No. _____

IN THE

Supreme Court of the United States

RICHARD E. LYNCH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

DEATH PENALTY CASE

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CAPITAL CASE

QUESTION PRESENTED

Whether the State of Florida violated Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by denying his right to jury fact-finding, as required by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), based on the fact that he waived an advisory jury recommendation under a death penalty scheme later deemed to be unconstitutional by this Court, and where he was not advised of all available mitigation due to the deficient performance of his trial counsel?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Petitioner, Richard E. Lynch, a death-sentenced Florida prisoner, was the appellant in the Florida Supreme Court. Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI

Richard E. Lynch respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

This is a petition regarding the errors of the Florida Supreme Court in denying Mr. Lynch's claim under *Hurst v. Florida*, 136 S. Ct. 616 (2016). The opinion at issue is reproduced at *Appendix A* and is reported at *Lynch v. State*, 254 So. 3d 312 (Fla. 2018). The unpublished order denying Mr. Lynch's *Hurst* claim from the Eighteenth Judicial Circuit Court in and for Seminole County is reproduced at *Appendix B*.

JURISDICTION

The opinion of the Florida Supreme Court was entered on September 20, 2018. *See Appendix A*. No motion for rehearing was filed. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or

> immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 921.141, Florida Statutes (2000), entitled "Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—" provides, in relevant part:

> (2) ***ADVISORY SENTENCE*** BY THE JURY.—After hearing all the evidence, the jury shall deliberate and ***render an advisory sentence to the court***, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the ***recommendation of a majority of the jury***, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but ***if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based*** as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
>
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla. Stat. § 921.141 (2000) (emphasis added).

STATEMENT OF THE CASE

I. Introduction

Petitioner, 65-year-old Richard E. Lynch remains in solitary confinement on Florida's death row despite the fact that he waived his right to a jury's recommendation of his sentence under a statute that violated the United States Constitution for the reasons described in *Hurst v. Florida*, 136 S. Ct. 616 (2016) due to the advice of his deficient trial counsel. Although the Florida Supreme Court concluded that *Hurst* should apply retroactively to many death sentences on collateral review which became final on direct appeal after June 24, 2002, the date this Court

decided *Ring v. Arizona,* 536 U.S. 584 (2002), the Florida Supreme Court decided that *Hurst* should not apply to Mr. Lynch's death sentence or dozens of others that also became final after *Ring*. This arbitrary decision is based solely on this class of defendants waiving a jury recommendation under death penalty statute that was unconstitutional, due to the trial judge having the final decision as to the determination of the defendant's sentence regardless of the jury's recommendation. This capricious partial application of *Hurst* to post-*Ring* capital defendants cannot pass muster under the Sixth, Eighth, or Fourteenth Amendments.

In *Furman v. Georgia*, 408 U.S. 238 (1972), and *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court described the now-familiar idea that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Godfrey*, 446 U.S. at 428. This Court's Eighth Amendment decisions have "insist[ed] upon general rules that ensure consistency in determining who receives a death sentence." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008).

The Eighth Amendment prohibition against arbitrariness and capriciousness in capital cases refined this Court's Fourteenth Amendment precedents holding that equal protection is denied "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and . . . [subjects] one and not the other" to a harsh form of punishment. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942). A state does not have unfettered discretion to create different classes of condemned prisoners.

This Petition arises from the Florida Supreme Court's arbitrary decision to institute this partial application and deny *Hurst* relief to prisoners who waived their right to a nonunanimous jury recommendation, even when the defendant's waiver was not knowing and voluntary. These death row prisoners whose death sentences became final post-*Ring*, such as Mr. Lynch, were not

granted the option of exercising their constitutional right to a unanimous jury determination of their death sentence, but they are being denied relief regardless of whether they previously preserved the issue. Whereas other Florida death row prisoners whose sentences also became final post-*Ring* and who elected to endure the unconstitutional process of receiving an advisory jury recommendation, were granted a constitutional resentencing or given a life sentence[1] in light of *Hurst*. The Florida Supreme Court's arbitrary application of *Hurst* prohibits a class of Florida prisoners from obtaining jury fact-finding and determination of their death sentences, while requiring that the death sentences of another group of prisoners be vacated on collateral review so that they can receive a proper jury determination. As these prisoners are similarly situated in every respect other than the fact that prisoners such as Mr. Lynch waived a right that did not exist at the time, this partial retroactivity is inconsistent with the Eighth Amendment's prohibition against the arbitrary and capricious imposition of the death penalty and the Fourteenth Amendment's guarantee of equal protection and due process. Worse yet, Mr. Lynch's rights have been violated more than most defendants who waived an advisory jury recommendation because his waiver was not knowing and voluntary due to Mr. Lynch waiving his advisory jury based upon the deficient advice of his trial counsel. Therefore, Mr. Lynch's Sixth Amendment rights have also been violated. Accordingly, this Court should resolve the constitutional infirmities with the Florida Supreme Court's application of *Hurst*. As Mr. Lynch challenged the unconstitutionality of Florida's death penalty statute and had his challenges repeatedly denied prior to following his trial

[1] In some cases where the defendants were entitled to resentencing under *Hurst*, the State has opted not to seek the death penalty, and the individuals have subsequently been sentenced to life. *See, e.g.*, *State of Florida v. Emilia L. Carr*, Marion County, Case No. 42-2009-CF-1253-B-X; *State of Florida v. John M. Buzia,* Seminole County, Case No. 59-2000-CF-000923-A000XX; *State of Florida v. Arthur Barnhill, III,* Seminole County, Case No. 95-2932-CFA; *State of Florida v. Richard T. Robards,* Pinellas County, Case No. 522006CF018453XXXXNO; and *State of Florida v. Maurice L. Floyd,* Putnam County, Case No. 1998-CF-001315.

counsel's deficient advice to waive an advisory penalty phase jury, his case highlights the injustice of Florida's current bright-line rule and provides the ideal vehicle for this Court to address Florida's blanket denial of *Hurst* relief to capital defendants who waived an advisory jury recommendation.

II. Factual and Procedural Background

A. Trial and Direct Appeal

Mr. Lynch was indicted by the Grand Jury for the Eighteenth Judicial Circuit Court in and for Seminole County, Florida on March 5, 1999, with two counts of first-degree murder, one count of armed burglary, and one count of kidnapping. Prior to his trial, on December 1, 1999, Mr. Lynch filed multiple motions challenging the constitutionality of Florida's death penalty scheme.[2] Notably, Mr. 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 the lack of a jury being required to find sentencing factors. Mr. 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. At the motion hearing challenging Florida's sentencing scheme, trial counsel argued the unconstitutionality of the bare majority jury recommendation and 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." Trial counsel 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." Trial counsel also argued that the procedure "is not constitutionally sound because this court ultimately will be making a decision based upon whatever

[2] This same sentencing scheme was held to be unconstitutional by this Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

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." The original trial judge, Nancy F. Alley, denied the motions on April 18, 2000.

As detailed in trial counsel James Figgatt's affidavit and his 2005 evidentiary hearing testimony, "[Mr. Figgatt] advised Lynch to waive his right to a penalty phase advisory jury" based on *Apprendi*[3] and the denial of the motions for a constitutional sentencing. *See Appendix D*. Accordingly, on October 19, 2000, acting upon the advice of trial counsel, Mr. Lynch pled guilty to all counts and waived a penalty phase advisory jury. At the start of the penalty phase bench trial in front of Judge O. H. Eaton, Jr., Mr. Lynch renewed his motions to declare Section 921.141 unconstitutional, but the motions were again denied.

The trial court went on to make the findings of fact required to impose a death sentence under Florida law and after independently finding and weighing the aggravators and mitigators, the trial court sentenced Mr. Lynch to death. *See Lynch v. State,* 841 So. 2d 362 (Fla. 2003); *see also* Fla. Stat. § 921.141(3) (2000), *invalidated by Hurst*, 136 S. Ct. at 624. Mr. Lynch appealed his judgment and sentence to the Florida Supreme Court and asserted that "Florida's death penalty is unconstitutional on its face and as applied." *Lynch v. State,* 841 So. 2d 362, 368 (Fla. 2003); *see Appendix C*. The Florida Supreme Court denied all grounds on January 9, 2003 and denied rehearing on March 21, 2003. *See id.* at 365. Mr. Lynch's petition for a writ of certiorari was denied by this Court on October 6, 2003. *Lynch v. Florida*, 540 U.S. 867 (2003). Accordingly, Lynch's sentences became final on this date.

[3] *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).

B. Postconviction

In Mr. Lynch's initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851, he raised an ineffective assistance of counsel claim pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984) regarding trial counsel's failure to adequately advise Mr. Lynch whether to waive a penalty phase jury and multiple ineffective assistance of counsel claims related to inadequately investigating mitigation. The initial motion was denied after an evidentiary hearing, and affirmed on appeal. *See Lynch v. State*, 2 So. 3d 47, 52, 54-55 (Fla. 2008), *as revised on denial of reh'g* (Jan. 30, 2009). The Florida Supreme 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 to the Florida Supreme Court 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[4] and Dr. Olander[5] had examined 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

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

> 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[6] (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.*[7] Accordingly, habeas relief is granted as to this claim.

Id. at 1309 (footnotes and emphasis 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 nom. Lynch v. Jones*, 136 S. Ct. 798 (2016). The Eleventh Circuit found that no prejudice existed under *Hill* and the analysis 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 the unanimity and jury fact-finding requirements of *Hurst*, the prejudice analysis would have been substantially different if the Eleventh Circuit decided Mr. Lynch's case post-*Hurst*.

C. *Hurst* Litigation and Decision Below

On January 12, 2016, this Court issued its opinion in *Hurst v. Florida,* striking down

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

Florida's longstanding capital-sentencing procedures[8] because the statute authorized a judge, rather than a jury, to make the factual findings necessary to impose a death sentence. On remand, the Florida Supreme Court held, as a state constitutional consequence, that a verdict for death could not be rendered without unanimous jury findings of at least one aggravating circumstance and that the finding that the sum of aggravation is sufficient to outweigh any mitigating circumstances and to warrant death. *See Hurst v. State,* 202 So. 3d 40 (2016). *Hurst* followed *Ring* in subjecting the capital sentencing process to *Apprendi*'s Sixth Amendment requirement that all facts necessary for criminal sentencing enhancement must be found by a jury. The Florida Supreme Court then addressed the question of the retroactive application of the federal constitutional rule of *Hurst* to Florida's approximately 380 condemned inmates. Applying Florida's retroactivity doctrines, the Florida Supreme Court held in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) that inmates whose death sentences were not yet final on June 24, 2002 (the date *Ring* was decided) were entitled to resentencing under *Hurst.* However, Florida did not extend the retroactive application of *Hurst* to capital defendants who waived a jury recommendation, even if their sentence became final after the date *Ring* was decided.

After the decisions in *Hurst v. Florida*, *Hurst v. State*, and *Mosley v. State* were rendered, Mr. Lynch filed a successive motion to vacate his sentence of death pursuant to Florida Rule of Criminal Procedure 3.851 on October 3, 2017. After hearing argument from the parties at a case management conference, the postconviction court orally denied Mr. Lynch *Hurst* relief and later rendered a written order summarily denying relief on November 21, 2017. *See Appendix B.* Mr. Lynch appealed the denial of his successive motion to vacate his sentence of death to the Florida

[8] Florida's capital sentencing procedure outlined in Fla. Stat. § 921.141 which had been in effect (with minor changes, irrelevant to this questions presented) since 1972.

Supreme Court. The Florida Supreme Court issued an order directing Mr. Lynch to file a brief addressing why the lower court's order should not be affirmed based on the Florida Supreme Court's precedent in *Mullens v. State,* 197 So 3d 16 (Fla. 2016). *See Appendix F.*

On September 20, 2018, the Florida Supreme Court denied Mr. Lynch *Hurst* relief. *See Lynch*, 254 So. 3d 312; *see also Appendix A.* In affirming the lower court's denial, the Florida Supreme Court held that Mr. Lynch's waiver of his right to a penalty phase jury was knowing and voluntary. *See id*. at 322. Therefore, in light of *Mullens*, Mr. Lynch was not entitled to *Hurst* relief due to "his valid waiver of a penalty phase jury." *Id*. The Florida Supreme Court also held that the prejudice prong of Mr. Lynch's original ineffective assistance of counsel claim under *Strickland* should not be reevaluated in light of *Hurst*. *See id*. at 323. These rulings are before this Court for review.

REASONS FOR GRANTING THE WRIT

I. The Florida Supreme Court's denial of Mr. Lynch's right to jury fact-finding based on his invalid waiver of a penalty phase jury violates his rights under the Sixth, Eighth, and Fourteenth Amendments.

Mr. Lynch's death sentences are unconstitutional under *Hurst* and the Sixth, Eighth, and Fourteenth Amendments. Although Mr. Lynch does not concede that the Florida Supreme Court properly decided *Mullens*, Mr. Lynch does assert that his case differs from *Mullens* in many ways, including that Mr. Lynch requested a constitutional jury sentencing and his penalty phase jury waiver was invalid. Mr. Lynch's waiver was not knowing, intelligent, and voluntary and was based on counsel's deficient advice. An individualized harmless error review will show that the *Hurst* error is not harmless in Mr. Lynch's case.

Mr. Lynch's sentences became final on October 6, 2003, and are undisputedly entitled to *Hurst* review. *See Lynch*, 540 U.S. 867; *see also Mosley*, 209 So. 3d 1248. However, the Florida

Supreme Court erred in finding that Lynch knowingly and voluntarily waived a penalty phase jury and thus was not entitled to *Hurst* relief based on *Mullens*. The Florida Supreme Court's findings are not supported by competent and substantial evidence and violate Mr. Lynch's constitutional rights.

In *Mullens,* the Florida Supreme Court created an arbitrary class of capital defendants who 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 *Hurst*, 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 the Florida Supreme Court has granted *Hurst* relief to other more heinous post-*Ring* cases due to nonunanimous jury recommendations while Mr. Lynch is denied the same opportunity.[9] The only way to distinguish Mr. 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 Mr. Lynch waived an advisory jury, when the waiver was not only invalid but also stemmed from the incompetent advice of trial counsel under an unconstitutional death penalty scheme, and deny Mr.

[9] *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 a 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).

Lynch his rights would be manifest injustice and a violation of his equal protection rights.

Whether Mr. Lynch waived his constitutional rights as defined in *Hurst* is a question of federal law. "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966). "There is a presumption against the waiver of constitutional rights" and "it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege'" for a waiver to be proper. *Id*. (citations omitted). However, if an ***appropriate*** waiver is procured, a defendant may waive his Sixth Amendment fundamental right to a jury trial and consent to judicial fact-finding. *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 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).

Mr. Lynch's colloquy was inadequate because the trial judge only briefly questioned Mr. Lynch regarding his waiver of an advisory jury for his penalty phase and did not focus on the value of a penalty phase jury trial. *See Appendix E*. The trial judge also did not fully explain the consequences to Mr. Lynch or verify Mr. Lynch's understanding of the advantages and

disadvantages to waiving a jury. In fact, the colloquy almost entirely revolved around Mr. Lynch's guilty plea. *See Appendix E*. Consequently, Mr. Lynch's jury waiver is invalid.

Contrary to the Florida Supreme Court's opinion, Mr. Lynch's waiver was not knowing and voluntary. Unlike the unequivocal waiver in *Mullens*, it is clear from Mr. 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). Mr. Lynch's waiver was not clear and unequivocal with "sufficient awareness of the relevant circumstances and likely consequences." *Id.* If trial counsel had effectively investigated mitigating factors, including Mr. 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 he would have been entitled to a new penalty phase.

In postconviction, brain damage in Mr. Lynch's frontal lobe and right cerebral hemisphere was discovered, which affects his ability to perceive, understand, and comprehend. 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.

The record demonstrates that at the time of trial, trial counsel did not know that Lynch suffered from brain damage or delusions. *See Appendix D*. Notably, trial 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 that Mr. Lynch should be evaluated further. In addition, as Mr. Figgatt stated in his affidavit, "The mental health experts that

[he] retained in Mr. Lynch's case were not provided any of [Mr. Lynch's] school records, which [he] understand[s] were later found to suggest that Mr. Lynch had organic brain damage." *See Appendix D*. Due to trial counsel's deficiencies, Dr. Olander, the mental health expert for the defense, did not have Mr. Lynch's educational records or background information such as Dr. Cox's report which suggested brain dysfunction. Therefore, trial counsel could not provide competent and informed advice to Mr. Lynch about waiving his penalty phase jury. Trial counsel's failure to identify Mr. Lynch's mental deficiencies severely affected the validity of his jury waiver.

Mr. Lynch's waiver of a penalty phase jury cannot be found to be knowing, intelligent, and voluntary if Mr. Lynch's own trial counsel were not even making informed decisions about his case. *See Appendix D*. At Mr. Lynch's 2005 evidentiary hearing, ***Mr. Figgatt admitted that he did not have information regarding Lynch's brain damage at the time of trial.*** Mr. Lynch's other trial counsel, ***Timothy Caudill, also agreed that any decision made about whether or not to present brain dysfunction was not informed.*** Mr. Figgatt stated that a PET scan revealing Mr. 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." Mr. 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." *See Appendix D.* Mr. Caudill also agreed that brain damage is a weighty mitigator and PET scans can be powerful mitigating evidence. Notably, at the evidentiary hearing, Mr. 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 Mr. Lynch to waive his right to a jury***. He also confirmed that ***Mr. Lynch did not know about that mitigation when he was deciding whether to waive his***

penalty phase jury. Moreover, Mr. Figgatt, stated in a sworn affidavit, 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*.**

See Appendix D. Brain damage is weighty and compelling mitigation that would convince at least one juror to vote for a life sentence. Mr. Lynch would not have waived a jury if he had been properly advised and was able to make an informed decision.

Dr. Cox stated that Mr. Lynch's "paranoid thinking style" and "cognitive dysfunction" can lead to delusions, which Dr. Cox defined as unrealistic thoughts and false fixed beliefs. Mr. Lynch suffered from delusions during his colloquy. When the judge asked him how much education he had, Mr. Lynch's response was, "I have high school and approximately two years of college, I didn't finish college though." *See Appendix E*. The reality is that Mr. Lynch dropped out of high school, and he never attended college. Worse yet, trial counsel knew Mr. Lynch had only gone as far as 10th or 11th grade, but failed to correct Mr. Lynch's misstatement. This is not the only time that this delusion arose; Mr. Lynch also exaggerated his academic abilities to the State's expert, Dr. Riebsame. Due to trial counsel's failures, the trial court was not fully informed as to Mr. 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. The deficiencies of trial counsel and the deficiencies of Mr. Lynch's cognition both invalidated Mr. Lynch's waiver.

On August 29, 2000, almost two months prior to waiving his right to a penalty phase jury, Mr. Lynch expressed his concern in a letter to trial counsel and stated that "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 trial court's denial of the pretrial motions challenging the constitutionality of the death penalty statute and the issuance of *Apprendi*, Mr. Lynch followed his trial counsel's advice and waived his penalty phase jury despite his concerns regarding the harshness of Judge Eaton's sentencing. Mr. Lynch followed the advice of trial counsel due to his high level of trust in Mr. Figgatt, which is evident in the letters that Mr. Lynch wrote to him. As an example of Mr. Lynch's level of trust in Mr. Figgatt in the timeframe surrounding his waiver, Mr. Lynch wrote a letter to Mr. 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."

The injustice and prejudice to Mr. Lynch is egregious because Mr. Figgatt advised Mr. Lynch to waive his jury because Mr. Figgatt "was concerned about a jury coming back with an 11-1 advisory recommendation." *See Appendix D*. Mr. Figgatt testified at the 2005 evidentiary hearing and stated in his affidavit that although none of his clients had ever received a unanimous recommendation for death, he was concerned about trying Mr. Lynch's case in front of a jury because he previously represented Edward James who received two 11-1 advisory jury recommendations. *See Appendix D*. Mr. Figgatt was concerned because both Mr. James' and Mr. Lynch's cases involved double homicides. *See James v. State*, 695 So. 2d 1229, 1230–31 (Fla. 1997). As Mr. Figgatt was able to obtain two 11-1 advisory jury recommendations in a similarly aggravated case, he clearly would not have advised Mr. Lynch to waive a penalty phase jury if an 11-1 advisory jury recommendation would have secured a life sentence. Notably, if Mr. Lynch had received the 11-1 jury recommendations that Mr. Figgatt sought to avoid by waiving a jury, Mr. Lynch would have been granted a new penalty phase pursuant to *Hurst*. *See Appendix D*. Post-

Hurst, trial counsel certainly would not adopt this strategy because an 11-1 jury verdict grants a binding life sentence.

Notwithstanding the insufficient colloquy, Mr. 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), *report and recommendation adopted*, 10-61792-CIV, 2011 WL 98320 (S.D. Fla. Jan. 12, 2011) ("It is axiomatic that a party cannot waive a right that it does not yet have."). At the time of Mr. Lynch's sentencing, Florida's unconstitutional capital sentencing scheme permitted only the judge, not the jury, to find facts determining whether a defendant would be sentenced to death. Unanimous jury fact-finding was a right not yet recognized by Florida courts; therefore, Mr. Lynch could only waive the right to bare majority jury recommendation of life or death. During the colloquy, the judge specifically told Mr. 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." *See Appendix E*.

> 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.***"

See Appendix E. The judge went on to ask Mr. 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?" *See Appendix E*. As Mr. 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, Mr. Lynch's colloquy and waiver cannot be considered appropriate or unequivocal and the State cannot offer judicial fact-finding.

See Mullens, 197 So. 3d at 38.

As evidenced by Mr. Lynch's *Ring*-like motions to declare Florida's death penalty sentencing scheme unconstitutional in 1999, Mr. Lynch ***never*** waived the protections and rights provided for post-*Ring* capital defendants under *Hurst*. Like Mr. Mosley who was granted relief by the Florida Supreme Court based on fundamental fairness, Mr. 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 Mr. Lynch's numerous pretrial arguments challenging the constitutionality of Florida's death penalty statute were valid arguments. Notably, he challenged the constitutionality of the bare majority juror recommendation and the jury not being required to find sentencing factors. Mr. Lynch also moved for an interrogatory verdict of jury fact-findings as to aggravation and mitigation. Although Mr. 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. Notably, if Judge Alley had not denied Mr. Lynch's motions for a constitutional jury sentencing, ***he would not have waived*** his right to a penalty phase jury. It is an obvious injustice to penalize Mr. 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.

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.

The jury's role in determining death-eligibility in Florida 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 sentencing 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 Mr. 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).[10]

[10] Defendants with more heinous facts and more victims than Mr. Lynch's case have received life sentences after *Hurst* and the use of interrogatory verdict forms. S*ee State of Florida v. Adam Matos,* Pasco County, Case No. 2014-CF-005586AXWS (post-*Hurst*, received life sentences for

Consideration must be given to the fact that Mr. 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. *See Appendix D*. Mr. 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." *See Appendix D*. Now trial 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 Mr. Lynch to waive a jury trial in order to convince the judge, a hundred percent of the fact finders, to spare his life. *See Appendix D*. Mr. 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***." *See Appendix D*. Accordingly, as proper *Caldwell* instructions would be required if Mr. 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 Mr. Lynch's sentence and is not harmless because Mr. Lynch's rights under the Sixth, Eighth, and Fourteenth Amendments have been violated.

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. Mr. Lynch's waiver was invalid and directly based on not only deficient advice, but also advice given due to Florida's unconstitutional statute. *See Appendix D.* If Mr. 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

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four murders)*; State of Florida v. James Bannister,* Marion County, Case No. 2011-CF-3085 (post-*Hurst*, received life sentences for four murders; two of the victims were under the age of twelve).

upon *Mullens*. As his penalty phase jury waiver is invalid, *Mullens* loses ***all*** relevance to Mr. Lynch's case. In light of *Hurst*, Mr. Lynch's death sentences stand in violation of the Sixth, Eighth, and Fourteenth Amendments. Thus, the *Hurst* error in Lynch's case warrants relief.

CONCLUSION

For all of these reasons, the Court should grant the petition for a writ of certiorari and order further briefing or vacate and remand this case to the Florida Supreme Court.

Respectfully submitted,

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