IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-931

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 80-00048CFAES

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 Seventh Judicial Circuit, in and for Volusia County, denying relief to the Appellant, Kenneth Darcell Quince ("Quince"). Page references to the trial record on appeal will be designated as **"**R[volume number]/[page number]." Page references to the supplementary record on appeal will be designated as "S[page number]." The postconviction record on appeal concerning the current successive motion to vacate sentence of death pursuant to Florida Rule of Criminal Procedure 3.851 will be designated as "P[page number]." All other references will be self-explanatory or otherwise explained.

QUESTION PRESENTED BY THE COURT

In its Order dated Thursday, June 29, 2017, the Court directed the parties to file briefs to specifically address why the Court should not affirm the lower court's order in light of *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In this brief, Quince will first address the Court's question. *See* Argument I, *infra*. Then, Quince will preserve for appellate review his arguments regarding the retroactive applicability of *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to his sentencing. *See Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *see* Argument II, *infra*.

REQUEST FOR ORAL ARGUMENT

A full opportunity to air the issues through oral argument would be

appropriate given the seriousness of the claims involved and the fact that a life is at stake. Quince accordingly respectfully requests that this Honorable Court permit oral argument.

STATEMENT OF THE CASE

I. TRIAL COURT PROCEEDINGS

Quince was indicted on January 17, 1980, with first-degree murder, sexual battery[1], and burglary of an occupied dwelling. R1/1. On March 10, 1980, ***the trial court ordered that Quince be evaluated for sanity*** (pursuant to a defense motion) at the time of the alleged offense. R1/4-10. George W. Barnard, M.D., was appointed to determine Quince's competency and sanity at the time of the offense. R4/111; R1/54[2]. On August 11, 1980, Quince pled guilty to first-degree felony murder and burglary. S1/1-20. He waived the right to a sentencing jury. S1/1-20.

At the sentencing hearing, the State presented the testimony of Dr. Barnard who testified that he interviewed Quince on March 18, 1980. R4/111; R1/54. Dr. Barnard confirmed his finding that "[c]linically [Quince] is judged to be of ***dull normal level of intelligence***." R4/128; R1/54. Dr. Barnard testified that based on defense expert

[1] This count was dismissed by the court. R1/29; S1/1-20.

[2] Dr. Barnard's report starts at page number "54" and all the pages are marked as "54." Dr. Rossario's report starts at page number "55" and all the pages are marked as "55." Dr. Carrera's report starts at page number "56" and all the pages are marked as "56." Dr. McMillan's report starts at page number "57" and all the pages are marked as "57." Dr. Stern's report starts at page number "58" and all the pages are marked as "58." The citation for these experts' reports will be in accordance with the starting page number.

Dr. Ann McMillan's data, "he would say [Quince] is ***borderline level intelligence***." R4/128; R1/54. Thereafter, in lieu of live testimony, the State introduced the reports of Edward J. Rossario, M.D. and Frank Carrera, III, M.D. into evidence. R4/131; R1/55-56. Both Drs. Rossario and Carrera were specifically appointed by the trial court to determine Quince's competency and sanity at the time of the offense. R1/55; 56. Dr. Rossario examined Quince on March 25, 1980, and Dr. Carrera examined Quince on March 18, 1980. R1/55; 56. Dr. Rossario clearly wrote that Quince's "intelligence can be described as ***slightly below average***." R1/54.

Quince presented the testimonies of Drs. McMillan and Stern. R4/132-165. Dr. McMillan was the psychologist who was appointed by the trial court to examine Quince regarding the presence of mental mitigating factors. R4/133. Dr. McMillan met with Quince on ***October 2, 1980***,[3] and administered the Minnesota Multiphasic Personality Test and the Wechsler Adult Intelligence Test on him. R4/140. Dr. McMillan's written report was entered into evidence. R1/57. Dr. McMillan ***opined that Quince suffered from borderline mental retardation***, ***severe specific learning disability,*** and neurological impairment. R4/144; R1/57. Dr. McMillan further

[3] Drs. McMillan and Stern did not see Quince prior to his plea of guilt and waiver of jury sentencing. It is clear that trial counsel did not have the knowledge of these expert findings of Quince's severe deficiencies of intelligence and mental retardation prior to his conversations with his client about the waiver. This fact matters as to the voluntary, knowing and intelligent assessment of Quince's waiver. *See* Argument I, *infra*.

opined that "Quince has ***permanent learning and judgment disability and limited ability to perceive the consequences of his actions***." R4/144; R1/57. Dr. McMillan testified that Quince had a "***low intelligence score, which is functioning on an eleven-year-old basis.***" R4/145. Dr. Stern, a physician specializing in psychiatry, examined Quince on October 13, 1980. R1/58; R4/154. Dr. Stern performed only a mental status examination on Quince to check his mental state to see if he was psychiatrically insane or sane. R4/156. Like Dr. McMillan, Dr. Stern testified that Quince "***is not a bright gentleman***" and that Quince "is functioning at ***a borderline level of intellectual capability***." R4/158; R1/58.

On October 21, 1980, the Court imposed a sentence of death and independently found all the aggravators and mitigators. R1/18-20; 30-31; R4/210-212. The trial court ***independently*** found the following in its sentencing order:

> the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape[4]; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

Quince v. State, 414 So. 2d 185, 186 (Fla. 1982). The convictions and death sentence were affirmed on direct appeal. *See Quince,* 414 So. 2d 185, *cert. denied,* 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed. 2d 155 (1982).

[4] This charge was dismissed.

On direct appeal, this Court denied relief on all issues raised, which were: (1) "that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law"; (2) that the murder was not heinous; (3) "that the underlying felony of sexual battery may not be used in aggravation"; (4) that there was an improper doubling of aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain and then used these facts as parts of his heinous finding"; (5) "an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse"; (6) "that certain additional factors should have been found in mitigation"; (7) that the sentencing procedure whereby the State was allowed two closing arguments violated Fla. R. Crim. P. 3.780(c); and (8) "that a general sentence was improperly imposed on him for two separate offenses, violating the dictates of *Dorfman v. State*, 351 So.2d 954 (Fla.1977)." *Id.* at 186-88.

II. POSTCONVICTION PROCEEDINGS

Quince filed a motion for postconviction relief, which was denied and affirmed on appeal.[5] *Quince v. State*, 477 So. 2d 535 (Fla. 1985), *cert. denied*, 475 U.S. 1132,

[5] Quince raised the following issues, many of which were deemed procedurally barred: (1) "that he was deprived of his right to know and to contest the contents of his presentence investigation report (PSI) as required by *Gardner v. Florida*, 430

106 S.Ct. 1662, 90 L.Ed. 2d 204 (1986). Quince then filed a successive motion for postconviction relief, which was denied after remand, and the denial affirmed on appeal. *See Teffeteller v. Dugger*, 676 So. 2d 369 (Fla. 1996). In this appeal, Quince, along with three other defendants with whom his appeal was consolidated, argued that his trial attorney's status as a special deputy sheriff created a conflict of interest. This Court upheld the trial court's finding that no conflict of interest existed. *Quince v. State*, 732 So. 2d 1059 (Fla. 1999).

In light of *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), Quince subsequently filed another successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851[6] as well as Rule 3.203, which provides for determination of intellectual disability as a bar to execution. *See Quince v. State*, 116 So. 3d 1262 (Fla. 2012). His motion was denied after an

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U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)"; (2) "that the trial court erred in allowing the state to introduce his prior juvenile adjudications at the sentencing hearing in order to negate the statutory mitigating factor of no significant history of prior criminal activity"; (3) "that the trial court erred in allowing the state to introduce psychiatric evidence at sentencing because he was not given *Miranda* warnings prior to submitting to the psychiatric examination"; (4) "that his trial counsel was ineffective at both phases of trial"; and (5) "that he was denied a full and fair evidentiary hearing because the trial court refused to appoint certain experts and investigators." *Id.* at 536-37.

[6] Florida Rule of Criminal Procedure 3.851 was adopted in 1987 to provide specific procedures for seeking capital postconviction relief. *In re Florida Rules of Criminal Procedure, Rule 3.851*, 503 So. 2d 320 (Fla.1987). Prior to the Rule's adoption, capital defendants sought postconviction relief in Florida pursuant to Florida Rule of Criminal Procedure 3.850.

evidentiary hearing and the denial was affirmed on appeal. *Id.* Thereafter, on May 21, 2015, Quince filed a Renewed Motion for Determination of Intellectual Disability as a Bar to Execution Under Florida Rule of Criminal Procedure 3.203 and § 921.137, Florida Statutes, following the United States Supreme Court decision in *Hall v. Florida*, 134 S. Ct. 1986, 188 L.Ed.2d 1007 (2014). No evidentiary hearing was requested by either party and both parties agreed to submit written memoranda and proposed orders to the lower court. In a final written order on December 28, 2016, the lower court denied Quince relief.[7]

After the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State*, Quince filed a successive motion to vacate his sentence of death pursuant to Florida Rule of Criminal Procedure 3.851. P17-45. The State filed its response. P56-72. The lower court held a case management conference. P111-25. At the case management conference, the lower court heard argument from all parties and orally denied Quince relief. P111-126. A written order denying relief was later issued and is the subject of this appeal. P73-97.

STATEMENT OF THE TRIAL FACTS

Part of the relevant factual history from the sentencing proceedings before the trial court was summarized by this Court in *Quince v. State*, 414 So. 2d 185 (Fla.

[7] The appeal of this Order denying relief is pending before the Court. *See Kenneth Darcell Quince v. State of Florida*, SC17-127.

1982) and is as follows:

> In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.
>
> Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased.

Quince, 414 So. 2d at 186; R3/4-99.

STANDARD OF REVIEW

The standard of review is *de novo*. *See Stephens v. State,* 748 So. 2d 1028, 1032 (Fla. 2000). The lower court's rulings are reviewed *de novo* and deference is given to factual findings ***supported by competent and substantial evidence***. *See Sochor v. State*, 883 So. 2d 766, 772 (Fla. 2004).

SUMMARY OF ARGUMENTS

ARGUMENT I: Despite the Court's precedence in *Mullens*¸ Quince submits that he is entitled to *Hurst* review and relief. Quince could not constitutionally waive a right that was wrongfully not afforded to him. Moreover, even if he could, the waiver could never be knowing, voluntary and intelligent. Furthermore, Quince's waiver colloquy was not thorough, nor did it demonstrate that Quince unequivocally

waived his penalty phase proceedings.

ARGUMENT II: Despite the Court's precedence in *Asay*, Quince continues to argue that he is entitled to the retroactive application of *Hurst v. Florida* and *Hurst v. State*. To deny Quince *Hurst* review is a constitutional violation of his Sixth, Eighth, and Fourteenth Amendments rights, a violation of his equal protection rights, and a fundamentally unfair and arbitrary application by this Court.

ARGUMENT AND CITATIONS OF AUTHORITIES

ARGUMENT I

A. ARGUMENT REGARDING THE COURT'S QUESTION PRESENTED

A defendant cannot waive a right that was not yet recognized by the courts. *See Halbert v. Michigan*, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 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."); *see Cruz v. Lowe's Home Centers, Inc.*, No. 8:009-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established"). At the time of Quince's sentencing, Florida's unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a sentence of death.

Therefore, Quince could never waive his right to a jury fact-finding and a requirement of a unanimous jury sentencing. *See Halbert*, 545 U.S. at 623; *see Hurst v. Florida*, 136 S. Ct. 616; *see Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst v. State*, 202 So.3d at 62, n. 18. Quince could not constitutionally waive a right that was wrongfully not afforded to him.

Should this Court determine that a defendant could waive his jury sentencing, even though the right did not exist, then this Court must inquire into the waiver colloquy. *See Mullens*, 197 So. 3d at 39; *see also Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010); *see also Rodgers v. Jones*, 3:15-cv-507-RH, ECF No.15 (N.D. Fla. Aug. 24, 2016). The Sixth Amendment to the United States Constitution provides that a defendant has a fundamental right to a jury trial. *See Duncan v. Louisiana,* 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). However, fundamental constitutional rights can be waived when a defendant so chooses. *See Boykin v. Alabama,* 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969). Nonetheless, an effective waiver of a constitutional right must be voluntary, knowing, and intelligent. *See Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). Further, the constitutionality or appropriateness of a waiver of a constitutional right, such as

Quince's Sixth, Fifth, and Fourteenth Amendment rights, must be unequivocal. The Supreme Court of the United States in *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) demonstrated the detailed inquiry that is necessary to determine whether a criminal defendant has unequivocally waived his right to counsel. Specifically, our highest Court held as follows:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused ***must 'knowingly and intelligently' forgo those relinquished benefits***. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, ***he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.***' *Adams v. United States ex rel. McCann*, 317 U.S., at 279, 63 S.Ct., at 242.
>
> Here, weeks before trial, Faretta ***clearly and unequivocally*** declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the 'ground rules' of trial procedure.

Faretta, 422 U.S. at 835-36 (internal footnote omitted). It should be noted just how detailed the colloquy was by the Court in *Faretta* to make sure that the defendant was aware of not only his rights but the court also articulated the dangers of waiving his right. *See Pasha v. State*, 39 So. 3d 1259, 1261 (Fla. 2010) (quoting *Tennis v. State*, 997 So. 2d 375, 378 (Fla. 2008) ("It is clear that '[b]efore the trial court can

make a decision whether to permit the defendant to proceed pro se, the defendant's request for self-representation must be unequivocal.'")

The importance of an appropriate and detailed colloquy cannot be understated when assessing whether a waiver of a constitutional right is valid. The Supreme Court of Florida clearly rejected an attorney's written waiver on behalf of his client waiving his right to a jury trial because the record did not demonstrate that the waiver was knowing, voluntary, and intelligent. *See State v. Upton*, 658 So. 2d 86 (Fla. 1995). The court held that

> [i]n the instant case, there was no affirmative showing on the record establishing that Upton agreed with the waiver his attorney had signed. The trial judge did not conduct a colloquy with Upton concerning the waiver nor did Upton make any statements regarding the written waiver. The mere fact that Upton remained silent during the trial and did not object to the judge sitting as the fact-finder was insufficient to demonstrate that he agreed with the waiver. Thus, we cannot conclude that Upton knowingly, voluntarily and intelligently waived his right to a trial by jury. We reject the State's alternative contention that the case should be remanded for an evidentiary hearing to determine whether Upton agreed with his attorney's waiver of a jury trial. *See Williams*, 440 So.2d at 1291.

Upton, 658 So. 2d at 88, *approved sub nom. Johnson v. State*, 994 So. 2d 960, 963 (Fla. 2008) ("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***, *see Tucker*, 559 So.2d at 220[8], is necessary to constitute a sufficient waiver. Further, a defendant's silence does not establish a valid

[8] *Tucker v. State*, 559 So. 2d 218 (Fla. 1990).

waiver of the right to a jury trial."(footnote added)). Quince's colloquy cannot be seen as an unequivocal waiver of his jury sentencing rights because he is not advised to any of the pros or cons of his decisions. He is simply told that he is waiving the right to a jury recommendation to the Court. When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, it is clear that pains must be made to ensure an unequivocal waiver of those rights, having been informed as to all of the dangers and disadvantages of waiving that right. There was no such inquiry in Quince's colloquy that would satisfy denying him *Hurst* review.

In its order, the lower court denied relief pursuant to this Court's ruling in *Asay v. State*, 210 So. 3d 1 (Fla. 2016) and this Court's ruling in *Mullens*. With regard to the denial of relief based on *Mullens*, the lower court stated as follows:

> Furthermore, the Florida Supreme Court has held that a defendant who waived his Sixth Amendment right to jury factfinding in sentencing procedure is not entitled to relief under *Hurst*. *Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016), *reh'g denied*, SC13-1824, 2016 WL 4377112 (Fla. Aug. 9, 2016), and *cert. denied*, 137 S. Ct. 672 (2017). Here, Defendant [Quince] waived his right to jury sentencing when he pleaded guilty to first degree murder and burglary. *See* Exhibit A, Transcript of Plea and Sentencing Hearing dated August 11, 1980, pages 5-7. The trial judge conducted a thorough colloquy and asked that Defendant fully understood that he was subject to sentences of either death or life imprisonment. *Id*. at 6-17. The trial judge then confirmed with Defendant's trial counsel that Defendant fully understood the effects of the plea knowingly, intelligently, and voluntarily waived his right to jury sentencing.

P75. While Quince acknowledges this Court's decision in *Mullens*, it is Quince's

position that this Court's decision has created an arbitrary class of defendants that are denied their Sixth and Fourteenth Amendment rights to specific jury fact-finding as to each element necessary to impose the death penalty, as required by the Supreme Court of the United States in *Ring* and *Hurst*, simply because the defendant waived an advisory jury recommendation under an unconstitutional sentencing scheme where a bare majority was all that was needed to recommend a death sentence. This Court held that Mullens could not "avail himself of relief" pursuant to *Hurst v. Florida* because he waived an advisory jury recommendation for penalty phase and elected to be sentenced by the judge. *See Mullens*, 197 So. 3d at 38-40. The court cited *Blakely v. Washington*, 542 U.S. 296, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and concluded, "[N]othing prevents a defendant from waiving his *Apprendi*[9] rights . . . . ***If appropriate waivers are procured***, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty." 197 So. 3d at 38. Certainly, no waiver can ever be appropriate or valid in these cases. Especially, when the right being waived provided less protection than it does now, i.e. a minor-majority jury recommendation versus a unanimous jury factfinding and ultimate decision-making.

The lower court's findings regarding the thoroughness of the colloquy

[9] *Apprendi v. New Jersey*, 530 U.S. 466, 488, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

concerning the waiver of jury sentencing is not supported by the competent and substantial evidence in the record and is an unreasonable finding of the facts. It is clear from the colloquy that Quince's waiver was not appropriate or constitutional in light of *Apprendi*. S1/1-20. The ***brief*** questioning of Quince by the trial court regarding his rights was as follows:

> THE COURT: All right. Mr. Quince, before I accept your plea, it is necessary that I explain the effect of your plea of guilty here today to you. If you have any questions during my explanation please stop me and ask any questions you have of Mr. Pearl. Now what you are doing today has very serious consequences on your life, and it is important that you understand fully what is going on here today. Do you understand the plea negotiations today?
> THE DEFENDANT: Yeah.
> THE COURT: You are pleading guilty to Count 1 and Count 3; ***you are waiving the right to have a jury give me an advisory recommendation*** as to what sentence I should impose as to Count 1, life or death, and that matter will be determined by me alone, after having ordered a background investigation, what we call a PSI, and after having a hearing, at which time your counsel will give reasons why there should be life imprisonment, as opposed to the State, which will present evidence at the hearing calling for the death penalty. So you understand that?
> THE DEFENDANT: (Nods head).
> THE COURT: Now do you understand that the State is going to seek the death penalty in this case?
> THE DEFENDANT: Yes.
> THE COURT: Okay. Mr. Quince, when you plead guilty in the State of Florida, you are admitting the truth of the charge. Do you understand that?
> THE DEFENDANT: Yeah.
> THE COURT: Okay.
> THE DEFENDANT: Yes, I do.
> THE COURT: Now that's opposed to pleading not guilty. If you please not guilty, before you could be convicted the State would have the burden of proving your guilt beyond and to the exclusion of every

reasonable doubt. Do you understand that?
THE DEFENDANT: Yeah, I know.
THE COURT: When you enter a plea of guilty in the State of Florida, one of the things that a plea of guilty does, it severely limits your right to appeal the judgment and sentence of this Court. If you wanted to appeal my judgment and sentence after you have entered a plea of guilty, you would have a very difficult time doing so. So a plea of guilty narrows your right to appeal. Do you understand that?
THE DEFENDANT: Yeah, I understand.
. . . [Mr. Quince is placed under oath and asked preliminary questions]
THE COURT: By your plea of guilty you are giving up certain other rights: Your right to remain silent, that is, your right against self-incrimination. Also, you are giving up you very important right to a jury trial as to your guilt or innocence; at that trial the right to be represented by counsel; the right to confront those who testify against you; and the right to compel the attendance of those who testify in your behalf. There will be no further trial of any kind. Do you understand that?
THE DEFENDANT: Yeah.
THE COURT: ***Although there will be a hearing in aggravation and mitigation at a later date***. Do you understand that?
THE DEFENDANT: Yeah.
THE COURT: Also, by your plea you are giving up your right to complain on appeal about any prior ruling the Court has made in your case. Do you understand that?
THE DEFENDANT: Yes.
. . . [factual basis recited].
THE COURT: Sir, do you admit the truth of the charges by the State of Florida against you?
THE DEFENDANT: Yes.
THE COURT: Has anybody promised you a light sentence or that you would otherwise be rewarded if you plead guilty?
THE DEFENDANT: No.
THE COURT: Do you understand there is no deal as to the sentence in this case?
THE DEFENDANT: Yeah. I understand.
THE COURT: Has anybody threatened you or pressured you to make you plead?
THE DEFENDANT: No.
THE COURT: You are represented by Mr. Pearl, who stands to your side. Have you told him everything you know about your case?

> THE DEFENDANT: Yes.
> THE COURT: Are you satisfied with his services as an attorney?
> THE DEFENDANT: Yeah, I'm satisfied.
> THE COURT: Okay. Mr. Pearl, does the defendant fully understand the effects of the plea negotiations?
> MR. PEARL: Your honor, based upon the conferences I have had with Mr. Quince, I have the impression and am convinced to a moral certainty that he understands the nature of the plea and the possible consequences of the plea which he has entered today.
> . . .
> THE COURT: All right. Sir, the Court finds you alert and intelligent, you understand the nature of the charges against you, and appreciate the consequences of pleading guilty; the facts which the State if prepared to prove, and which by your plea you admit, are sufficient to sustain the plea. The Court further finds your decision to plead guilty is freely, voluntarily and intelligently made, you have had the advice and counsel of a competent attorney, with whom you say you are satisfied. The plea of guilty is accepted.

S1/8-17. It is clear from the foregoing plea colloquy that the primary focus of the trial court was the waiver of rights associated with the guilt/innocence phase and the rights that accompany a jury trial. The trial court makes a passing reference [emphasized in the block quote] at the beginning of the colloquy as to the waiver of a jury recommendation to the court and later, that there will be a hearing in aggravation and mitigation. There is no questioning specifically aimed at the penalty phase proceedings or the bare majority recommendation. This colloquy cannot be considered appropriate or unequivocal; therefore the State cannot offer judge factfindings. *See Mullens*, 197 So. 3d at 38.[10]

[10] What should not be forgotten by this Court is that experts have determined that Quince has deficient intellectual functioning, a fact that certainly calls into question his understanding of the plea colloquy and the consequences of waiving a *jury*

Moreover, Quince's colloquy immensely pales in comparison to Mullens' colloquy that consisted of "persistent questions" and a "thorough colloquy." *Mullens*, 197 So. 3d at 39 (Mullens remarked to the trial court that "it seem[s] like [the court] keep[s] asking the same thing like [he] is making the wrong decision or something." Mullens said he was "absolutely positive" as to his waiver). There were no questions by the trial court regarding the specific rights that are abandoned by the waiver of jury sentencing at a penalty phase that were detailed in *Mullens* by this Court in support of its denial. *See id*. Further, there were no questions by the trial court regarding Quince's intellectual capabilities despite evidence of deficits. *See id*. ("The trial court was fully cognizant of Mullens's status and his background.") *See* p.2-4, *supra*.[11] At the bench trial there was obvious and relevant evidence as to

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recommendation. *See Atkins*, 536 U.S. 304. ("Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." (internal footnotes omitted)). Of note, Freddie Lee Hall (found to be intellectually disabled) and Tavares Wright (argued that he was intellectually disabled and two experts diagnosed him as such), both of low intelligence like Quince, also waived their jury sentencings. *See Hall v. Florida*¸ 201 So. 3d 628 (Fla. 2016); *see Wright v. State*, 216 So. 3d 881 (Fla. 2016).

[11] Dr. Barnard confirmed his finding that "[c]linically [Quince] is judged to be of dull normal level of intelligence." R4/128; R1/54. Dr. Barnard also testified that based on defense expert Dr. Ann McMillan's data, "he would say [Quince] is

Quince's mental deficiencies, which shows that the colloquy was deficient. Prior to the plea colloquy, trial counsel was not aware of the grave deficits in Quince's intellectual capacity. *See* p.3-4; n.3, *supra*. The trial court even found the mental mitigator that Quince had the inability to appreciate the criminality of his conduct, but only gave it little weight because of conflicting evidence. *See Quince*, 414 So. 2d at 186. Further, this Court now has the additional benefit of the expert and lay witness evidence and records from the two proceedings regarding Quince's intellectual disability that clearly show that Quince's intellectual and adaptive functioning are severely deficient. *See Kenneth Darcell Quince v. State of Florida*, SC17-127. The intellectual deficiency was evident even from the time of trial. *See* p.2-4, *supra*.

Notwithstanding the insufficient colloquy, Quince cannot waive a constitutional right that should have been afforded to him and every capital defendant, if the constitutional right did not exist at the time. The fact that Quince's

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borderline level intelligence." R4/128; R1/54. Dr. Rossario clearly wrote that Quince's "intelligence can be described as slightly below average." R1/54. Dr. McMillan opined that Quince suffered from borderline mental retardation, severe specific learning disability and neurological impairment. R4/144; R1/57. Dr. McMillan further opined that "Quince has permanent learning and judgment disability and limited ability to perceive the consequences of his actions." R4/144; R1/57. Dr. McMillan testified that Quince had a "low intelligence score, which is functioning on an eleven-year-old basis." R4/145. Dr. Stern testified that Quince "is not a bright gentleman" and that Quince "is functioning at a borderline level of intellectual capability." R4/158; R1/58.

trial counsel stated that he believed that Quince understood the possible consequences of his plea is not relevant as he advised him under the belief of an unconstitutional sentencing law. P92. *See Hurst v. Florida*, 136 S. Ct. 616; *see Ring v. Arizona*, 536 U.S. 884 (2002). Now that a unanimous jury is needed to sentence a defendant to death, the conversations and assessments between counsel and criminal defendants dramatically changes. Moreover, the colloquy by a court in cases of waivers will also dramatically change. *Hurst* will impact an attorney's strategy and decision-making throughout the trial, including the decision whether to waive a penalty phase jury. No longer will the jury's role in determining death-eligibility be advisory; the jury will make the ultimate decision of whether the defendant's life will be spared. The new constitutional statute changes the harmlessness analysis, the landscape of *voir dire* and death qualification, pre-trial 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 will have to change so that a capital defendant is afforded a constitutional trial in accordance with the Sixth and Fourteenth Amendments.

As the Florida Supreme Court explained in *Hurst v. State*, all of the findings necessary for the imposition of a death sentence must be unanimously found by the jury:

> *Hurst v. Florida* mandates that all the findings necessary for imposition of a death sentence are "elements" that must be found by a jury, and

> Florida law has long required that jury verdicts must be unanimous. Accordingly, we reiterate our holding that before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death. We equally emphasize that by so holding, we do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances.

Hurst v. State, 202 So. 3d at 57-58; *See also*, *Simmons v. State,* 207 So. 3d 860, 867 (Fla. 2016)(remanding for a resentencing based on *Hurst v. State* where, although the jury was provided with an interrogatory verdict form, it did not unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances). Mr. Quince never had the constitutional benefit of the option of a penalty phase jury to return a verdict making findings of fact. So we have no way of knowing what aggravators, if any, a jury unanimously could have found proven beyond a reasonable doubt, if the jurors unanimously found the aggravators sufficient for death, or if the jurors unanimously found that the aggravating circumstances outweighed the mitigating circumstances. Further, each individual juror would be instructed that they carried the immense responsibility for 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. These

are all considerations for a conversation regarding a waiver and/or a colloquy. Reviewing courts cannot speculate as to what the findings or vote would be in a case where Quince would be allowed a jury sentencing where twelve jurors have to make a binding decision.

Consideration must be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would not join in a death recommendation at resentencing.

When this Court compares Mullens' colloquy to Quince's, there is no comparison. The lower court erred in its findings and must be reversed. Quince did not have an appropriate and unequivocal waiver of his jury sentencing. Quince was predominantly questioned about the waiver of his guilt/innocence phase and the effect of a plea of guilt. Moreover, Quince's case represents why it is dangerous for this Court to create a blanket denial of *Hurst* review for waiver of jury sentencing cases. This Court must look at each case. Now, under *Hurst*, Quince would get a life sentence if one juror voted for life versus the unconstitutional bare majority recommendation. Quince's death sentence stands in violation of the Sixth, Eighth, and Fourteenth Amendments, and *Hurst v. Florida*. The *Hurst* error in Quince's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly

instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Quince's death sentence must be vacated and a resentencing ordered.

ARGUMENT II

B. ARGUMENT REGARDING PRESERVATION OF ARGUMENTS AS TO THE COURT'S PREVIOUSLY DECIDED CASES.

The Court permitted all parties to include a brief statement to preserve arguments as to the merits of this Court's previously decided cases, as deemed necessary. Quince will briefly address the additional arguments that were raised below and requests that this Court rely on his pleadings and arguments below in support of his request for *Hurst* review and relief. P17-45; P73-97.

The lower court, pursuant to this Court's precedence in *Asay*[12], denied Quince retroactive application of *Hurst*.[13] P74-5. *Hurst v. Florida* was a decision of fundamental significance that has resulted in substantive and substantial upheaval in Florida's capital sentencing jurisprudence. The fundamental change in Florida law that has resulted means that under Florida's retroactivity test set forth in *Witt v. State*,

[12] Mark Asay has a pending Petition for a Writ of Certiorari before the Supreme Court of the United States regarding the opinion in *Asay*, 210 So. 3d 1 (Fla. 2016). *See Mark James Asay v. Florida et al.*, SC16-223, SC16-102, SC16-628 (*docketed* May 5, 2017).

[13] This Court has stayed a number of appeals pending the disposition of *Hitchcock v. State*, SC17-445, where the partial retroactivity of *Hurst* has been raised.

387 So. 2d 922 (Fla. 1980), the decision in *Hurst v. Florida* must be given retroactive effect.[14] Retroactivity would also ensure that all defendants' Sixth and Eighth Amendment rights are protected. "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life under a process no longer considered acceptable and no longer applied to indistinguishable cases.'" *Falcon v. State*, 162 So. 3d 954, 962 (Fla. 2015) (*quoting Witt*, 387 So. 2d at 929). Accordingly, "[t]he doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness and uniformity in individual adjudications." *Witt*, 387 So. 2d at 925. Partial retroactivity can never ensure fairness and uniformity in individual adjudications and would amount to arbitrary application of the death penalty. *See Asay*, 210 So. 3d at 37-41 (Perry, J. *dissenting* "The grave injustice of assigning whether a person lives or dies on a date in time, when it is clear that they were illegally sentenced is irreversible."); *see Furman v. Georgia*, 408 U.S. 238 (1972); *see Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Moreover, society's evolving standards of decency demand that Quince be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to now unanimous. P33-

[14] Quince recognizes that *Asay v. State*, 210 So. 3d 1 (Fla. 2016) suggests that cases that were final when *Ring* was decided are not entitled to the retroactive effect of *Hurst*. However, Quince's case should be decided on an individual basis. To deny him the retroactive effect of *Hurst*, while granting it to similarly situated capital defendants, deprives him of due process and equal protection under the federal constitution and the corresponding provisions of the Florida Constitution.

34. Also, as a matter of due process and equal protection of laws under the Fourteenth Amendment of the United States Constitution, all death sentences under Florida's unconstitutional sentencing scheme must be entitled to retroactive application of *Hurst*. *See* U.S. Const. amend. XIV; P26-7; 35; 24, n.5. It can never be repeated enough that "Death is Different" and is permanent. Quince must be granted retroactive relief of *Hurst v. Florida*. P26-7. Quince continues to preserve his arguments in his successive motion proceedings for further appellate review.

In light of fundamental fairness, due process, equal protection, and the evolving standards of decency, partial retroactivity that sets a point in time as to whether a person lives or dies can never be constitutional. Quince submits to this Court that in accordance with his Sixth, Eighth, and Fourteenth Amendment rights, he should receive retroactive application of *Hurst*. The *Hurst* error in Quince's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt that no properly instructed juror would have refused to vote in favor of a death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence, Quince's death sentence must be vacated and a resentencing ordered.

CONCLUSION

Quince requests that this Court reverse the lower court's rulings, vacate his sentence, and grant him a new penalty phase.

CERTIFICATE OF COMPLIANCE

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

s/ Raheela Ahmed
Raheela Ahmed
Florida Bar Number 0713457
Assistant CCRC
Email: ahmed@ccmr.state.fl.us

CERTIFICATE OF SERVICE

I 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 19th day of July, 2017.

I HEREBY CERTIFY that a copy of the foregoing has been served through the Florida Courts E-Filing Portal to **Tayo Popoola**, Assistant Attorney General, Office of the Attorney General, at tayo.popoola@myfloridalegal.com and CapApp@myfloridalegal.com on this 19th day of July, 2017.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Kenneth Quince**, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 19th day of July, 2017.

/s/ Lisa Marie Bort
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