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

REPLY BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Richard E. Lynch ("Lynch") relies on the arguments presented in the Initial Brief of the Appellant ("Initial Brief"), and offers the following reply to the Answer Brief of Appellee dated March 8, 2018. While Lynch will not reply to every issue and argument raised by the Appellee, he expressly does not abandon the issues not specifically replied to herein.

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]. Page references to the Initial Brief are designated with IB[page number]. Page references to the Answer Brief of Appellee ("Answer Brief") are designated with AB[page number]. All other references will be self-explanatory or otherwise explained herein. All emphasis is supplied unless otherwise noted.

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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.

The Appellee argues that Lynch is not entitled to relief under *Hurst v. Florida*, 136 S. Ct. 616 (2016) because he waived his right to a penalty phase jury. AB6-7, 10. The Appellee incorrectly claims that *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016) is controlling and interprets its holding as "the defendant was entitled to no relief because he waived the penalty phase jury."[1] AB7. However, that is an incomplete interpretation of *Mullens*, which also holds that, "a waiver of the right to jury sentencing will be upheld if that waiver is knowingly, voluntarily, and intelligently made" and noted that Mullens "*validly waived* that right." *Id*. at 39, 40 (emphasis in original). The Appellee also mentions that *Mullens* quotes *Blakely v. Washington*, 542 U.S. 296, 310 (2004), but fails to include the portion of the quote that states, "If *appropriate* waivers are procured, States may continue to offer judicial factfinding." *Id*. at 38. Accordingly, as Lynch explained in his Initial Brief, this case is distinguishable from *Mullens* because, unlike Mullens, who validly waived his right to a penalty phase jury, Lynch's waiver was not knowing,

[1] The Appellee also incorrectly stated that Mullens and Lynch both "plead guilty to two counts of first-degree murder and one count of attempted first-degree murder." AB7. No attempted murder existed in Lynch's case.

intelligent, and voluntary. *See* IB9-13, 19-20.

The Appellee cites to multiple opinions where this Court has denied *Hurst* relief to a capital defendant who waived a penalty phase jury. AB8. However, all of the cases listed on page eight of the Answer Brief can be distinguished from Lynch's case because all of those opinions cite *Mullens* as the precedent for denying relief. However, Mullens was denied *Hurst* relief because his penalty phase jury waiver was *valid*. *Mullens*, 197 So. 3d at 40; *see, e.g., Allred v. State*, 230 So. 3d 412, 413 (Fla. 2017) ("Allred is among those defendants who *validly* waived the right to a penalty phase jury, and his arguments do not compel departing from our precedent.") The circumstances of Lynch's case show that his waiver was *invalid*; therefore, none of the opinions denying *Hurst* relief on the basis of the holding in *Mullens* are applicable to his case.

The Appellee argues that a waiver remains "valid regardless of later developments in the law." AB9. For this assertion, the Appellee is making the same presumption as the lower court by assuming that Lynch's waiver was valid without further analysis. S92. In addition, the cases cited by the Appellee solely relate to guilty pleas, which are distinguishable from waiving the right to a penalty phase jury because there is not a "high likelihood that defendants, advised by competent counsel, would falsely condemn themselves." *See Brady v. United States*, 397 U.S. 742, 758 (1970). To illustrate further, *McMann v. Richardson* explains that

"[w]hether or not the advice the defendant received in the pre-Jackson[2] era would have been different had Jackson then been the law has no bearing on the accuracy of the defendant's admission that he committed the crime." 397 U.S. 759, 773 (1970). Notably, the requirement that a valid plea must be knowing, intelligent, and voluntary still exists. *See Brady*, 397 U.S. at 758 ("[O]ur view…is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions….") Further, *McMann* concedes, "Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction *unless* he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." 397 U.S. at 774. Nonetheless, Lynch has shown that he would not have waived a penalty phase jury but for his trial counsel's serious derelictions and inadequate advice, and his waiver was not knowing, intelligent, and voluntary. Therefore, Lynch's waiver is invalid and he is not bound by his waiver.

Further, Lynch is not attempting to abuse the judicial process and now request a penalty phase jury solely because he was sentenced to death, which is the scenario envisioned in *Mullens* and suggested by the Appellee. 197 So. 3d at 40; *see also*

[2] *Jackson v. Denno*, 378 U.S. 368 (1964).

AB10. Rather, Lynch is continuing to request a constitutional jury sentencing where a jury finds and weighs aggravators and mitigators and must unanimously vote to sentence him to death, just as he litigated for in 1999 and 2000. R1/128-30, 134-35, 147-50, 153-54, 157-64, SR82-83. If Lynch's pretrial motions challenging the constitutionality of § 921.141, Fla. Stat. had not been denied, Lynch would not have waived his right to a jury. Lead counsel, James Figgatt ("Figgatt"), stated in his affidavit attached to Lynch's Successive Motion to Vacate Sentences of Death Pursuant to Florida Rule of Criminal Procedure 3.851 that his advice would have been different under a constitutional sentencing scheme and "If *Hurst* had been the law in 2000, [he] would not have advised Mr. Lynch to waive a penalty phase jury at all." S50, 52. As Lynch only waived his penalty phase jury due to following counsel's advice after his pretrial motions were denied, *Lynch would not have waived his right to a penalty phase jury under a constitutional sentencing scheme*.

The Appellee also asserts that this issue was resolved on direct appeal because this Court mentioned in a footnote that

> 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.

Lynch v. State, 841 So. 2d 362, 366 n.1 (Fla. 2003); AB1, 6-7. Appellee fails to consider that capital defendants who raised *Ring*-like claims were consistently

denied relief both before Lynch's appeal and for thirteen years after *Ring*. Accordingly, many capital defendants did not raise the issue due to the law appearing to be well settled. *See Boyd v. State*, 200 So. 3d 685, 699 (Fla. 2015) ("[W]here this Court previously has rejected a substantive claim on the merits, counsel cannot be deemed ineffective for failing to make a meritless argument."). However, in light of *Hurst*, post-*Ring* capital defendants with nonunanimous jury recommendations were entitled to relief regardless of whether a *Ring*-like claim was raised. *See Kopsho v. State*, 84 So. 3d 204, 220 (Fla. 2012) (*Ring* claim denied, but granted *Hurst* relief in *Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017)); *see also Snelgrove v. State*, 217 So. 3d 992, 999, 1004 (Fla. 2017) (did not raise a *Ring* claim on direct appeal and was granted *Hurst* relief). Therefore, under the Fourteenth Amendment, although Lynch did not raise a *Ring* claim on appeal, the same analysis should apply to him. As Section 921.141 of the Florida Statutes was incorrectly found constitutional during the period that Lynch's direct appeal opinion was written, the language of the footnote cannot be held to be controlling and Lynch's argument must be considered under the constitutional sentencing statute.

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.

The Appellee argues that Lynch is attempting to resurrect and relitigate claims that were previously raised and rejected. AB11. However, Lynch is not attempting

to relitigate his claims. He merely requests that his claims be reconsidered under the new analysis that exists due to Florida's newly constitutional sentencing scheme. If the current sentencing scheme was actually the law in effect since June 24, 2002, the date of the *Ring* opinion and the date that this Court has deemed *Hurst* retroactive to, Lynch would have had the benefit of his postconviction claims being decided under a constitutional system. Accordingly, it would be an obvious injustice if Lynch's claims were not reconsidered under the current constitutional analysis because similarly situated capital defendants will benefit from the new analysis. *See Bevel v. State*, 221 So. 3d 1168, 1181-82 (Fla. 2017). If Lynch's postconviction claims are not reconsidered under a constitutional analysis, Lynch will be deprived of the Fourteenth Amendment due process and equal protection he is entitled to.

Based on the Appellee's contentions that "the prejudice prong requires a showing that he was prejudiced by his counsel's errors, not by a Sixth Amendment fact-finding error" and that "this Court [has] already found there is no basis for prejudice," the Appellee appears to have misunderstood Lynch's argument. AB12. To clarify, as to Lynch's most egregious postconviction claim, ineffective assistance of counsel related to his penalty phase, Lynch is requesting a prejudice analysis which reflects *Hurst* and the resulting constitutional Florida law. *See Bevel*, 221 So. 3d at 1181-82. Contrary to the Appellee's assertion, Lynch is not implying that trial counsel was deficient for failing to anticipate a change in the law. AB15. *Lynch has*

already demonstrated that his trial counsel was deficient; therefore, the first prong of Lynch's ineffective assistance of counsel claim has been satisfied. This Court found that "[b]ased on the fact that trial counsel knew Lynch suffered from some type of cognitive impairment and never fully investigated this condition, counsel were deficient during the penalty phase in failing to address and utilize evidence related to Lynch's frontal-lobe and right-hemispheric cognitive impairment." *Lynch v. State*, 2 So. 3d 47, 75 (Fla. 2008), *as revised on denial of reh'g* (Jan. 30, 2009). As the Appellee pointed out, this Court did not find that prejudice existed. *See* AB12-14. However, this Court's prejudice analysis was based on the pre-*Hurst* unconstitutional sentencing scheme. Accordingly, Lynch asserts that, in light of *Hurst* and *Bevel*, the prejudice he has suffered due to the errors and deficiencies of trial counsel has been exacerbated. Pre-*Hurst*, Lynch's counsel advised him to waive because he "would have had to convince six jurors to vote for life in order to receive a life recommendation." S50-51. In light of *Hurst v. Florida*, *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and the resulting newly constitutional sentencing scheme, Lynch's counsel would only need to convince one of twelve jurors, *less than nine percent of the factfinders*, to save Lynch's life and would not have advised Lynch to waive a jury trial in order to convince the judge, *a hundred percent of the factfinders*, to spare his life. *See* S50-52.

The Appellee claims that Lynch is repackaging a claim that he previously

litigated in his prior postconviction proceedings and cites to *Marek v. State*, 8 So. 3d 1123 (Fla. 2009) in attempt to show that his ineffective assistance of counsel claim is procedurally barred. AB15. However, *Marek* is distinguishable because Marek incorrectly claimed that the *Rompilla*,[3] *Wiggins*,[4] and *Williams*[5] opinions modified the standard of review governing ineffective assistance of counsel claims. *Id*. at 1128-29. In contrast, the prejudice analysis has actually changed in light of *Hurst*. Now, "where 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."' *Bevel*, 221 So. 3d at 1182 (quoting *Phillips v. State*, 608 So. 2d 778, 783 (Fla. 1992)). Prior to *Hurst*, this analysis was only applied in cases with a 7-5 jury recommendation, but now it is applied to all capital defendants. *See Phillips*, 608 So. 2d at 783. Due to the modified analysis of the prejudice prong enunciated in *Bevel*, prejudice must be reevaluated in Lynch's case. This Court has never determined the effect that a constitutional sentencing scheme would have had on both trial counsel's advice and Lynch's actual decision whether to waive a penalty phase jury. This assessment is of utmost importance because Figgatt stated in his affidavit that if *Hurst* was the law at the time, he "would not have advised Mr. Lynch

[3] *Rompilla v. Beard*, 545 U.S. 374 (2005).
[4] *Wiggins v. Smith*, 539 U.S. 510 (2003).
[5] *Williams v. Taylor*, 529 U.S. 362 (2000).

waive a penalty phase jury at all." S52. As Lynch would not have waived a penalty phase jury under a constitutional sentencing scheme or if his counsel had not been deficient, this Court still has yet to consider whether a complete presentation of Lynch's mitigation would make a critical difference by swaying the vote of one juror to vote for life. *See Bevel*, 221 So. 3d at 1182.

The Appellee also incorrectly asserts that there is no evidence that Lynch would not have waived a penalty phase jury if counsel had properly advised him. AB12. On August 29, 2000, almost two months prior to waiving his right to a jury, Lynch wrote a letter to Figgatt expressing his concern that Judge O. H. Eaton, Jr. would be presiding over his case instead of his original judge, Judge Nancy F. Alley. P4/593-94. Lynch stated, "[T]he change of judge from Alley to O.H. Eaton I don't feel will help, he reminds me of an [sic] cranky old man & possibly harsher as [sic] concerning sentence." P4/594. Although Lynch was concerned about the harshness of Judge Eaton's sentencing, he trusted the advice of his counsel and ended up going along with counsel's advice to waive his right to a penalty phase jury. Lynch's trust in Figgatt is evident in the letters that he wrote to him. As an example of Lynch's level of trust in Figgatt in the timeframe surrounding his waiver, Lynch wrote a letter to Figgatt three days after his waiver stating, "I followed your instruction and kept my mouth shut," "You are my only hope," and "Please do your best Mr. Figgatt, I am placing my trust and my life in your hands." P4/598. Unbeknownst to Lynch, his

trial counsel was not as trustworthy as he thought because he had not fully investigated Lynch's mitigation or properly read the report of Clinical Neuropsychologist, David R. Cox, Ph.D., ABPP. before giving Lynch advice. *See* IB 4-5, 10-13, 23-24. Notably, Figgatt admitted that his advice to Lynch would have changed if he knew Lynch "suffered from brain dysfunction in his right cerebral hemisphere and his frontal lobe." S51-52.

Accordingly, if trial counsel was not deficient or Section 921.141 of the Florida Statutes had been constitutional, Lynch would have requested a penalty phase jury. Further, if Section 921.141 of the Florida Statutes was constitutional at the time, Lynch would have only had to convince one juror to vote for life to avoid being sentenced to death. Therefore, under the analysis that follows from a constitutional sentencing scheme, Lynch has satisfied both *Strickland*[6] and *Hill*[7] and must be granted a constitutional penalty phase in front of a jury.

CONCLUSION

The lower court erred in denying Lynch postconviction relief. 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, remand his case for an evidentiary hearing, or grant such other relief as this Court deems just and proper.

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[6] *Strickland v. Washington*, 466 U.S. 668 (1984).
[7] *Hill v. Lockhart*, 474 U.S. 52 (1985).

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 13th 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 13th 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 13th 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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