CASE NO. 18-7118

IN THE UNITED STATES SUPREME COURT

RICHARD E. LYNCH,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

****

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

****

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(Capital Case)

(Restated)

Whether this Court should grant review of the Florida Supreme Court's holding that Petitioner was procedurally barred from relitigating his ineffective assistance of counsel claim and whether he waived his right to relief based upon Hurst v. State by waiving his right to a jury during the penalty phase?

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CITATION TO OPINION BELOW

The decision which Petitioner seeks discretionary review of is Lynch v. State, 254 So.3d 312 (Fla. 2018).

STATEMENT OF JURISDICTION

Petitioner, Richard Lynch ("Lynch"), is in custody and under a sentence of death. He is subject to the lawful custody of the State of Florida pursuant to a valid judgment of guilt and a subsequent sentence of death entered for two counts of first-degree murder, kidnapping and felony burglary. The armed burglary conviction is under the jurisdiction pursuant to 28 U.S.C. § 1254(1). Respondent agrees that the statutory provision sets out the scope of this Court's certiorari jurisdiction but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction because Petitioner does not raise a novel question of federal law and the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Sup. Ct. R. 14(g)(i). Additionally, the Florida Supreme Court's decision does not implicate an important or unsettled question of federal law, does not conflict with another state court of last resort or a United States court of appeals, and does not conflict with relevant decisions of this Court. Sup. Ct. R. 10.

CONSTITUTIONAL PROVISIONS INVOLVED

Lynch contends that the Sixth and Fourteenth Amendments of the U.S. Constitution are implicated in this case.

STATEMENT OF THE CASE AND FACTS

A. Direct Appeal and Facts

On direct appeal from Lynch's convictions and sentences of death, the Florida Supreme Court summarized the facts of the case in the following way:

> On March 23, 1999, a grand jury returned an indictment against appellant, Richard Lynch, for two counts of first-degree premeditated murder, one count of armed burglary of a dwelling, and one count of kidnapping. The indictment was the result of events that occurred on March 5, 1999, culminating in the deaths of Roseanna Morgan ("Morgan") and her thirteen-year-old daughter, Leah Caday ("Caday").
>
> On October 19, 2000, appellant pled guilty to all four counts of the indictment. Subsequently, the trial judge granted appellant's request to have the penalty phase conducted without a jury.1 During the penalty phase, the State produced a letter written by the appellant two days prior to the murders. In the letter, addressed to appellant's wife, Lynch admitted to having a "long affair" with Roseanna Morgan, which lasted from August 1998 until February 9, 1999. He detailed the affair and asked his wife to send copies of cards Morgan had written to Lynch and nude pictures Lynch had taken of Morgan to Morgan's family in Hawaii. Lynch wrote: "I want them to have a sense of why it happened, some decent closure, a reason and understanding...."
>
>> [FN1] Because appellant requested and was granted a penalty phase conducted without a jury, he has not and cannot present a claim attacking the constitutionality of Florida's death penalty scheme under the United States Supreme Court's recent holding in Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Therefore, we do not address this issue.
>
> The testimony elicited during the penalty phase regarding the events of March 5, 1999, included a tape of a telephone call that appellant made to the "911" emergency assistance service while still in the apartment where the murders occurred. On that tape, Lynch is heard admitting to the 911 operator that he shot two people at 534 Rosecliff Circle. He said he initially traveled to the apartment only to attempt to have Morgan pay a

credit card debt, but resorted to shooting her in the leg and in the back of the head. He told the 911 operator that he had three handguns with him and that he shot Morgan in the back of the head to "put her out of her misery." Appellant also admitted to firing at the police when they first arrived on the scene.

As to Caday, appellant informed the 911 operator that he had held Caday at gunpoint while waiting for Morgan to return home. He related that she was terrified during the process prior to the shootings and asked him why he was doing this to her. Appellant admitted that he shot Caday, and said "the gun just went off into her back and she's slumped over. And she was still breathing for awhile and that's it." Appellant told the operator he planned to kill himself.

During the course of these events on March 5, 1999, appellant telephoned his wife three times from the apartment. His wife testified that during the first call she could hear a woman screaming in the background. Appellant's wife further testified that the screaming woman sounded "very, very upset." When Lynch called a second time, he admitted to having just shot someone.

Prior to being escorted from the apartment by police, Lynch also talked to a police negotiator. The negotiator testified that Lynch told her that during the thirty to forty minutes he held Caday hostage prior to the shootings, Caday was terrified, he displayed the handgun to her, she was aware of the weapon, and appeared to be frightened. He confided in the negotiator that Caday had complied with his requests only out of fear. Finally, appellant described the events leading to Morgan's death by admitting that he had confronted her at the door to the apartment, shot her in the leg, pulled her into the apartment, and then shot her again in the back of the head.

Several of Morgan's neighbors in the apartment complex also testified as to the events of March 5, 1999. Morgan's neighbor across the hall2 testified that she looked out of the peephole in her door after hearing the initial shots and saw Lynch dragging Morgan by the hands into Morgan's apartment. She further testified that Lynch knocked on the door to Morgan's apartment and said, "Hurry up, open the door, your mom is

hurt." The neighbor testified that Morgan was screaming and was bloody from her waist down. Morgan's neighbor further testified that the door was opened, then after entering with Morgan, Lynch closed the door and approximately five minutes later she heard the sound of three more gunshots. A second neighbor in the apartment complex also testified that approximately five to seven minutes after she heard the initial gunshots, she heard three more.

[FN2] The neighbor lived in the apartment directly across the hall from Morgan's apartment in the same apartment building.

After his arrest, appellant participated in an interview with police in which he confessed to the murders. He again admitted the events of the day, telling police he showed Caday the gun and that she was very scared while they were waiting for Morgan to arrive home. He told the detective that Caday was afraid and that he was "technically" holding her hostage. He admitted to shooting Caday's mother, Morgan, four or five times in the presence of her daughter.

In his post-arrest interview, Lynch also admitted that he planned to show Morgan the guns he brought with him to let her know he possessed them, and to force her to sit down and be quiet. He told the detectives he did not know why he did not just leave the guns in his car.3 He admitted shooting Morgan four or five times, dragging her into the apartment, and then shooting her in the back of the head with a different firearm.

[FN3] The detective conducting the interview with appellant testified that Lynch's car was parked down the street, around the corner, and away from Morgan's apartment. It could not be seen from the apartment.

The State's final witness was the medical examiner who testified that after receiving the gunshot wound, it probably would have taken "no more than several minutes" for Caday to die. On cross-examination, although he conceded that it was possible that Caday could have died in less than one minute from the wound, such was unlikely. Finally, he also testified that with the amount of blood loss suffered by Caday, she could have lost consciousness within ten to twenty seconds.

The defense presented only one witness, a mental health expert. She related that she had diagnosed Lynch with schizoaffective disorder, a condition which is a combination of schizophrenia and a mood disorder. Further, she testified that she did not believe the letter appellant wrote two days prior to the murders demonstrated an intent by Lynch to kill Morgan. She concluded that appellant was under the influence of an extreme mental and emotional disturbance on March 5, 1999, and that his psychotic process substantially impaired his capacity to conform his conduct with the requirements of the law.

The State attempted to rebut the defense mental health evidence through the testimony of another mental health expert. The State's expert opined that Lynch suffered from a depressive disorder. The State's expert admitted that it was his opinion that on the day of the incident, appellant was suffering emotional distress, but it was not extreme, and Lynch did not lack the ability to conform his conduct to the requirements of the law. Finally, the State's doctor opined that the letter appellant wrote prior to the murders evidenced a murder-suicide plot.

After accepting written closing arguments and sentencing recommendations and conducting a Spencer4 hearing, the judge sentenced appellant to death for the murders of Roseanna Morgan and Leah Caday. He found three aggravating factors as to the murder of Morgan: (1) the murder was cold, calculated, and premeditated ("CCP") (given "great weight"); (2) appellant had previously been convicted of a violent felony (given "moderate weight"); and (3) the murder was committed while appellant was engaged in committing one or more other felonies (given "little weight"). As to the murder of Caday, the judge found (1) that the murder was heinous, atrocious, or cruel ("HAC") (given "great weight"); (2) that appellant was previously convicted of a violent felony (given "great weight"); and (3) that the murder was committed while appellant was engaged in committing one or more other felonies (given "moderate weight"). He also found one statutory and eight nonstatutory mitigators as to each murder.

[FN4] Spencer v. State, 615 So.2d 688 (Fla.1993).

> [FN5] The statutory mitigating factor found was that Lynch had no significant history of prior criminal activity (moderate weight). The eight nonstatutory mitigators were: (1) the crime was committed while defendant was under the influence of a mental or emotional disturbance (moderate weight); (2) the defendant's capacity to conform his conduct to the requirements of law was impaired (moderate weight); (3) the defendant suffered from a mental illness at the time of the offense (little weight); (4) the defendant was emotionally and physically abused as a child (little weight); (5) the defendant had a history of alcohol abuse (little weight); (6) the defendant had adjusted well to incarceration (little weight); (7) the defendant cooperated with police (moderate weight); (8) the defendant's expression of remorse, the fact that he has been a good father to his children, and his intent to maintain his relationship with his children (little weight).

Lynch v. State, 841 So.2d 362, 365-368 (Fla. 2003). The Florida Supreme Court affirmed the convictions and sentences of death. Id., at 379. This Court denied certiorari review. Lynch v. Florida, 540 U.S. 867 (2003).

B. Petitioner's Plea And Subsequent Litigation of Trial Counsel's Effectiveness In Advising Petitioner To Waive A Penalty Phase Jury

On direct appeal, the Florida Supreme Court specifically found that Petitioner had knowingly and voluntarily entered his plea:

> The record in this case contains substantial evidence which shows that the underlying guilty plea was knowing, intelligent, and voluntarily made. The trial judge conducted the following colloquy with the defendant:
>
> The Court: ... Mr. Lynch, is that what you want to do, enter a plea of guilty to those charges?
> Mr. Lynch: Yes, Your Honor.
> The Court: Have you read everything on this plea form?
> Mr. Lynch: Yes, I have.

The Court: Do you understand everything on the plea form?
Mr. Lynch: Yes.
The Court: Do you have any questions about anything on the plea form?
Mr. Lynch: No. I've talked it over with my counsel.
The Court: Is everything on the plea form true?
Mr. Lynch: Yes.
....
The Court: You can read, write, speak and understand the English language?
Mr. Lynch: Yes.
The Court: Are you in good physical and mental health?
Mr. Lynch: Yes, as far as I know.
The Court: Have you had any drugs or alcohol in the last twenty-four hours?
Mr. Lynch: No, other than what the jail has prescribed for me, just some antidepression sleeping pill.
The Court: Okay. Do you feel that your mind is clear and you know exactly what you're doing this morning?
Mr. Lynch: Yes, Your Honor.
The Court: Do you believe you're capable of exercising your best judgment today?
Mr. Lynch: Yes.
....
The Court: Do you understand that the maximum penalty you could receive in this case would be either life in prison without parole, or the death penalty; do you understand that?
Mr. Lynch: Yes, I do.
The Court: Do you understand that a plea of not guilty denies the truth of the charge, and a plea of guilty admits the truth of the charge?
Mr. Lynch: Yes.
The Court: You have the right to have a trial by jury to see, hear, face and cross-examine the witnesses against you in open court, and the subpoena power of the Court to call witnesses in your behalf. You have the right to testify at trial, or remain silent, and your silence cannot be held against you. You have to the right to be represented by lawyers at the trial. But if you enter a plea of guilty, you'll waive that right and give up those rights and there will be no trial; do you understand that?
Mr. Lynch: Yes, Your Honor.

> The Court: Do you want to give up those rights?
> Mr. Lynch: Yes.
> ....
> The Court: Has any person threatened you or coerced you into entering this plea?
> Mr. Lynch: No.
> The Court: Has any person promised any leniency or any reward to get you to enter this plea, other that's what has been said here in open court here today?
> Mr. Lynch: No.
> The Court: Has there been any off the record assurances made to you by your lawyers or by anyone else?
> Mr. Lynch: No.
> The Court: Are you sure about your answers that you've given me this morning?
> Mr. Lynch: Yes, Your Honor.
> Further, after the judge read the charges to the defendant, the colloquy continued:
> The Court: Do you understand those are the charges?
> Mr. Lynch: Yes, Your Honor.
> The Court: Are you guilty of those charges?
> Mr. Lynch: Yes.
> Clearly the appellant understood the charges and pled to them voluntarily. The evidence here is sufficient to support that the guilty plea underlying the convictions was given knowingly, intelligently, and voluntarily.

Lynch v. State, 841 So.2d 362, 375–77 (Fla. 2003).

Lynch subsequently sought post-conviction relief in State court. Following an evidentiary hearing held on July 25-30, 2005, the collateral proceeding court denied all relief. On October 29, 2006, Judge Eaton entered a Second Amended Order Denying Motion for Post-Conviction Relief (Rule 3.851) and Order on Defendant's Motion for Rehearing. With respect to counsel's advice to waive a penalty phase jury, the post-

conviction court held:

> … Lynch [asserts he] "would not have waived his right to a jury trial in the penalty phase portion of his capital trial" had he been properly advised by counsel. **There is no evidence of this assertion presented by Lynch through testimony anywhere in the record, and this claim should be rejected for that reason alone.**

In its turn, the Florida Supreme Court affirmed the denial of relief, noting the claim primarily consisted of a recrafted version of Lynch's first guilt-phase ineffectiveness sub-claim which combined with allegations elated to mental-health mitigation, through which Lynch contended that he would not have waived a penalty-phase jury had counsel adequately informed him of the elements of and defenses to the charged offenses along with his diagnosis of "mild cognitive impairment." The Florida Supreme Court stated:

> This claim primarily consists of a recrafted version of Lynch's first guilt-phase ineffectiveness subclaim combined with allegations related to mental-health mitigation, through which Lynch contends that he would not have waived a penalty-phase jury had counsel adequately informed him of the elements of and defenses to the charged offenses along with his diagnosis of "mild cognitive impairment." However, as previously stated, trial counsel did discuss the elements of and legal defenses to first-degree murder, armed burglary, and kidnapping with Lynch. Competent, substantial evidence supports the conclusion that no valid defenses existed in this case. *See* analysis in Part II.A.i, *supra*. Additionally, as explained in later portions of our analysis, Lynch's "mild cognitive impairment" has not affected his ability to lead an otherwise normal life, he is of average overall intelligence, and he has never connected this "impairment" to his actions on March 5, 1999, or his decisions with regard to how to best proceed in this case. *See* analysis in Parts II.B.ii and II.E.ii, *infra*. Therefore, Lynch's asserted ignorance of hypothetical,

> unsupported defenses and a comparatively minor mental-health diagnosis could not have affected his decision to waive a penalty-phase jury. Moreover, Mr. Figgatt testified that he discussed potential aggravators with Lynch before Lynch pled guilty and waived a penalty-phase jury. Second-chair trial counsel, Mr. Caudill, corroborated this statement. As explained above, trial counsel's less than complete guilt-phase factual proffer did not prejudice Lynch because both he and trial counsel were well aware of the fact that the State possessed the necessary evidence to prove his guilt for each charged offense. *See* analysis in Part II.A.i, *supra.*
>
> Counsel were justifiably concerned that this case involved a thoroughly planned and executed murder of a former lover and the accompanying murder of her minor daughter. Trial counsel's recommendation was a strategic decision to conduct the penalty phase with the court sitting as the factfinder. In the words of trial counsel, they were "presenting this to a judge who wasn't going to be emotional about the fact that there was a death of a child, *and the jury was going to be.*" (Emphasis supplied.) Lynch has not demonstrated prejudice, and it is unclear how further discussion of hypothetical defenses, which did not exist in this case, and a comparatively minor mental-health diagnosis would have altered his decision to forgo a penalty-phase jury in favor of a potentially less emotional, highly experienced jurist.
>
> Accordingly, we deny relief on this subclaim.

Lynch v. State, 2 So.3d 47, 70–71 (Fla. 2008), as revised on denial of reh'g (Jan. 30, 2009).

Following his unsuccessful state court litigation, Lynch filed a federal writ of habeas corpus to the United States Circuit Court for the Middle District of Florida. While the district court denied several claims, it granted penalty phase relief based upon counsel's allegedly deficient penalty phase investigation that, in the district court's opinion, affected Petitioner's decision to waive a penalty phase jury. Lynch v.

Sec'y, Dept. of Corr., 897 F. Supp. 2d 1277 (M.D. Fla. 2012). Both parties challenged the decision. On appeal, the Eleventh Circuit affirmed the denial of Lynch's claims and reversed the grant of penalty phase relief. Lynch v. Sec'y, Florida Dept. of Corr., 776 F. 3d 1209 (11th Cir. 2015). The Eleventh Circuit provided the following discussion of Petitioner's ineffective assistance of counsel claim relating to the waiver, in part:

> Nor was the Florida Supreme Court's prejudice analysis an "unreasonable application of" clearly established federal law. A state court decision is not an unreasonable application of federal law unless the petitioner shows that there is no possibility that "fairminded jurists" could debate whether the state court's decision is inconsistent with the holding of a prior Supreme Court decision. *Evans*, 703 F.3d at 1326 (quotation marks omitted). Here, the analysis turned on two factors. The first factor was the Florida Supreme Court's determination that the new brain impairment evidence would not have affected the balance of aggravating and mitigating circumstances because: (1) the new evidence established only that Lynch had a "mild cognitive impairment"; (2) that impairment "ha[d] not affected his ability to lead an otherwise normal life"; (3) he was "of average overall intelligence"; and (4) he had "never connected this 'impairment' to his actions on March 5, 1999." *Lynch*, 2 So.3d at 70–71. That was not an unreasonable assessment. As we already explained when analyzing Lynch's failure-to-investigate claim, the facts of the crime and the expert testimony offered by the State effectively undercut the brain impairment testimony of Lynch's experts. *See supra* Section VI.C.2.
>
> The second factor in the Florida Supreme Court's prejudice analysis was Lynch's failure to offer any reason to think the jury would have been more receptive than the judge to the brain impairment evidence so that the new evidence "would have altered his decision to forgo a penalty-phase jury in favor of a potentially less emotional, highly experience jurist." *Lynch*, 2 So.3d at 71. Neither Lynch's brief nor the district court's opinion offers any reason why a jury would be more likely than a judge to be persuaded by such evidence, let alone a reason with which no "fairminded jurists" could disagree. *See Evans*, 703 F.3d at 1326

(quotation marks omitted). The Florida Supreme Court's prejudice analysis was therefore not an unreasonable application of clearly established federal law.

Nor do the three things that the district court relied on in its de novo determination that there was prejudice overcome the § 2254(d) deference owed to the Florida Supreme Court's determination. *See Lynch*, 897 F.Supp.2d at 1309. None of them speaks directly to "whether the evidence likely would have changed the outcome" with a jury and a judge as opposed to a judge alone, which *Hill* identifies as the primary factor in its prejudice inquiry. 474 U.S. at 59, 106 S.Ct. at 370. Fairminded jurists could agree with the state court's reasoning and disagree with the district court's. *See Evans*, 703 F.3d at 1326.

The district court focused first on lead trial counsel's "admission that brain damage is a compelling mitigator for a jury to consider." *Lynch*, 897 F.Supp.2d at 1309. Counsel's testimony at the state post-conviction hearing was that juries are "more receptive to a mitigator like brain damage than they are to the common scheme of poor upbringing and mental illness." But that testimony simply reflects the fact that, as counsel put it, "showing a physical defect of the brain" is often more persuasive than "showing something amorphous like a mental illness." Counsel never suggested that juries are more receptive than judges to brain impairment evidence, which is what matters here.

The district court also pointed out that Lynch's "mental health [w]as the only weighty mitigating factor in his defense" and that in two letters to trial counsel Lynch expressed interest in presenting mental health mitigation evidence. *Id.* Again, those statements speak to mental health mitigation generally, not to the relevant question of whether a judge or a jury would be more receptive to that mitigation. There is absolutely nothing in the record to support the proposition, which the district court apparently relied on, that juries would be more receptive than judges to mental health mitigation evidence.

Finally, the district court referred to Lynch's letter to trial counsel dated August 29, 2000, which discussed the fact that the judge who initially had been scheduled to preside over the trial had been replaced by Judge

> Eaton. *Id.* Expressing the hope that the new judge would not be harsher on sentencing, Lynch wrote: "Also 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 concerning sentence. I hope not." Lynch's vague expression of concern does not make the Florida Supreme Court's prejudice determination objectively unreasonable. He chose to waive a sentence-stage jury despite his initial concern about Judge Eaton, and his worry that Judge Eaton might be harsher than Judge Alley does not directly answer the relevant question: Judge Eaton or a jury.[fn19] As the Florida Supreme Court recognized, in Lynch's case the primary reason for choosing Judge Eaton instead of a jury was the likelihood that Judge Eaton would be less emotional and therefore more likely to fully and fairly consider any mitigation evidence. *See Lynch*, 2 So.3d at 47. That factor still favored choosing Judge Eaton even with the new mental health mitigation evidence. A reasonable jurist could conclude that Lynch was not prejudiced by his counsel's advice to waive the sentence-stage jury. The district court erred in granting Lynch sentence-stage relief on this claim.

Lynch v. Sec'y, Florida Dept. of Corr., 776 F.3d 1209, 1230–31 (11th Cir. 2015) (footnote omitted).

Petitioner attempted to resurrect his ineffective assistance of counsel claim after this Court issued Hurst v. Florida,136 S.Ct. 616 (2016) and the Florida Supreme Court issued Hurst v. State, 202 So.3d 40 (Fla. 2016) and Mosley v. State, 209 So.3d 1248 (Fla. 2016). Lynch filed a successive motion for post-conviction relief seeking either a life sentence or a new penalty phase trial. The post-conviction court denied the motion on November 21, 2017. Lynch appealed that denial. The Florida Supreme Court directed Lynch to brief the issue of why the lower court's order denying relief should not be affirmed given its opinion in Mullens. The Florida Supreme Court denied Hurst

relief on September 20, 2018. Lynch v. State, 254 So.3d 312 (Fla. 2018). Lynch filed the instant petition on or about December 17, 2018.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY REVIEW OF THE FLORIDA SUPREME COURT'S HOLDING THAT PETITIONER WAIVED ANY RIGHT TO RELIEF BASED ON HURST V. STATE, 202 SO.3D 40 (FLA. 2016), BY WAIVING HIS RIGHT TO A JURY DURING THE PENALTY PHASE.

Lynch contends that the Florida Supreme Court's denial of post-conviction relief was error on the issue of counsel's ineffective assistance for advising Lynch to waive the jury recommendation in the penalty phase. Lynch contends his waiver thereby prevented him from obtaining Hurst relief due to the state court's issue of Mullens v. State, 197 So.3d 16 (2016), again arguing that the court erred in finding his waiver of the penalty phase jury was unconstitutional, entitling him to relief pursuant to Hurst v. Florida, 136 S.Ct. 616 (2016) and Hurst v. State, 202 So.3d 40 (Fla. 2016) under the standard set out in Strickland v. Washington, 466 U.S. 668, 687 (1984). See Lynch v. State, 2 So.3d at 70-71. However, contrary to those contentions, the Florida Supreme Court's denial of relief was based on a procedural bar, solely based on state law. Moreover, the underlying decision does not conflict with any of this Court's precedent. Certiorari should be denied.

Certiorari review is not a matter of right, but of judicial discretion. Petitioner fails to provide this Court with a "compelling reason" that would justify granting discretionary jurisdiction. See U.S. Sup. Ct. R. 10. The primary purpose for which this Court uses its certiorari jurisdiction is to resolve conflicts among the United States courts of appeals and state courts "concerning the meaning and provisions of federal law." Braxton v. United States, 500 U.S. 344, 348 (1991). Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. Rockford Life Insurance Co. v. Illinois Dept. of Revenue, 482 U.S. 182, 184, n. 3 (1987).

Petitioner presents this Court with no compelling reason to grant certiorari review. He does not point to any conflict among state or federal courts that requires this Court's intervention. Further, Lynch fails to articulate an important unsettled question of federal law that this Court must address.

Petitioner's Attempt to Relitigate His Previously Rejected Ineffective Assistance Of Counsel Claim Was Procedurally Barred From Review In State Court.

To the extent Petitioner sought review below of his previously rejected ineffective assistance of counsel claim based upon this Court's decision in Hurst, the Florida Supreme Court found Petitioner's claim procedurally barred. The Florida Supreme Court stated: "Because this Court previously extensively analyzed the issue of trial counsel's ineffectiveness, Lynch's present claim is procedurally barred. See

Hendrix v. State, 136 So.3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." Lynch v. State, 254 So. So.3d 312, 323 (Fla. 2018) (citing Van Poyck v. State, 116 So.3d 347, 362 (Fla. 2013)); see also Reed v. State, 116 So.3d 260, 268 (Fla. 2013); Grossman v. State, 29 So.3d 1034, 1042 (Fla. 2010). Lynch cannot now resurrect a previously extinguished claim under the guise of a new Strickland prejudice analysis in the post-Hurst legal landscape." Lynch v. State, 254 So.3d 312, 323 (Fla. 2018).

Since Lynch's claim before this Court rests almost entirely upon an ineffectiveness claim found procedurally barred in state court, certiorari review would be inappropriate. This is no Federal constitutional violation; certiorari review by this Court would involve nothing more than an examination of Florida's application of its own state law regarding a procedural bar. This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Michigan v. Long, 463 U.S. 1032, 1038 (1983). See also Cardinale v. Louisiana, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court

below); Street v. New York, 394 U.S. 576, 581-82 (1969) (same). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2010). Accordingly, certiorari should be denied.

Petitioner's Plea Was Knowingly And Voluntarily Entered And Subsequent Changes in Decisional Law Do Not Render His Plea Involuntary Or His Attorney's Advice Deficient Under *Strickland*.

In addition to finding his claim procedurally barred, the Florida Supreme Court also rejected it on the merits. The court, consistent with its own established precedent found the waiver continued to be knowing and voluntary despite subsequent changes in decisional law. The court provided, in part:

> Lynch's argument, however, has one fatal flaw. The evidence Lynch's lawyers did or did not present has no bearing on the knowing and intelligent nature of the waiver of his right to a penalty phase jury. Lynch was advised on the record of his right to a penalty phase jury and the consequences of waiving that right and further attested to his informed waiver in writing. Whether the mitigation investigated and presented, upon waiver of the penalty phase jury, was sufficient is something more appropriately presented under an ineffective assistance of counsel claim. *See McMann v. Richardson*, 397 U.S. 759, 774, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act."). This Court, however, extensively analyzed whether Lynch's trial counsel

were ineffective for failing to adequately investigate the mild cognitive impairment in his initial postconviction motion. *Lynch II*, 2 So.3d at 70-77. As discussed in more detail below, we held that, while counsel may have been deficient, Lynch had failed to prove that this deficiency prejudiced him—thus failing the *Strickland* test. *Id.* at 70-71, 77. Absent a showing that trial counsel was ineffective, Lynch cannot show his waiver of his penalty phase jury was unknowing or unintelligent. Therefore, the postconviction court properly held that Lynch's waiver was knowing and voluntary.

In *Mullens,* we held that when a defendant knowingly and voluntarily waives the right to a penalty phase jury, he is not later entitled to relief under *Hurst v. Florida*, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). *Mullens*, 197 So.3d at 39-40.

> If a defendant remains free to waive his or her right to a jury trial, even if such a waiver under the previous law of a different jurisdiction automatically imposed judicial factfinding and sentencing, we fail to see how Mullens, *who was entitled to present mitigating evidence to a jury as a matter of Florida law even after he pleaded guilty and validly waived that right*, can claim error. As our sister courts have recognized, accepting such an argument would encourage capital defendants to abuse the judicial process by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. This we refuse to permit. Accordingly, 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. (citation omitted). Furthermore, since issuing our decision in *Mullens*, we have repeatedly reaffirmed the principle that a defendant who knowingly and voluntarily waives his right to a penalty phase jury cannot later claim relief under *Hurst* and its progeny. *Hutchinson v. State*, 243 So.3d 880, 883 (Fla. 2018); *Rodgers v. State*, 242 So.3d 276, 276-77 (Fla. 2018); *Allred v. State*, 230 So.3d 412, 413 (Fla. 2017); *Deassure v. State*, 230 So.3d 411, 412 (Fla. 2017); *Twilegar v. State*, 228 So.3d 550, 551 (Fla. 2017); *Covington v. State*, 228 So.3d 49, 69 (Fla. 2017); *Wright v.*

State, 213 So.3d 881, 903 (Fla.), *vacated on other grounds*, ––– U.S. –––
–, 138 S.Ct. 360, 199 L.Ed.2d 260 (2017); *Knight v. State*, 211 So.3d 1, 5 (Fla. 2016); *Robertson v. State*, No. SC16-1297, 2016 WL 7043020, at *1 (Fla. Dec. 1, 2016); *Davis v. State*, 207 So.3d 177, 212 (Fla. 2016); *Brant v. State*, 197 So.3d 1051, 1079 (Fla. 2016). Based on our clear and repeated precedent, Lynch is not entitled to *Hurst* relief in light of his valid waiver of a penalty phase jury. Therefore, we affirm the postconviction court's denial of relief on this claim of Lynch's successive motion for postconviction relief.

Next, Lynch asserts that the test for the prejudice prong under *Strickland* has changed post-*Hurst*. Thus, Lynch requests that his prior claim of ineffective assistance of counsel be reevaluated with regard to the prejudice prong, in light of the allegedly modified post-*Hurst Strickland* test. Although the concur in result opinion takes the position that Lynch's *Strickland* argument should not be addressed, we disagree. The altered post-*Hurst Strickland* argument was a major component of Lynch's successive postconviction motion and we would be remiss to ignore it. The *Strickland* analysis, however, remains unchanged post-*Hurst* and, therefore, we conclude that this claim of Lynch's successive postconviction motion is without merit.

In *Lynch II*, we extensively addressed the issue of whether Lynch's counsel were ineffective for failing to fully investigate his mental health mitigation evidence before advising him to waive his penalty phase jury. 2 So.3d at 70-77. Specifically, we noted that, while counsel may have been deficient for failing to fully investigate Lynch's "mild" cognitive impairment, their deficiency did not prejudice Lynch because he "failed to present any evidence connecting any cognitive condition to his behavior" on the day of the murders. *Id.* at 77. Thus, even if counsel had presented evidence of Lynch's mild cognitive impairment, the significant aggravation in this case would have nonetheless outweighed the mitigation. *Id.* at 70-71. Because this Court previously extensively analyzed the issue of trial counsel's ineffectiveness, Lynch's present claim is procedurally barred. *See Hendrix v. State*, 136 So.3d 1122, 1125 (Fla. 2014) ("Claims raised and rejected in prior postconviction proceedings are procedurally barred from being relitigated in a successive motion." (citing *Van Poyck v. State*, 116 So.3d 347, 362 (Fla. 2013)));

> *see also Reed v. State*, 116 So.3d 260, 268 (Fla. 2013); *Grossman v. State*, 29 So.3d 1034, 1042 (Fla. 2010). Lynch cannot now resurrect a previously extinguished claim under the guise of a new Strickland prejudice analysis in the post-*Hurst* legal landscape.
>
> Nevertheless, Lynch's claim also fails on the merits. We have repeatedly held that trial counsel is not required to anticipate changes in the law in order to provide effective legal representation. *See, e.g., Lebron v. State*, 135 So.3d 1040, 1054 (Fla. 2014) ("This Court has 'consistently held that trial counsel cannot be held ineffective for failing to anticipate changes in the law ....' " (quoting *Cherry v. State*, 781 So.2d 1040, 1053 (Fla. 2000))). Furthermore, under *Strickland*, claims of ineffective assistance of counsel are assessed under the law in effect at the time of the trial. 466 U.S. at 690, 104 S.Ct. 2052. Therefore, Lynch is not entitled to a different prejudice analysis today, simply due to the release of *Hurst* and its progeny. As we previously explained, Lynch's trial counsel may have rendered deficient performance, but that deficiency did not ultimately prejudice Lynch. Thus, we affirm the denial of this claim of Lynch's successive postconviction motion.

Lynch v. State, 254 So.3d 312, 321–23 (Fla. 2018)

The Florida Supreme Court's alternate merits ruling was reasonable and does not contravene any of this Court's precedent. Indeed, since this case comes to this Court on collateral review, this Court would need to address some significant issues before even addressing the question of counsel's advice to the defendant in light of Hurst.

Counsel's Advice Was Not Deficient Based Upon Subsequent Developments In The Law.

Lynch asserts that his trial attorney was ineffective for advising him to waive his right to a penalty phase jury in light of the subsequent legal developments in Hurst.

The Florida Supreme Court rejected this claim of ineffectiveness and finding the advice was a strategic decision and therefore, was not deficient performance.

Claims of ineffectiveness of counsel are analyzed under the law at the time the advice was given, not a decade later. Strickland v. Washington, 466 U.S. 668, 689 (1984) (explaining that a fair assessment of attorney performance requires that courts make every effort to eliminate the distorting effects of hindsight and to evaluate the attorney's conduct from counsel's perspective at the time); McMann v. Richardson, 397 U.S. 759, 773 (1970) (stating that counsel "cannot be faulted" for not anticipating a change in law where the attorney advised the defendant to enter a guilty plea under the law at the time). Counsel is not required to have a legal crystal ball to be effective. Trial counsel's advice to Lynch at the time of trial cannot be attacked based on legal developments that occurred in 2016 when Hurst v. Florida was decided. Such a claim of ineffectiveness is, as a matter of law, invalid.

The Florida Supreme Court relied on its precedent regarding the waiver of a penalty phase jury established in Mullens v. State, 197 So.3d 16, 38-40 (Fla. 2016), cert. denied, 137 S.Ct. 672 (2017), to deny the Hurst claim in this case. In Mullens, the Florida Supreme Court rejected a Hurst claim in a case where the defendant had waived his penalty phase jury. The Florida Supreme Court noted that Mullens waived his right to a penalty phase jury. Id. at 20. The Florida Supreme Court concluded that,

in light of the fact that Mullens waived his right to a jury, his argument that his sentence must be commuted to life imprisonment failed. Id. at 38. The Florida Supreme Court, relying on this Court's caselaw, explained that nothing prevents a defendant from waiving his right to a jury 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)).

The Florida Supreme Court noted that this Court has long "recognized that defendants may entirely waive their right to a jury trial." Id. at 38 (citing Singer v. United States, 380 U.S. 24, 32-35 (1965); and Patton v. United States, 281 U.S. 276, 308 (1930)). The Florida Supreme Court also relied on a number of cases from other state supreme courts, as well as a Fourth Circuit case, holding that Ring v. Arizona, 536 U.S. 584 (2002), did not invalidate a prior waiver of a jury. Id. at 38-39 (citing other state cases and Lewis v. Wheeler, 609 F.3d 291, 309 (4th Cir. 2010)). The court explained that a "subsequent change in the law regarding the right to jury sentencing did not render that initial waiver involuntary." Id. at 39 (citing State v. Murdaugh, 97 P.3d 844, 853 (Ariz. 2004) (citing Brady v. United States, 397 U.S. 742 (1970)). The Florida Supreme Court noted that the trial court conducted a thorough colloquy before permitting Mullens to waive the penalty phase jury. Id. at 39. The court observed that accepting such an argument would "encourage capital defendants to abuse the judicial

process" by waiving the right to jury sentencing and claiming reversible error upon a judicial sentence of death. Id. at 40. The court wrote 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. The Florida Supreme Court denied Hurst relief based on the waiver.

The Florida Supreme Court has followed its Mullens precedent in several other capital cases where the defendant waived his penalty phase jury to reject Hurst claims, just as it did in this case. See, e.g., Covington v. State, 228 So.3d 49, 69 (Fla. 2017) (rejecting a Hurst claim where the defendant waived the penalty phase jury citing Mullens), cert. denied, 138 S.Ct. 1294 (2018); Twilegar v. State, 228 So.3d 550 (Fla. 2017) (rejecting a Hurst claim where the defendant waived the penalty phase jury citing Mullens), cert. denied, 138 S.Ct. 2578 (2018); Quince v. State, 233 So.3d 1017 (Fla.) (rejecting a Hurst claim where the defendant waived the penalty phase jury citing Mullens), cert. denied, 139 S.Ct. 165 (2018); Rodgers v. State, 242 So.3d 276 (Fla.) (rejecting a Hurst claim where the defendant waived the penalty phase jury citing Mullens), cert. denied, 2018 WL 3625926 (July 23, 2018). This Court has denied petitions for writ of certiorari in all of these cases. Review should be denied in this case as well.

A capital defendant may waive his Sixth Amendment right to a jury trial. Blakely v. Washington, 542 U.S. 296, 300 (2004) (explaining that nothing prevents a defendant from waiving his right under Apprendi v. New Jersey, 530 U.S. 466 (2000), and when "a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or ***consents*** to judicial factfinding") (emphasis added); United States v. Mezzanatto, 513 U.S. 196, 201 (1995) ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution" citing numerous constitutional waiver cases); Singer v. United States, 380 U.S. 24, 34 (1965) (holding a defendant can waive his right to a jury trial and employ a bench trial instead with the consent of the judge and the prosecutor). When a capital defendant waives a penalty phase jury, he is consenting to judicial factfinding regarding his sentence.

This Court has held that pleas are not rendered involuntary due to later changes in the law. McMann v. Richardson, 397 U.S. 759, 773-74 (1970). Richardson argued his plea was involuntary when a new decision regarding coerced confessions was issued by this Court. Richardson argued that he could now challenge his confession under the new decision regardless of his guilty plea. This 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. This Court observed that, regardless of whether a defendant might have "pleaded differently" had the later decided case 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. See also 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"); 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"). Voluntariness is determined under the law that exists at the time.

The same rationale expressed by this Court in Richardson, Brady, and Ruiz applies to Lynch's waiver of a penalty phase jury. Defense counsel was not required to

foresee Hurst for Petitioner's waiver of the penalty phase jury to be valid. The validity of a waiver is not dependent on subsequent changes in the law.[1]

The statutory right to a jury during the penalty phase well established in Florida at the time of the waiver of the penalty phase jury, and it was a significant right under the Florida Supreme Court precedent at the time of Lynch's waiver. It was nearly impossible for a trial judge to override a jury's recommendation of life under the Florida Supreme Court's established precedent of Tedder v. State, 322 So.2d 908 (Fla. 1975), and Keen v. State, 775 So.2d 263 (Fla. 2000). So, many years before Lynch's waiver of a penalty phase jury, the established precedent in Florida was a jury recommendation of life would have almost guaranteed him a life sentence. He did not waive some minor right that later turned out to be of great significance. At the time of

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[1] The federal appellate courts naturally follow the logic of Richardson regarding pleas. United States v. Sahlin, 399 F.3d 27, 31 (1st Cir. 2005) (stating the possibility of a favorable change in the law occurring after a plea agreement is "one of the normal risks that accompanies a guilty plea"); United States v. Lockett, 406 F.3d 207, 214 (3rd Cir. 2005) (observing that "the possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea"); United States v. Cardenas, 230 Fed. Appx. 933, 935 (11th Cir. 2007) (rejecting a claim that the plea was rendered involuntary due to this Court's later decision in United States v. Booker, 543 U.S. 220 (2005), explaining that a guilty plea is not invalidated by a later change in the law citing Brady). As the Seventh Circuit explained, if the law allowed the defendant to get off scot free in the event an argument later is shown to be a winner, then every plea would become a conditional plea, with the (unstated) condition that the defendant obtains the benefit of favorable legal developments, while the prosecutor is stuck with the original bargain no matter what happens later. Young v. United States, 124 F.3d 794, 798 (7th Cir. 1997).

the waiver, a jury's recommendation mattered a great deal. Lynch waived an established and significant right to a penalty phase jury. Subsequent developments in the law, that modify or expand an established right, do not render prior waivers involuntary.

The Florida Supreme Court's decision in this case is fully in accord with this Court's precedent. Petitioner fails to identify any legal conflict, or important unsettled question of law, which can be resolved by this Court granting review of his case.

Furthermore, Lynch cannot establish that his attorney was ineffective for advising him to waive the penalty phase under the law at the time. Counsel's advice to waive the jury in a case involving a double homicide, including the prolonged and heinous, atrocious, and cruel murder of a child, was sound advice at that time and for that place. Lynch does not cite any decision from any court of appeals on this issue, and there is no conflict between the Florida Supreme Court's decision and that of any other court. He merely asserts that the Florida Supreme Court erred in assessing the particular facts of his case and launches into the merits of the underlying issue. He makes no attempt to explain how any potential error in the actual ruling below merits this Court's certiorari review. Moreover, significant predicate questions render this case uniquely inappropriate for certiorari review.

Predicate Questions Of Retroactivity And Absence Of Any Sixth Amendment Error

This Court's decision in Hurst v. Florida was limited to a right to jury findings on the aggravating circumstances. Hurst v. Florida, 136 S.Ct. at 624 (holding "Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional"). Lynch's contemporaneous convictions for homicide establish beyond a reasonable doubt the existence of an aggravating factor under Florida law rendering him eligible for the death penalty. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); Alleyne v. United States, 570 U.S. 99, 111 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in Almendarez-Torres v. United States, 523 U.S. 224 (1998)). See also Jenkins v. Hutton, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). This Court's ruling in Hurst v. Florida did not change the recidivism exception articulated in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002).

Lower courts have almost uniformly held that a judge may perform the "weighing" of factors to arrive at an appropriate sentence without violating the Sixth

Amendment.[2] The findings required by the Florida Supreme Court following remand in Hurst v. State involving the weighing and selection of a defendant's sentence are not required by the Sixth Amendment. See, e.g., McGirth v. State, 209 So.3d 1146, 1164 (Fla. 2017). There was no Sixth Amendment error in this case. Certiorari review would therefore be inappropriate because counsel's advice to waive a penalty phase jury did not, under the facts of this case, implicate any subsequently recognized constitutional violation by this Court in Hurst.

Aside from failing to present any federal constitutional error, this case is also inappropriate for certiorari review because this Court would first have to decide the predicate question of retroactivity. Lynch's case became final in 2003, well before this

[2] State v. Mason, 108 N.E.3d 56, 64-65 (Ohio 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citation omitted); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); United States v. Purkey, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); Waldrop v. Comm'r, Alabama Dept. of Corr., 711 Fed. Appx. 900, 923 (11th Cir. 2017) (unpublished) (rejecting Hurst claim and explaining "Alabama requires the existence of only one aggravating circumstance in order for a defendant to be death-eligible, and in Mr. Waldrop's case the jury found the existence of a qualifying aggravator beyond a reasonable doubt when it returned its guilty verdict.") (citation omitted); State v. Gales, 658 N.W.2d 604, 628-29 (Neb. 2003) ("[W]e do not read either Apprendi or Ring to require that the determination of mitigating

Court decided Hurst.[3] As Ring, and by extension Hurst, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying Witt v. State, 387 So.2d 922, 926 (Fla. 1980) instead of Teague for determining the retroactivity of Hurst. See Schriro v. Summerlin, 542 U.S. 348, 358 (2004) (holding that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review"). Federal courts have had little trouble determining that Hurst, like Ring, is not retroactive at all under Teague. See Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law Hurst, like Ring, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); Ybarra v. Filson, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a Hurst v. Florida claim concluding that Hurst v. Florida did not apply retroactively).

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circumstances, the balancing function, or proportionality review to be undertaken by a jury").

[3] In Mosley v. State, 209 So.3d 1248, 1276-83 (Fla. 2016), the Florida Supreme Court held that Hurst is retroactive to cases which became final after this Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), on June 24, 2002. Mosley, 209 So.3d at 1283. In determining whether Hurst should be retroactively applied to Mosley, the Florida Supreme Court conducted a Witt analysis, the state-based test for retroactivity. See Witt v. State, 387 So.2d 922, 926 (Fla. 1980) (determining whether a new rule should be applied retroactively by analyzing the purpose of the new rule, extent of reliance on the old rule, and the effect of retroactive application on the administration of justice) (citing Stovall v. Denno, 388 U.S. 293, 297 (1967); Linkletter v. Walker, 381 U.S. 618 (1965)).

Consequently, this Court would first have to find Hurst retroactive under federal law, overruling Schriro v. Summerlin, before reaching the underlying question of counsel's advice and the application of Hurst to a defendant's waiver of a penalty phase jury. Certiorari should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, the State requests respectfully that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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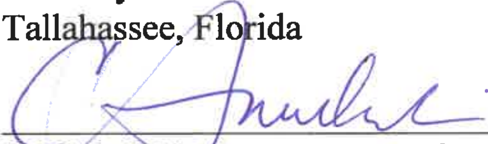

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