October 6, 2003, and are entitled to *Hurst* review. *See Lynch*, 540 U.S. 867; *see also Mosley*, 209 So. 3d 1248. The lower court correctly found that the *Hurst* rulings applied to Lynch. S91. However, the lower court erred in finding that Lynch knowingly and voluntarily waived a penalty phase jury and thus was not entitled to *Hurst* relief. S92. Further, the lower court erred in denying Lynch an EH to put on his counsel to support his argument that his waiver was not constitutional. The lower court's findings are not supported by competent and substantial evidence.

Mullens created an arbitrary class of defendants who are denied their Sixth and Fourteenth Amendment rights to specific jury factfinding as to each element necessary to impose the death penalty, as required by *Hurst v. Florida*, simply because they waived an advisory jury recommendation under an unconstitutional sentencing scheme that required only a bare majority of jurors to ***recommend*** a death sentence. It is arbitrary that this Court has granted *Hurst* relief to other more heinous cases due to nonunanimous jury recommendations while Lynch is denied the same

opportunity.[6] The only way to distinguish Lynch's case from these more aggravated cases exhibiting more heinous facts is his advisory jury waiver. To make a blanket finding that the *Hurst* error was harmless because Lynch waived an advisory jury, when the waiver was not only invalid but also stemmed from the incompetent advice of counsel under an unconstitutional death penalty scheme, and deny Lynch his rights would be manifest injustice and a violation of his equal protection rights.

If an ***appropriate*** waiver is procured, a defendant may waive his Sixth Amendment fundamental right to a jury trial and consent to judicial factfinding. *See Blakely v. Washington*, 542 U.S. 296, 310 (2004). A defendant's relinquishment of a constitutional right must be clear and unequivocal. *See Faretta v. California*, 422 U.S. 806, 835 (1975). Further,

> [a]n appropriate oral colloquy will focus a defendant's attention on the

[6] *See e.g., Cole v. State*, 221 So. 3d 534 (Fla. 2017) (two victims buried alive; seven aggravating factors found); *Calloway v. State,* 210 So. 3d 1160 (Fla. 2017) (five men shot in the head execution style; six aggravating factors found); *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016) (three counts of first-degree murder where one of the victims was a law enforcement officer; five aggravating factors found); *Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (murder of Brevard County Sheriff's Deputy; five aggravating factors found); *Pasha v. State,* 225 So. 3d 688 (Fla. 2017) (defendant murdered his wife and another victim by cutting their throats; four aggravating factors found); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (defendant convicted of kidnapping, robbery, and first-degree murder of 81 year old woman and jury unanimously found four out of five aggravating factors on special verdict form); *Davis v. State*, 217 So. 3d 1006 (Fla. 2017) (two counts of first-degree murder; five aggravating factors found for one murder and three for the other); *Snelgrove v. State*, 217 So. 3d 992 (Fla. 2017) (elderly couple brutally beaten and stabbed to death; five aggravating factors found); and *Hertz v. Jones,* 218 So. 3d 428 (Fla. 2017) (two counts of first-degree murder; six aggravating factors found).

> value of a jury trial and should make a defendant aware of the likely consequences of the waiver. If the defendant has been advised by counsel about the advantages and disadvantages of a jury trial, then the colloquy will serve to verify the defendant's understanding of the waiver.

Tucker v. State, 559 So. 2d 218, 220 (Fla. 1990), *approved sub nom. Johnson v. State*, 994 So. 2d 960 (Fla. 2008). Accordingly, "an oral waiver, which is preceded by a proper colloquy during which the trial judge focuses on the value of a jury trial and provides a full explanation of the consequences of a waiver is necessary to constitute a sufficient waiver." *Johnson*, 994 So. 2d at 963 (citation omitted).

Lynch's colloquy was inadequate because the judge only briefly questioned Lynch regarding his penalty phase jury waiver. P1/151-53. The judge did not focus on the value of a penalty phase jury trial. He also did not fully explain the consequences to Lynch or verify Lynch's understanding of the advantages and disadvantages to waiving a jury. In fact, almost all of the colloquy revolved around Lynch's guilty plea. P1/139-51. Consequently, Lynch's jury waiver is invalid.

In addition, the lower court, without any analysis, simply found that Lynch's waiver was knowing and voluntary. S92. Unlike the unequivocal waiver in *Mullens*, it is clear from Lynch's colloquy, as well as his mental deficiencies and limited educational background, that his waiver was unconstitutional because it was not knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 748 (1970). Lynch's waiver was not clear and unequivocal with "sufficient awareness of the relevant circumstances and likely consequences." *Id.* If counsel had effectively

investigated mitigating factors, including Lynch's brain damage and abnormalities, and advised him properly, Lynch would be in the class of defendants whose *Hurst* error was not found to be harmless and entitled to a new penalty phase.

In postconviction, brain damage in Lynch's frontal lobe and right cerebral hemisphere was discovered, which affects his ability to perceive, understand, and comprehend. P16/622-23, P17/879, 893, 965-966, 983-986. Joseph J. Sesta, Ph.D., M.S.Pharm, a forensic neuropsychologist, explained:

> Mr. Lynch has basically exactly what you want in a defense case. Had he had aphasia or some left hemisphere or some posterior damage, we would say, okay, so what?
> To have right hemisphere damage, particularly right anterior damage in a capital murder case, certainly it's mitigating. You might have been able to find a neuropsychologist to parley it into an insanity defense. I don't think that would work, but you certainly have strong mitigation.

P17/984. The record demonstrates that at the time of trial, counsel did not know that Lynch suffered from brain damage or delusions. S51-52, P13/70, P16/611-13. Notably, counsel blatantly ignored statements in Dr. Cox's report detailing that cognitive testing suggested "possible cerebral dysfunction in the form of significant right hemisphere weakness" and Lynch should be evaluated further. P8/1461-62. Therefore, counsel could not provide competent and informed advice to Lynch about waiving his penalty phase jury. Counsel's failure to identify Lynch's mental deficiencies severely affected the validity of his waiver.

Lynch's waiver of a penalty phase jury cannot be found to be knowing, intelligent, and voluntary if Lynch's own counsel were not even making informed

decisions about his case. P14/247, P18/1193, S51-52. At the 2005 EH, *Figgatt admitted that he did not have information regarding Lynch's brain damage at the time of trial*. P14/247-48. *Caudill also agreed that any decision made about whether or not to present brain dysfunction was not informed*. P18/1193. Figgatt stated that a PET scan revealing Lynch's brain damage "would have been invaluable in presenting to a jury a picture that would have shown why he, on that day, was otherwise a nice guy but had a really bad day." P13/81. Figgatt explained that juries are "more receptive to a mitigator like brain damage than they are to the common scheme of poor upbringing and mental illness" and "that the Florida Supreme Court regards brain damage as a weighty mitigator." P13/82, S51-52. Caudill also agreed that brain damage is a weighty mitigator and PET scans can be powerful mitigating evidence. P18/1131, 1137. Notably, at the EH, Figgatt conceded that had he "been able to present brain damage as mitigation in the form of proof in psychological and neuropsychological testing and the PET scan" *that he would not have advised Lynch to waive his right to a jury*. P13/81. He also confirmed that *Lynch did not know about that mitigation when he was deciding whether to waive his penalty phase jury*. P14/248. Moreover, Figgatt, in his affidavit attached to the Successive Motion, stated as follows:

> [I]f I had known that Mr. Lynch suffered from brain dysfunction in his right cerebral hemisphere and his frontal lobe, I would have advised Mr. Lynch that penalty phase jurors are more receptive to brain damage mitigation. If I had requested a PET scan and it had depicted brain

> damage, that would have been valuable to present to a penalty phase jury. As lead counsel, having failed to give him that advice, *Mr. Lynch was not able to make an informed decision whether to waive his right to a penalty phase jury*.

S51-52. Brain damage is weighty and compelling mitigation that would convince one juror to vote for life. Lynch would not have waived a jury if he had been properly advised and able to make an informed decision.

Dr. Cox stated that Lynch's "paranoid thinking style" and "cognitive dysfunction" can lead to delusions, which he defined as unrealistic thoughts and false fixed beliefs. P16/612-13. Lynch suffered from delusions during his colloquy. When the judge asked him how much education he had, Lynch's response was, "I have high school and approximately two years of college, I didn't finish college though." P1/141. The reality is that Lynch dropped out of high school, and never attended college. P8/1456, P18/1063-64. Worse yet, counsel knew Lynch had only gone as far as 10th or 11th grade, but failed to correct Lynch's misstatement. P13/65. This is not the only time that this delusion arose; Lynch also exaggerated his academic abilities to the State's expert, Dr. Riebsame. P18/1066. Due to counsel's failures, the trial court was not fully informed as to Lynch's brain damage and was misinformed as to his educational background, which would have been vital in determining whether his waiver was knowing, intelligent, and voluntary. P1/141-42, 154. If the lower court had granted an EH, it would have highlighted the deficiencies of counsel and Lynch's cognition, both of which invalidated Lynch's waiver.

Prior to waiving, Lynch expressed concern in a letter to counsel: "the change of judge from Alley to O.H. Eaton I don't feel will help, he reminds me of a[ ] cranky old man & possibly harsher as [sic] concerning sentence." *Lynch*, 776 F.3d at 1231. However, after the denial of the pretrial motions challenging the constitutionality of the death penalty statute and the issuance of *Apprendi,* Lynch followed his counsel's advice and waived his penalty phase jury. The injustice and prejudice to Lynch is egregious because Figgatt advised Lynch to waive his jury because Figgatt "was concerned about a jury coming back with an 11-1 advisory recommendation." S51. Figgatt testified at the 2005 EH and stated in his affidavit, that although none of his clients had ever received a unanimous recommendation for death, he was concerned about trying Lynch's case in front of a jury because he previously represented Edward James ("James") who received two 11-1 advisory recommendations. P13/75-76, P14/248, S51. Although the facts of James' case were more heinous because James murdered a grandmother and eight-year-old granddaughter, and also raped the child, Figgatt was concerned because both James' and Lynch's cases involved double homicides. P13/75; *see James v. State*, 695 So. 2d 1229, 1230–31 (Fla. 1997). As Figgatt was able to obtain two 11-1 recommendations in a similar, but arguably worse case, he clearly would not have advised Lynch to waive a jury if an 11-1 recommendation would have secured a life sentence. Notably, if Lynch had received the 11-1 jury recommendations that Figgatt sought to avoid by waiving a

jury, Lynch would have been granted a new penalty phase pursuant to *Hurst*. S51. Post-*Hurst*, counsel certainly would not adopt this strategy because an 11-1 jury verdict grants a binding life sentence.

Notwithstanding the insufficient colloquy, Lynch cannot waive a constitutional right that was wrongfully not afforded to him. A defendant cannot waive a right not yet recognized by the courts. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Mgmt. Health Sys., Inc. v. Access Therapies, Inc.*, 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have."). At the time of Lynch's sentencing, Florida's unconstitutional sentencing scheme permitted only the judge, not the jury, to find facts determining whether a defendant would be sentenced to death. Unanimous jury factfinding was a right not yet recognized by Florida courts; therefore, Lynch could only waive the right to bare majority jury recommendation of life or death. During the colloquy, the judge specifically told Lynch, "If the jury by a vote of *at least six to six recommends* that you be given a life sentence, I will not override that decision and will impose a life sentence upon you." P1/152.

> On the other hand, if the jury should return by a vote of at least seven to five and recommend that you be sentenced to death, I would have to give that recommendation, quote, great weight, end quote, although *the final decision on the penalty to be imposed is my responsibility alone*."

Id. The judge went on to ask Lynch, "Is that what you want to do, you want to waive the right to have a jury trial as far as the *recommendation* of the penalty is

concerned?" P1/153. As Lynch only waived an advisory jury recommendation and the waiver did not consider the possibility that Florida's death-sentencing scheme would be found unconstitutional, his waiver was not knowing, voluntary, and intelligent. Thus, Lynch's colloquy and waiver cannot be considered appropriate or unequivocal and the State cannot offer judicial factfinding. *See Mullens*, 197 So. 3d at 38.

As evidenced by Lynch's *Ring*[7]-like motions to declare Florida's death penalty sentencing scheme unconstitutional in 1999, Lynch ***never*** waived the protections and rights provided for post-*Ring* capital defendants under *Hurst*. Like Mosley who was granted relief based on fundamental fairness, Lynch "raised a *Ring* claim at his first opportunity and was then rejected at every turn." *Mosley*, 209 So. 3d at 1275. *Hurst* establishes that Lynch's numerous pretrial arguments challenging the constitutionality of Florida's death penalty statute were valid. Notably, he challenged the bare majority juror recommendation and the jury not being required to find sentencing factors. R1/134-35, 147-50, 153-54, 157-64. Lynch also moved for an interrogatory verdict of jury factfindings as to aggravation and mitigation. R1/128-30, SR82-83. Although Lynch requested an interrogatory verdict form, he never had the option to receive the constitutional benefit of a jury returning a verdict making findings of fact because his motion was denied. R1/128-30, R2/267-68.

[7] *Ring v. Arizona*, 536 U.S. 584 (2002).

Notably, if Judge Alley had not denied Lynch's motions for a constitutional jury sentencing, *he would not have waived* his right to a jury. It is an obvious injustice to penalize Lynch now for refusing to participate in a proceeding that he knew to be unconstitutional and that he litigated vigorously to be *Ring* and *Apprendi* compliant.

The jury's role in determining death-eligibility is no longer advisory and as contemplated in *Caldwell v. Mississippi*, the jury now properly makes the ultimate decision of whether the defendant's life will be spared. *See* 472 U.S. 320, 328–29, 341 (1985). Now that a unanimous jury is required to sentence a defendant to death, the conversations and assessments between trial counsel and defendants change dramatically. *Hurst* impacts the attorney's strategy and decisions throughout the trial, including the decision whether to waive a penalty phase jury. Moreover, the waiver colloquy required by a court will also evolve. The new constitutional scheme also changes the harmlessness analysis because the landscape of *voir dire* and death qualification, pretrial motions, opening and closing arguments, investigation and presentation of evidence in mitigation of a death sentence, challenging and arguing against evidence in aggravation, and jury instructions have changed to afford a constitutional trial in accordance with the Sixth and Fourteenth Amendments. Further, each juror would now be instructed that they individually carried the immense responsibility of whether a death sentence was authorized or a life sentence was mandated. The jurors would be told that they each were authorized to preclude

a death sentence simply to be merciful. Post-*Hurst*, these are all important details to consider when making a decision to waive a jury or to advise a client to waive. Based on evolving standards of decency and the use of post-*Hurst* interrogatory verdict forms (which Lynch had requested but was denied) that lead the jury through the deliberation process step-by-step, it is even less likely Lynch would receive a unanimous verdict if resentenced. *See* FL ST CR JURY INST 3.12(e).[8]

Consideration must be given to the fact that Figgatt stated in his affidavit that he would have "taken a different approach and advised Mr. Lynch accordingly" if he had been able to try the case under a constitutional death penalty scheme. S50. Figgatt "advised Mr. Lynch to waive his right to a penalty phase advisory jury sentencing because [he] would have had to convince six jurors to vote for life in order to receive a life recommendation." S50-51. Now counsel only needs to convince one of twelve jurors, less than nine percent of the fact finders, to save a defendant's life and would not have advised Lynch to waive a jury trial in order to convince the judge, a hundred percent of the fact finders, to spare his life. *See* S50-52. Figgatt stated in his affidavit, "If *Hurst* had been the law in 2000, *I would not have advised Mr. Lynch waive a penalty phase jury at all.*" S52. Accordingly, as

[8] S*ee also State of Florida v. Adam Matos,* Pasco County, Case No. 2014-CF-005586AXWS (received life sentences in 2017 for four murders)*; State of Florida v. James Bannister,* Marion County, Case No. 2011-CF-3085 (received life sentences in 2017 for four murders; two of the victims were under the age of twelve).

proper *Caldwell* instructions would be required if Lynch had a constitutional penalty phase jury trial, it is more likely than not that at least one juror would not join in a death recommendation due to the volume of mitigation uncovered in postconviction. Therefore, the *Hurst* error affected Lynch's sentence and is not harmless.

Further, the Eighth Amendment requires narrowing the class of murderers subject to capital punishment and juror unanimity serves that function. *Hurst,* 202 So. 3d at 60. A capital defendant's life no longer lies in the hands of a judge or a bare majority; it lies in the hands of twelve individuals. Now a defendant can only receive a death sentence if the jury unanimously concludes the defendant should be sentenced to death. *Id*. at 44. As a result, defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence and cannot be executed under the Eighth Amendment. Lynch must be granted the opportunity to have a constitutional jury sentencing, just as he fully litigated for in 1999.

Mullens only precludes *Hurst* relief when a defendant knowingly, voluntarily, and intelligently makes a *valid* waiver of his right to a penalty phase jury. *See Mullens*, 197 So. 3d at 38-40. Although Lynch's Successive Motion, which included an affidavit from lead counsel, Figgatt, highlighted the invalidity of Lynch's waiver, the lower court erred in summarily denying Lynch's claims without an EH. S49-52, 89-93. An EH would have demonstrated the multitude of reasons why Lynch's waiver was invalid and directly based on not only deficient advice, but also advice

given due to an unconstitutional statute. *See* S49-52; *see also infra* pp. 21-24. If Lynch was not advised to waive a penalty phase jury, he would currently be awaiting a new penalty phase or sentenced to life instead of being mistakenly lumped into a blanket denial of *Hurst* relief based upon *Mullens*. As his penalty phase jury waiver is invalid, *Mullens* loses *all* relevance to Lynch's case. In light of *Hurst*, Lynch's death sentences stand in violation of the Sixth, Eighth, and Fourteenth Amendments. Thus, the *Hurst* error is not harmless in Lynch's case and warrants relief.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING LYNCH'S CLAIM THAT, IN LIGHT OF *HURST*, HIS POSTCONVICTION CLAIMS MUST BE REEVALUATED UNDER A CONSTITUTIONAL SENTENCING SCHEME.

In light of *Hurst*, Lynch's initial postconviction claims must be reevaluated under the new Florida law that would govern at a constitutional resentencing. The lower court erred in finding that Lynch's claim was procedurally barred because it was raised and rejected previously. S92. Lynch's situation is distinguishable from cases cited by the lower court because his initial postconviction claims were adjudicated under an unconstitutional scheme. Lynch is not attempting to relitigate his claims as the lower court suggests, he is merely requesting a reconsideration of his claims in light of the fact that a constitutional sentencing scheme necessitates a different analysis because now only one juror, instead of six, is required to vote for life to receive a binding life sentence.

Lynch's IAC claim is especially egregious and deserves reevaluation in light

of *Hurst*. IAC claims are reviewed under *Strickland's* two-prong test of deficient performance and prejudice. 466 U.S. 668 (1984). Under *Hill*, when faulting counsel for advising before finding evidence relevant to that advice and informing the defendant, prejudice "will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation." 474 U.S. at 59. Therefore, unlike *Mullens*, IAC invalidated Lynch's jury waiver. *See supra* pp. 11-15.

This Court has already held that Lynch's counsel were deficient in their performance. *Lynch*, 2 So. 3d at 75-77. Notably, the Middle District found that counsel was prejudicially ineffective for advising Lynch "to waive a penalty-phase jury prior to adequately investigating and advising him of his cognitive impartment" and granted habeas relief. *Lynch*, 897 F. Supp. 2d at 1293, 1309. The Eleventh Circuit overturned the grant of habeas relief. *Lynch*, 776 F.3d at 1232. The court analyzed prejudice under *Hill* and focused on whether the outcome likely would have changed "with a jury recommending a sentence to the judge as opposed to a judge determining a sentence without a jury's recommendation." *Id.* at 1229. In light of *Hurst*, the outcome would have changed because counsel's advice would reflect the crucial differences of the jury being the *actual factfinder* now, no longer offering a mere recommendation to a judge, *and* verdicts for death now must be unanimous.

The identity of the factfinder is crucial in deciding whether to waive a jury. Under *Hurst*, there is no question that Lynch satisfies the *Hill* prejudice analysis. If

Figgatt had discovered evidence of Lynch's brain damage or *Hurst* was the law, his recommendation would have changed. *See* S51-52. As evidenced by Lynch's letters voicing concerns regarding the harshness of his sentencing judge, he would have insisted on a penalty phase jury if Florida's sentencing scheme was constitutional and required a unanimous jury verdict. *See Lynch*, 897 F. Supp. 2d at 1309. Further, Lynch was never able to make an informed decision as to whether to waive a penalty phase jury because counsel's mitigation was incomplete at the time Lynch was advised to waive his jury. *See* S51-52. If Lynch was able to make an informed decision about waiving a jury *or* had the benefit of a constitutional death penalty sentencing scheme, which he requested in pretrial motions, the outcome would be different because he would not have waived a penalty phase jury. As such, he would have received either a new penalty phase or a binding life sentence.

An EH would have allowed Lynch to demonstrate that counsel's substantial deficiencies affected the fairness and reliability of his proceeding. As Figgatt stated in his affidavit, "The mental health experts that [he] retained in Mr. Lynch's case were not provided any of his school records, which [he] understand[s] were later found to suggest that Mr. Lynch had organic brain damage." S51. Due to counsel's deficiencies, mental health expert Dr. Olander, did not have Lynch's educational records or background information such as Dr. Cox's report which suggested brain dysfunction. P16/646-47, 649, 654, 663-64, 666. Thus, Lynch's brain damage was

not diagnosed prior to the waiver. P16/646-47, 649, 654, 663-64, 666. As explained above, if Figgatt knew of Lynch's brain damage he would have advised that juries are more receptive to that form of mitigation and allowed him to make an informed decision whether to waive a penalty phase jury. S51-52; *see supra* pp. 11-13.

Like Bevel, Lynch's counsel failed "to conduct a constitutionally adequate mitigation investigation." *See Bevel*, 221 So. 3d at 1177-78. "[W]here the jury's vote recommending death was dependent on one juror's vote, our confidence has been undermined when counsel was deficient in presenting mitigation to the jury, because '[t]he swaying of the vote of only one juror would have made a critical difference.'" *Id.* at 1179 (quoting *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992)). *Bevel* has altered the prejudice analysis by stating that under *Hurst*, if counsel was deficient in presenting mitigation, the confidence in the outcome is undermined due to the potential to convince one juror to vote for life. *See id*. Therefore, prejudice is now an easier hurdle to overcome and Lynch's IAC claim must be reconsidered. A complete presentation of Lynch's mitigation would have made a critical difference by influencing Lynch not to waive a jury and would have surely swayed at least one juror to vote for a life sentence, as indicated in Figgatt's affidavit. *See generally* S50-52. Therefore, if Lynch had been humanized in front of a jury and the jurors had heard the mitigation uncovered in postconviction, such as the brain damage and dysfunction in his right cerebral hemisphere and anterior tertiary cortex of his frontal

lobe and his learning deficiencies, there is a reasonable probability that Lynch would not be sentenced to death. P16/662-66, P17/966, 982-84. As this claim was previously a close determination and the prejudice analysis has evolved, it would be an obvious injustice to fail to reevaluate the prejudice prong of in light of *Hurst*.

Bevel's counsel was deficient for many of the same reasons as Lynch's counsel and the extensive amount of mitigation uncovered in postconviction for Bevel was nearly identical to the mitigation uncovered for Lynch, including evidence of brain damage, frontal lobe impairment, academic struggles in school, and unresolved grief issues following the death of a parent. *Bevel*, 221 So. 3d at 1176; P13/160-61, P15/501-02, P16/663-66, 728-31. Although Bevel's advisory jury recommendation was *unanimous*, in this post-*Hurst* landscape he met the prejudice prong and his death sentence was vacated and remanded for a new penalty phase. *Id.* at 1179. As a matter of due process and equal protection of laws under the Fourteenth Amendment, the law must be applied consistently to all capital defendants. Because Lynch's mitigation is practically identical to Bevel's, Lynch's death sentences must be vacated, and he must be granted a new penalty phase.

As this Court has stated:

> The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications. Thus, society recognizes that a sweeping change of law can so drastically alter the substantive or procedural underpinnings of a final conviction and sentence that the machinery of post-conviction relief is necessary to avoid individual instances of

> obvious injustice. Considerations of fairness and uniformity make it very "difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases."

Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) (footnote and citation omitted). Accordingly, in light of *Hurst*, it is imperative to reevaluate Lynch's initial postconviction claims under the new constitutional death penalty scheme. Although Lynch's IAC claim is the most evident display of injustice raised in postconviction, Lynch should not be denied the benefit of having all of his claims considered under the new Florida sentencing scheme that would govern at a constitutional resentencing. All other similarly situated capital defendants will be entitled to that opportunity; therefore, Lynch is being deprived of the Fourteenth Amendment due process and equal protection he is entitled to.

Consideration of Lynch's IAC claim under the new constitutional Florida law will show that Lynch was prejudiced because but for trial counsel's deficiencies, Lynch would have requested a penalty phase jury. Thus, there is a reasonable probability that the outcome of Lynch's proceeding would have been different.

CONCLUSION

Based on the arguments in this brief and the records on appeal, Lynch requests that this Court reverse the lower court's order denying relief, vacate his sentences of death and grant him a new penalty phase, or remand his case for an EH, or grant such other relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

WE 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 1st day of March, 2018.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was served via electronic mail to **Donna M. Perry,** Assistant Attorney General, Office of the Attorney General, 1615 N. Flagler Drive, Suite 900, West Palm Beach, Florida 33401, at donna.perry@myfloridalegal.com and capapp@myfloridalegal.com on this 1st day of March, 2018.

WE HEREBY FURTHER CERTIFY that a copy of the foregoing was mailed to **Richard E. Lynch,** DOC# E08942, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on or about this 1st day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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