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IN THE SUPREME COURT OF FLORIDA

CHARLES GROVER BRANT,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_____/

CASE NO. SC18-1061
L.T. NO. 04-CF-12631
DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Citations to the instant record of Appellant's successive postconviction motion will be referred to as "2PCR p. _" with the appropriate page number inserted within the blank space.

STATEMENT OF THE CASE AND FACTS

The instant case involves a successive postconviction motion for relief under *Hurst v. State* ("*Hurst*"), 202 So. 3d 40 (Fla. 2016), even though this Court previously denied *Hurst* relief because Appellant waived his penalty-phase jury. *Brant v. State,* 197 So. 3d 1051, 1079 (Fla.), *reh'g denied*, 2016 WL 4446453 (Fla. Aug. 23, 2016).

Appellant, Charles Grover Brant, was indicted for first-degree murder, sexual battery, kidnapping, grand theft of a motor vehicle, and burglary with assault or battery on July 14, 2004. The victim, S.R., was a young woman who lived in Brant's neighborhood. Brant sexually battered, strangled, and murdered S.R. *Brant v. State*, 21 So. 3d 1276, 1277 (Fla. 2009).

S.R. was found dead in her bathtub with water running over her body. *Id.* There was a plastic bag over her head and a dog leash, an electrical cord from a heating pad, and a woman's stocking around her neck. *Brant*, 21 So. 3d at 1277. The autopsy revealed bruises on the victim's body that could be interpreted as defensive wounds as well as hemorrhages in the eyes and

eyelids that were indicative of strangulation. *Id.* The cause of death was strangulation and suffocation. *Id.*

On May 25, 2007, Brant pled guilty to all counts, and Brant was adjudicated guilty. Brant subsequently advised the court that he wished to waive his right to a penalty-phase jury advisory sentence. *Id.* at 1277. The trial court engaged in a lengthy colloquy with Brant in which it explained what the waiver meant, and it also confirmed that it was Brant's intention to waive his penalty-phase jury. *Id.* at 1288-89. The trial court accepted Brant's waiver and conducted a penalty-phase hearing. After hearing all the evidence of aggravation and mitigation, the court ultimately sentenced Brant to death. *Id.* at 1283. The aggravation found by the court was that the murder was heinous, atrocious, or cruel and the murder was committed while engaged in the commission of a sexual battery. *Id.*

Brant's conviction for first-degree murder and sentence of death were affirmed by this Court on direct appeal. This Court specifically found that "Brant knowingly, intelligently, and voluntarily entered his plea to first-degree murder, and the trial court properly accepted it." *Brant v. State*, 21 So. 3d 1276, 1289 (Fla. 2009).

Brant subsequently filed a motion for postconviction relief that included a claim about his penalty-phase jury waiver. The

postconviction court denied the motion, and Brant appealed the denial of postconviction relief and filed a petition for writ of habeas corpus. After the parties had completed briefing and oral argument, Brant motioned for supplemental briefing pursuant to *Hurst v. Florida*, 136 S. Ct. 616 (2016), which was granted. *Brant v. State*, 197 So. 3d 1051, 1079 (Fla.), *reh'g denied*, 2016 WL 4446453 (Fla. Aug. 23, 2016). This Court ultimately affirmed the postconviction court's order denying relief, denied the petition for writ of habeas corpus, and rejected Brant's *Hurst* argument. *Id.*

One of Brant's claims involved an allegation that his trial counsel rendered deficient performance by either advising him to or failing to advise him not to waive a penalty-phase jury. This Court found that the trial court's denial of this claim was supported by competent substantial evidence in the record, as credible testimony established Brant's attorneys had laid out all the pros and cons of waiving a jury recommendation, but neither attorney advised Brant to waive the jury. *Brant*, 197 So. 3d at 1076.

With regard to the *Hurst* argument, this Court specifically noted that Brant had waived his right to a penalty-phase jury, and "[w]e have previously held in a direct appeal that a defendant who has waived the right to a penalty-phase jury is

not entitled to relief under *Hurst*." *Brant*, 197 So. 3d at 1079 (citing *Mullens v. State*, 197 So. 3d 16, 40 (Fla. 2016)). This Court found Brant's claim was similar to the one in *Mullens* and was "necessarily precluded." *Id.* at 1079. The Court, therefore, rejected Brant's *Hurst* claim. *Id.*

Despite this Court's ruling, Brant filed another postconviction motion challenging the voluntariness of his penalty-phase jury waiver. (2PCR pp. 206-217). He specifically alleged that he could not have knowingly waived his right to a unanimous jury recommendation because that right did not yet exist at the time of his waiver. The lower court denied relief, finding his claim procedurally barred to the extent that the allegations were addressed in the previous postconviction appeal. (2PCR p. 417). Relying on *Mullens*, the court further found that Brant was not entitled to relief, given that he waived his penalty-phase jury and advisory recommendation. (2PCR p. 417).

This appeal follows.

SUMMARY OF THE ARGUMENT

Hurst does not apply to defendants, like Brant, who waived their penalty-phase jury. The lower court's order should be affirmed based on this Court's precedent in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). Additionally, the lower court's order

should be affirmed because Brant's successive motion was procedurally barred when this Court already found that Brant was not entitled to *Hurst* relief due to the fact that he waived his penalty-phase jury. *See Brant v. State*, 197 So. 3d 1051 (Fla. 2016).

ARGUMENT

BRANT IS NOT ENTITLED TO *HURST* RELIEF BECAUSE HE WAIVED HIS PENALTY-PHASE JURY; THE LOWER COURT'S ORDER DENYING *HURST* RELIEF SHOULD BE AFFIRMED IN LIGHT OF THIS COURT'S *MULLENS* OPINION, ADDITIONALLY THE ORDER SHOULD BE AFFIRMED BECAUSE BRANT'S SUCCESSIVE *HURST* MOTION IS PROCEDURALLY BARRED.

In *Hurst v. Florida*, the United States Supreme Court declared the portion of Florida's capital sentencing scheme requiring the judge, rather than a jury, to find each fact necessary to impose a sentence of death unconstitutional in light of *Ring v. Arizona*, 536 U.S. 583 (2002). After being remanded to this Court for a harmless-error analysis, this Court determined that *Hurst v. Florida* requires that all critical findings must be unanimously found by the jury before the trial court may consider imposing a death sentence. *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016). Additionally, in *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016), this Court determined that *Hurst* is retroactively applicable to cases that were not final when the *Ring* opinion was issued in 2002.

While Brant's case was final in 2009, *Hurst* is not applicable to his case because he waived his penalty-phase jury. *Hurst* relief is not available for defendants who have waived a penalty-phase jury. *Hutchinson v. State*, 243 So. 3d 880, 883 (Fla.), *reh'g denied*, 2018 WL 1975448 (Fla. Apr. 26, 2018). As this Court has explained, a defendant cannot subvert the right to jury factfinding by waiving that right and then later suggest that a subsequent development in the law has fundamentally undermined his sentence. *Mullens v. State*, 197 So. 3d 16, 40 (Fla.), *reh'g denied*, 2016 WL 4377112 (Fla. Aug. 9, 2016), and *cert. denied*, 137 S. Ct. 672 (2017). In *Mullens*, this Court rejected the defendant's *Hurst* claim, finding that he could not avail himself to *Hurst* relief when he had waived his right to jury factfinding. *Mullens*, 197 So. 3d at 39. *Mullens* forecloses relief here when Brant knowingly and voluntarily waived his penalty-phase jury.

This Court has consistently applied *Mullens* in similar cases to deny *Hurst* relief to defendants who have waived their penalty-phase jury. *See Allred v. State*, 230 So. 3d 412 (Fla. 2017) (explaining that the Court has "consistently relied on *Mullens* to deny *Hurst* relief to defendants that have waived the right to a penalty phase jury"); *see also State v. Silvia*, 235 So. 3d 349 (Fla. 2018); *Hutchinson v. State*, 243 So. 3d 880

(Fla. 2018); *Dessaure v. State*, 230 So. 3d 411 (Fla. 2017); *Rodgers v. State*, 242 So. 3d 276 (Fla. 2018); *Twilegar v. State*, 228 So. 3d 550 (Fla. 2017); *Allred v. State*, 230 So. 3d 412, 413 (Fla. 2017); *Covington v. State*, 228 So. 3d 49, 69 (Fla. 2017); *Knight v. State*, 211 So. 3d 1, n.2 (Fla. 2016); *Robertson v. State*, 2016 WL 7043020, n.1 (Fla. Dec. 1, 2016); *Davis v. State*, 207 So. 3d 177, 212 (Fla. 2016); and *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016). The lower court correctly denied Brant's *Hurst* claim based on this Court's *Mullens* decision, and the lower court's denial of relief requires affirmance.

Notably, this Court rejected Brant's *Hurst* claim in his last postconviction appeal precisely because he had waived his penalty-phase jury. This Court explained, "We have previously held in a direct appeal that a defendant who has waived the right to a penalty-phase jury is not entitled to relief under *Hurst*." *Brant v. State*, 197 So. 3d 1051, 1079 (Fla. 2016), *reh'g denied*, 2016 WL 4446453 (Fla. Aug. 23, 2016) (citing *Mullens*, 197 So. 3d at 40). It was entirely improper for Brant to raise yet another *Hurst* claim in a successive postconviction motion. Accordingly, the lower court also properly found Brant's claim was procedurally barred in addition to being meritless. *State v. McBride*, 848 So. 2d 287 (Fla. 2003).

Brant's attempt to distinguish his claim the second time

around is unavailing. Brant now bases his *Hurst* claim on the Eighth Amendment, rather than the Sixth Amendment, and he argues that he never waived his right to a unanimous jury recommendation. While the State does not agree that the Eighth Amendment requires a unanimous jury recommendation, the State certainly acknowledges that unanimous recommendations are required under this Court's *Hurst* ruling. For the same reason why *Mullens* applies to his Sixth Amendment claim, it also applies to his Eighth Amendment claim. When Brant waived his right to a penalty-phase jury, he waived **all of his rights** associated with having a jury involved with his penaltyphase.

Brant's contention that his waiver could not have been knowing, voluntary, and intelligent is completely without merit. Significantly, this Court has already found that Brant's waiver of his penalty-phase jury was knowingly, intelligently, and voluntarily made even though the waiver was made prior to *Hurst*. *See Brant*, 197 So. 3d at 1066; *see also Hutchinson*, 243 So. 3d at 883 ("In both *Mullens* and *Brant*, this Court found that the defendants' waivers were knowingly, intelligently, and voluntarily made based on their colloquies, even though those waivers were made with the advice of counsel based on pre-*Hurst* law."). This Court has further rejected defendants' requests for the Court to re-evaluate, in light of *Hurst,* its prior

determination that a waiver of a penalty-phase jury was knowing, intelligent, and voluntary. *See, e.g., Twilegar*, 228 So. 3d at 551. Accordingly, Brant's claim that the jury waiver could not have been knowing because the waiver occurred prior to this Court's *Hurst* decision is entirely without merit.

Likewise, this Court should reject Brant's contention that under *Halbert v. Michigan*, 545 U.S. 605 (2005), he could not waive his right to a unanimous jury recommendation because it was not yet recognized by the courts. *Halbert* deals with an amendment to the Michigan constitution, which provided that appeals by defendants who pled guilty or nolo contendere shall be by leave of the court, rather than by right, and this prompted Michigan judges to deny appointed appellate counsel to indigent defendants seeking appeals. *Halbert*, 545 So. 2d at 609.

The United States Supreme Court held that the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan's appellate court. *Halbert v. Michigan*, 545 U.S. 605, 609–10 (2005). The Court reasoned that defendants still had the ability to appeal if they entered a plea, and therefore, indigent defendants should not be forced to proceed pro se. *Id.* 617-624.

No comparison can be made between *Halbert* and the circumstances in Brant's case. The right to an attorney in order for a defendant to seek an appeal after entering a plea is completely different from a challenge made to the right to a unanimous jury recommendation after the right to a jury has been waived. Further, in *Halbert*, the Court emphasized that a defendant who pleads guilty or nolo contendere in Michigan **does not waive** all opportunity for appellate review. *Halbert*, 545 U.S. at 617. "Although he relinquishes access to an appeal as of right, he is entitled to apply for leave to appeal, and that entitlement is officially conveyed to him." *Id*. When entering the plea, Halbert was expressly told about certain instances in which the court "must" or "may" appoint appellate counsel if Halbert sought an appeal. *Halbert*, 545 U.S. at 2589.

In this case, Brant certainly was not advised that he had the right to challenge the validity of his jury waiver if the law subsequently changed. *Halbert* is not contrary to this Court's *Mullens* decision, nor does it apply, in any way, to Brant's case. As this Court has recognized, "*Halbert* did not establish any rights related to successive postconviction proceedings like this one." *Hutchinson*, 243 So. 3d at 884. Given Brant's penalty-phase jury waiver in this case, he is precluded

from obtaining relief. The lower court's order denying *Hurst* relief requires affirmance.

CONCLUSION

Brant's successive motion was properly denied as (1) procedurally barred in light of this Court's prior order denying *Hurst* relief in *Brant*, 197 So. 3d at 1066, and (2) meritless under *Mullens* given Brant's jury waiver. Appellee respectfully requests that this Honorable Court deny Appellant's request for oral argument and affirm the postconviction court's order denying Brant's successive motion for postconviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 9th day of August 2018, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will

send a notice of electronic filing to the following: Marie-Louise Samuels Parmer, Esquire, Samuels Parmer Law Firm, P.A., Post Office Box 18988, Tampa, Florida 33679, **marie@samuelsparmerlaw.com**.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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