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IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC17-931

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR VOLUSIA COUNTY, FLORIDA

APPELLEE'S ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the denial of Appellant's successive motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.851. This Court issued an order directing the parties to file briefs "addressing why the lower court's order should not be affirmed based on this Court's precedent in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016)."

Facts of the Direct Appeal Case

Appellant, Kenneth Darcell Quince, was convicted of first-degree murder and burglary. *Quince v. State*, 414 So. 2d 185, 186 (Fla. 1982). After plea negotiations, Appellant waived the right to a sentencing jury. *Id*. Immediately preceding the plea colloquy, the trial court spoke with Appellant regarding the ramifications of Appellant's decision to waive his right to a sentencing jury. (R: 85-87)[1] During the plea colloquy, the trial court again inquired of Appellant as to whether he understood that he had the right to have a jury render a recommendation as to the appropriate sentence, and whether Appellant fully understood that he was

[1] Cites to the record are as follows: "R" will designate the record on appeal in this case, followed by any appropriate page number. "IB" will designate Appellant's Initial Brief, followed by any appropriate page number. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized; other emphases are contained within the original quotations.

agreeing to waive his right to a sentencing jury. (R: 88-94) Appellant advised that he understood the nature of the right that he was giving up, that he was not forced or coerced into waiving a sentencing jury, and was aware that the State would advocate that he be sentenced to death. (R: 85-86) Appellant also advised the court that he was not mentally disabled. (R: 88)

After weighing the evidence, the trial court sentenced Appellant to death, and found the existence of three aggravating factors: "1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous." *Quince*, 414 So. 2d at 186. The trial court assigned little weight to one mitigating factor, Appellant's inability to appreciate the criminality of his conduct. *Id.* at 186.

<u>Postconviction Proceedings</u>

On January 9, 2017, Appellant filed a successive motion for postconviction relief in the Circuit Court of the Seventh Judicial Circuit. (R: 17-45) In the motion, Appellant contended that his death sentence violated *Hurst v. Florida*, 136 S. Ct. 616 (2016). (R: 17-45)

On April 20, 2017, Circuit Judge Raul Zambrano entered an order denying Appellant's successive motion for postconviction relief, citing *Mullens v. State*, 197 So. 3d 16 (Fla. 2016) and

Asay v. State, 210 So. 3d 1 (Fla. 2016). (R: 74-75)

Appellant filed a timely notice of appeal on May 18, 2017. (R: 98-100)

SUMMARY OF ARGUMENT

ISSUE I: The trial court correctly denied Appellant's motion for postconviction relief. This Court has consistently held that capital defendants like Appellant, who waive the right to a sentencing jury, are not entitled to any *Hurst* relief. The record shows that the trial court conducted a proper inquiry of Appellant to ensure that Appellant fully understood the nature of his decision to waive a sentencing jury. The record shows that the waiver was knowing, intelligent, and voluntary. Thus, under *Mullens*, Appellant's decision to waive a sentencing jury precludes *Hurst* relief in his case.

ISSUE II: Appellant is also not entitled to retroactive application of *Hurst*, because his death sentence was finalized prior to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Asay v. State*, 210 So. 3d 1 (Fla. 2016), this Court held that defendants whose death sentence was finalized prior to *Ring* are precluded from *Hurst* relief. Appellant's death sentence was finalized nearly twenty years prior to *Ring*. Thus, *Hurst* does not apply retroactively to his case.

ARGUMENT

I. APPELLANT IS NOT ENTITLED TO RELIEF UNDER *HURST V. FLORIDA*, 136 S. CT. 616 (2016) BECAUSE THIS COURT HAS CORRECTLY HELD THAT *HURST* DOES NOT APPLY TO CAPITAL DEFENDANTS LIKE APPELLANT WHO KNOWINGLY AND VALIDLY WAIVED THE RIGHT TO A PENALTY PHASE JURY. (Restated)

Appellant contends that the trial court erred in denying his successive motion for postconviction relief, because he did not knowingly, intelligently, and voluntarily waive his right to a sentencing jury. However, Appellant is incorrect. The evidence in the record clearly shows that at the time of the waiver, Appellant fully understood and agreed to waive his right to a sentencing jury, and agreed to have the trial judge decide the appropriate sentence in his case. Thus, Appellant is not entitled to *Hurst* relief as stated by this Court in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), and his claim must be denied.

"Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing '[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief.'" *Darling v. State*, 45 So. 3d 444, 447 (Fla. 2010) (citations omitted). This Court reviews the circuit court's decision to summarily deny a successive rule 3.851 motion under the de novo standard of review, and affirms the ruling of the circuit court if the record conclusively shows that the movant is not entitled to relief. *Gaskin v. State*, 218 So. 3d 399,

400 (Fla. 2017).

In *Mullens v. State*, 197 So. 3d 16 (Fla. 2016), this Court rejected a *Hurst* claim in a case where the defendant waived his penalty phase jury. *Id.* at 38. This Court stated that, regardless of the exact scope and nature of the rights established in *Hurst*, the defendant was entitled to no relief because he waived the penalty phase jury. *Id.* This Court acknowledged that the United States Supreme Court in *Hurst* "said nothing" about waiving the rights established by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002). *Mullens*, 197 So. 3d at 38. Yet, the United States Supreme Court, in the non-capital context, has stated that "nothing prevents a defendant from waiving his *Apprendi* rights" and that even "a defendant who stands trial may consent to judicial factfinding as to sentence enhancements." *Id*. at 38 (quoting *Blakely v. Washington*, 542 U.S. 296, 310 (2004)). Therefore, this Court ultimately held that "Mullens cannot subvert the right to jury factfinding by waiving that right and then suggesting that a subsequent development in the law has fundamentally undermined his sentence." *Id*. at 40.

However, Appellant contends that his waiver of a sentencing jury in his case was not valid, because he could not waive a right that did not exist at the time he waived the jury. In support of his contention, Appellant cites to several cases in his Initial

Brief which support the proposition that a defendant cannot waive a right that was not yet recognized by the courts. *See e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 623 (2005) (holding that Halbert could not knowingly waive his right to court-appointed counsel, when the right to court-appointed counsel did not exist at the time Halbert tendered his *nolo contendere* plea). However, this argument is flawed and should be rejected by this Court.

Appellant's argument is premised on the notion that the "right" announced in *Hurst* is one that did not previously exist, as in *Halbert*. However, that is not the case, because Appellant always possessed the right to have a jury render an advisory recommendation as to what the appropriate sentence should be in his case. See § 921.141(2), Fla. Stat. (1980) (requiring the jury to render an advisory sentence based upon whether sufficient aggravating circumstances exist to justify imposition of the death penalty). Thus, the right announced in *Hurst* was not a new right that did not previously exist. Instead, *Hurst* reflected a mere change in procedure, and held that a defendant could not be sentenced to death based upon a judge's factfinding alone. *See* *Hurst*, 136 S. Ct. at 624 (holding Florida's death sentencing scheme unconstitutional, because it allowed the judge alone to find the existence of an aggravating circumstance). Accordingly, Appellant's argument that he could not waive a right that did not

exist is without merit, because Appellant always possessed the right to a sentencing jury.

Moreover, subsequent changes in the law do not render a prior waiver invalid. As the United States Supreme Court has explained, a defendant who waives a proceeding or right does so under the current law, and those waivers remain valid regardless of later developments in the law. In *McMann v. Richardson*, 397 U.S. 759, 773-74 (1970), the defendant argued that his plea was involuntary when a new decision regarding coerced confessions was issued by the United States Supreme Court. The Court rejected the argument that subsequent changes in the law rendered an earlier plea involuntary. The Court explained that when a defendant waives his right to a jury trial "he does so under the law then existing." *Id*. at 774. The Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided cases been the law at the time of the plea, "he is bound by his plea." *Id*. The Court noted the damage that would be wrought on the finality of pleas if courts permitted later changes in the law to be a basis for claiming a plea was involuntary. *Id*. *See also United States v. Ruiz*, 536 U.S. 622, 630 (2002) (stating that "the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with

its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor" including a defendant's failure "to anticipate a change in the law regarding relevant punishments");*Brady v. United States*, 397 U.S. 742, 757 (1970) (rejecting an argument that the plea was involuntary because it was based in part on a statute that was declared unconstitutional years later because the fact the defendant did not anticipate a change in the law "does not impugn the truth or reliability of his plea.")

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

Furthermore, Appellant's contention that the plea colloquy in his case was insufficient, is also without merit. First, any allegation as to the sufficiency of the plea colloquy at this point is untimely and procedurally barred from consideration. *See Gorby v. State*, 819 So. 2d 664, 674 n. 8 (Fla. 2002) (holding that claims

that could have been, or were raised on direct appeal, are procedurally barred from being raised in a postconviction motion.)

Second, even if his argument was not procedurally barred, Appellant would still not be entitled to relief. The law is well settled that "[a] waiver of the right to a jury trial must be knowing, intelligent, and voluntary." *Knight v. State*, 211 So. 3d 1, 17 (Fla. 2016).

Here, prior to the plea colloquy, the trial court spoke with Appellant regarding the ramifications of Appellant's decision to waive his right to a sentencing jury. During the plea colloquy, the trial court again questioned Appellant as to whether he understood that he had the right to have a jury render a recommendation as to what sentence should be imposed, and whether Appellant fully understood that Appellant was agreeing to waive his right to a sentencing jury. Appellant advised that he understood the nature of the right that he was giving up, that he was not forced or coerced into waiving a sentencing jury, and was aware that the State would advocate that he be sentenced to death. Furthermore, the trial court inquired of Appellant's counsel, and Appellant's counsel advised, "based upon the conference 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."

More importantly, although Appellant argues extensively regarding his alleged intellectual disability, **during the colloquy, Appellant advised the trial court that he was not intellectually disabled at that time, or at any other time in the past.**

Hence, Appellant's argument that his plea colloquy was insufficient is meritless. The trial court inquired of Appellant to make sure Appellant understood the nature of the right he was giving up, and Appellant advised the court that he was fully aware of his decision to waive a jury sentencing recommendation. Furthermore, Appellant's contention of a mental disability at this time is, respectfully, unavailing, given his statement to the court that he was not intellectually disabled. Thus, as the record shows that the plea colloquy was proper and that Appellant knowingly, intelligently, and voluntarily waived his right to a sentencing jury, Appellant's claim is meritless and should be denied. *See Bryant v. State*, 901 So. 2d 810, 822-23 (Fla. 2005) (holding that the defendant knowingly, intelligently, and voluntarily waived his right to a sentencing jury, where record shows that the trial court inquired of defendant as to his decision to waive a sentencing jury and defendant expressed that it was his desire to waive the sentencing jury).

In sum, Appellant has not met his obligation of showing why the trial court's ruling should not be affirmed based on this

Court's precedent in *Mullens*, and thus his claim should be denied.

II. APPELLANT IS NOT ENTITLED TO RETROACTIVE APPLICATION OF *HURST* BECAUSE HIS DEATH SENTENCE WAS FINAL PRIOR TO THE UNITED STATES SUPREME COURT'S DECISION IN *RING V. ARIZONA*, 536 U.S. 584 (2002). (Restated)

Appellant contends that the trial court wrongly denied his motion for postconviction relief, and argues that *Hurst* should be applied retroactively to his case. However, Appellant is incorrect. This Court correctly held in *Asay v. State*, 210 So. 3d 1 (Fla. 2016), that capital defendants like Appellant whose sentence was final prior to *Ring* are not entitled to *Hurst* relief.

In *Asay*, this Court held that defendants whose death sentences were final prior to the United States Supreme Court decision in *Ring*, are not entitled to Hurst relief. *Asay*, 210 So. 3d at 22. Here, Appellant's death sentence was final on October 4, 1982, when the United States Supreme Court denied Appellant's petition for writ of certiorari. Hence, because Appellant's death sentence was final prior to the United States Supreme Court's decision in *Ring*,[2] Appellant is not entitled to *Hurst* relief, as held by this Court in *Asay*.

However, Appellant claims that fairness and uniformity require that *Hurst* be retroactively applied to all cases. Fairness and uniformity require no such thing. Appellant cannot establish

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[2] The *Ring* decision was rendered on June 24, 2002.

that his sentencing procedure was less accurate than future sentencing procedures employing the new standards announced in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Just like *Ring* did not enhance the fairness or efficiency of death penalty procedures, neither does *Hurst*. *Johnson v. State*, 904 So. 2d 400, 409 (Fla. 2005). As the United States Supreme Court has explained, "for every argument why juries are more accurate factfinders, there is another why they are less accurate." *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004). Thus, because the accuracy of Appellant's death sentence is not at issue, fairness does not demand retroactive application of *Hurst*.

As to uniformity, Appellant appears to suggest that any new development in the law should be applied to all cases. Inherent in the concept of non-retroactivity is that some defendants will get the benefit of a new development, while other defendants will not. Drawing a line between newer cases that will receive a benefit and older, final cases that will not receive a benefit is part of the landscape of retroactivity analysis. If it were not this way, cases would never be resolved. With every new development in the law, capital defendants would get a new trial or a new penalty phase. Given that litigation in capital cases can span decades, there would never be finality.

Moreover, the decision in *Hurst v. Florida* is based on an

entire line of jurisprudence which courts have almost universally held to not have retroactive application. *See Summerlin,* 542 U.S. at 358 (holding that *Ring* was not retroactive); *DeStefano v. Woods*, 392 U.S. 631 (1968) (*per curiam*) (holding the Court's decision in *Duncan v. Louisiana*, which guaranteed the right to a jury trial to the States was not retroactive); *Varela v. United States*, 400 F.3d 864, 866–67 (11th Cir. 2005) (explaining that Supreme Court decisions, such as *Ring*, *Blakely*, and *Booker*,[3] applying *Apprendi's* "prototypical procedural rule" in various contexts are not retroactive); *McCoy v. United States*, 266 F.3d 1245, 1255, 1259 (11th Cir. 2001) (holding *Apprendi* not retroactive under *Teague*,[4] and acknowledging that every federal circuit to consider the issue reached the same conclusion); *State v. Johnson*, 122 So. 3d 856, 865-66 (Fla. 2013) (holding *Blakely* not retroactive in Florida).[5]

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[3] *United States v. Booker*, 543 U.S. 220 (2005).

[4] *Teague v. Lane*, 489 U.S. 288 (1989).

[5] The Eleventh Circuit Court of Appeals has determined that if a lead case is not retroactive, neither is its progeny. In *Jeanty v. Warden, FCI-Miami*, 757 F.3d 1283, 1285 (11th Cir. 2014), the court reiterated its view that *Apprendi's* rule does not apply retroactively on collateral review, and if the rule is not retroactive on collateral review then neither is a decision applying its rules. This has also been the prior practice of this Court which has determined that *Apprendi* and its progeny were not to be applied retroactively in Florida. *See Hughes v. State*, 901 So. 2d 837, 844 (Fla. 2005) (holding that *Apprendi* is not retroactive and noting that "neither the accuracy of convictions nor of sentences imposed and final before *Apprendi* issued is seriously impugned.")

See also Rhoades v. State, 233 P. 3d 61, 70-71 (2010) (holding that *Ring* is not retroactive after conducting its own independent *Teague* analysis and observing, as the Supreme Court did in *Summerlin*, that there is debate as to whether juries or judges are the better fact-finders and that it could not say "confidently" that judicial factfinding "seriously diminishes accuracy."); *State v. Towery*, 64 P. 3d 828, 835-36 (2003) ("[c]onducting new sentencing hearings, many requiring witnesses no longer available, would impose a substantial and unjustified burden on Arizona's administration of justice" and would be inconstant with the Court's duty to protect victims' rights under the Arizona Constitution). Thus, Appellant's fairness argument rings hollow against the interests of the State, which prosecuted Appellant in good faith under the law existing at the time of his trial, the concept of finality, and the interests of the victims' family members.

Furthermore, Appellant's Eighth Amendment argument must fail. *Hurst v. Florida* involved a Sixth Amendment issue, not an Eighth Amendment issue. Because Florida has a conformity clause in its constitution, this Court cannot craft an Eighth Amendment holding that is inconsistent with the United States Supreme Court's decisions regarding the Eighth Amendment. The surviving precedent under *Spaziano v. Florida*, 468 U.S. 447 (1984) reveals that there is no Eighth Amendment requirement for jury sentencing in capital

cases. *See Spaziano*, 468 U.S. at 462-63 ("the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge.") Thus, as there is no Eighth Amendment requirement for jury sentencing, Appellant is not entitled to relief under the Eighth Amendment.

Likewise, Appellant's equal protection argument also fails. Appellant has not demonstrated how he is treated differently from similarly situated defendants. *See Asay*, 210 So. 3d at 28 ("Asay does not demonstrate how he was treated differently from similarly situated defendants.") Appellant's due process argument also fails. A due process violation impairs the truth-finding function and raises doubts as to the accuracy of a guilty verdict. *In re Winship*, 397 U.S. 358, 364 (1970). However, a *Hurst* error does not rise to the level of substantially impairing the truth-finding function of the criminal trial because a *Hurst* violation requires remand for resentencing, not a new trial or vacation of the conviction. Accordingly, Appellant's arguments are meritless, and Appellant is not entitled to relief.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Court affirm the trial court's order denying Appellant's successive 3.851 motion for postconviction relief.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 31, 2017, a true and correct copy of the foregoing was furnished by electronic mail to Raheela Ahmed, Esq., ahmed@ccmr.state.fl.us; Maria Perinetti, Esq., perinetti@ccmr.state.fl.us; and Lisa Marie Bort, Esq., bort@ccmr.state.fl.us and support@ccrc.state.fl.us, CCRC-Middle, 12973 N. Telecom Parkway, Temple Terrace, FL 33637, the attorneys for Appellant.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing was printed in Courier New 12 point and thereby satisfies the font requirements of Florida Rule of Appellate Procedure 9.210.

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