IN THE SUPREME COURT OF FLORIDA
CASE NO. SC18-1061

CHARLES GROVER BRANT

Appellant,

v.

STATE OF FLORIDA

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal of the circuit court's denial of Mr. Brant's successive motion for postconviction relief brought pursuant to Florida Rule of Criminal Procedure 3.851.

Mr. Brant waived his right to a penalty phase jury and was sentenced to death in violation of the Sixth and Eighth Amendments. The United States Supreme Court in *Hurst v. Florida*, 136 S. Ct. 616 (2016), and this Court in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), held that the Sixth Amendment "in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt." *Hurst*, 136 S. Ct. at 621, and further that Florida law and the Eighth Amendment require a unanimous jury verdict prior to sentencing an individual to death. The issues in this case are whether: (1) whether this Court will deny relief to Mr. Brant who unknowingly waived his Eighth Amendment right to a unanimous jury verdict as to death; and (2) whether such a holding contravenes federal constitutional law.

CITATIONS

Citations shall be as follows: The record on appeal from Brant's trial proceedings shall be referred to as "TR" followed by the appropriate volume and page numbers. The postconviction record on appeal shall be referred to as "PC" followed by the appropriate volume and page numbers. The record on appeal for the successive postconviction motion is comprised of one volume and shall be referred to as "R"

followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

QUESTION PRESENTED BY THE COURT

In its Order dated July 13, 2018, this Court directed the parties to file briefs to specifically address why the Court should not affirm the lower court's order in light of *Mullens v. State*, 197 So. 3d 16 (Fla. 2016). In this brief, Brant will first address the Court's question. Then, Brant will preserve for appellate review his arguments regarding the unconstitutionality of this Court's blanket denial of the application of the Eighth Amendment right to a unanimous jury verdict recognized in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) to those defendants who waived a sentencing phase jury. Due to the truncated nature of the briefing, all claims not specifically argued from Brant's successive motion are not waived and expressly incorporated herein.

REQUEST FOR ORAL ARGUMENT

A full opportunity to air the issues through oral argument would be appropriate given the seriousness of the claims involved and the fact that a life is at stake. Brant respectfully requests that this Honorable Court permit oral argument.

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STATEMENT OF THE CASE

I. Trial Court Proceedings

Charles Grover Brant was charged by Indictment on July 14, 2004 with one count of first degree premeditated murder, sexual battery, kidnapping, grand theft auto and burglary of a dwelling with assault and/or battery. Upon advice of counsel, Mr. Brant pled guilty to all crimes as charged on May 25, 2007. He received no negotiated benefit for his guilty plea and continued to face the death penalty.

Jury selection for the penalty phase began on August 20, 2004. TR V. 17, p. 1651. (Supp). Upon being informed that Brant had been found guilty, Juror Brenda Ricci stated, "He's guilty, he's guilty and I'm really tired of the system being wasted, to be honest with you." TR V. 18, p. 1816-17. Ms. Ricci continued,

> Yes, I was upset just hearing what the judge described … *and the five guilty verdicts that were already decided*. I mean, this was three years ago. I don't understand due process to me. (sic).

Id. at 1817-18. Upon request by counsel, the trial judge inquired of the Panel if anyone else agreed with Juror Ricci. Id. at 1820. Approximately 19 potential jurors agreed with Ms. Ricci. Id. at 1828, 1830-1832.

As jury selection continued, some of the potential jurors continued to express similar views. Juror Parker stood up and told the prosecutor, "Seriously. I mean, I totally agree. *We all know*, I mean, I'm on your side. *I will put him to death*." Id. at 1952, 1954. The prosecutor thanked the juror. Id. at 1952.

Defense counsel renewed his motion to strike noting that the jurors had laughed after Juror Parker's comment. The trial judge agreed: "Then there was laughter, yes." *Id*. at 1954. The court "reluctantly" granted the defense motion over the State's objection, determining that the jurors "starting with Ms. Ricci," created an "atmosphere" that warranted striking the panel. Id. at 1964-1966.

The very next day, Brant waived a penalty phase jury. TR V. 7, p. 1- 16. Brant told the court he had stopped taking his depression medication about two months prior to waiving the jury. Id. at 11-12. The next day, the State put on the record that in a recorded jail phone call made by Mr. Brant the night before, Mr. Brant told a friend that, "pleading guilty was a big mistake." TR V. 8, p. 244. Trial counsel described jury selection as a "debacle." TR (Supp.) V. 18, p. 1958.

This Court denied Brant's appeal and affirmed his conviction and sentence. *Brant v. State*, 21 So.3d 1276 (Fla. 2009). Brant's counsel failed to file a petition for writ of certiorari with the United States Supreme Court.

II. Postconviction Proceedings

Mr. Brant filed a timely 3.851 Motion which had to be amended several times due to protracted public records litigation. The circuit court held an evidentiary hearing. The circuit court denied the 3.851 motion and denied rehearing .

Mr. Brant timely appealed to this Court. On January 12, 2016, the United States Supreme Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016) (*Hurst*) and, on

February 8, 2016, Mr. Brant moved for supplemental briefing, which this Court granted. On June 30, 2016, this Court affirmed the denial of Mr. Brant's 3.851 Motion, denied his state habeas petition and denied his claim that his sentence of death was unconstitutional under the Sixth Amendment as recognized in *Hurst. Brant v. State,* 197 So. 3d 1051 (Fla. 2016). Mr. Brant timely filed for rehearing on July 15, 2016, which this Court denied on August 23, 2016.

On September 9, 2016, Mr. Brant timely filed a petition for writ of habeas corpus with the federal district court, *Brant v. Sec'y, D.O.C.,* Fla. M.D. Case No. 8:16-cv-2601-T-23MAP, which remains stayed pending exhaustion of Mr. Brant's *Hurst* claim.

On December 21, 2017, Brant filed a successive motion to vacate his death sentence in the circuit court based on *Hurst v. Florida,* 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), arguing that the Eighth Amendment right to a unanimous sentencing jury verdict rendered his sentence of death unconstitutional. (R). The State filed a response on , 2018. (R). A case management conference was held on , 2018. (R). The lower court denied Brant's motion on , 2018. (R). Brant filed a timely motion for rehearing on , 2018, which was denied on 2018. (R). This appeal follows.

STANDARD OF REVIEW

The standard of review is *de novo*. *See Stephens v. State*, 748 So. 2d 1028, 1032

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

SUMMARY OF ARGUMENT

ARGUMENT I: Mr. Brant did not validly waive his Eighth Amendment right to a unanimous penalty phase jury verdict and is entitled to a new constitutional penalty phase despite this Court's precedent in *Mullens*. Brant could not waive a right that was unconstitutionally withheld from him and had not been acknowledged by this Court at the time of Brant's waiver, or, at the time *Mullens* was decided. On its face, such a waiver could never be knowing, voluntary and intelligent under federal law and nor could *Mullens* preclude relief. Brant submits that he is entitled to *Hurst* review and relief.

ARGUMENT I: Brant never validly waived his Eighth Amendment right to a unanimous penalty phase jury verdict as he could not validly waive a right that was unconstitutionally withheld from him.

When waiving a vital constitutional right such as the right to counsel, the right to a jury trial, the right to a jury sentencing, and the right to testify, courts must be vigilant and ensure that a criminal defendant waives such a right only after being fully informed of the nature of the right he is waiving and the consequences of the waiver. However, as a result of this court's holding in *Mullens*, Brant's unconstitutionally obtained sentence of death has been held constitutional based on a Kafka-esque legal

analysis that cannot withstand candid scrutiny. Brant never knowingly, voluntarily and intelligently waived his Eighth Amendment right to a unanimous penalty phase jury verdict. Because this Court had repeatedly failed to recognize that right, Brant was never informed that he had the right to a unanimous jury verdict and that he need only move one juror to mercy to obtain a life sentence. Had that right existed, Brant never would have waived his rights; nor could any waiver be fully informed and knowing as required by the federal Constitution.

Prior to 2016, this Court repeatedly held that a non-unanimous jury verdict did not violate the Eighth Amendment. As recently as 2013, when determining whether a nine to three jury verdict was sufficient within the meaning of the Eighth Amendment to allow an execution to proceed, this Court stated: "Mann asserts that Florida's death penalty scheme that permits the sentence of death based on a simple majority jury recommendation does not conform to society's evolving standards of decency. We reject this argument by concluding that it is subject to our general jurisprudence that non-unanimous jury recommendations to impose the sentence of death are not unconstitutional." *Mann v. State*, 112 So. 3d 1158, 1162 (Fla. 2013). In support of that holding, this Court cited numerous cases in a footnote. "*See also Parker v. State*, 904 So.2d 370, 383 (Fla.2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote." (citing *Whitfield v. State*, 706 So.2d 1 (Fla.1997); *Thompson v. State*, 648 So.2d 692

(Fla.1994); *Brown v. State,* 565 So.2d 304 (Fla.1990), *abrogated by Jackson v. State,* 648 So.2d 85 (Fla.1994); *Alvord v. State,* 322 So.2d 533 (Fla.1975), *abrogated by Way v. State,* 760 So.2d 903 (Fla.2000))); *Davis v. State,* 859 So.2d 465, 479 (Fla.2003) ("This Court has repeatedly rejected [this] argument and held that a capital jury may recommend a death sentence by a majority vote." *(citing Sexton v. State*, 775 So.2d 923, 937 (Fla.2000); *Thompson*, 648 So.2d at 698))." *Id*. at 1162, n. 2.

On June 16, 2016, this Court issued *Mullens v. State,* 197 So. 3d 16 (Fla. 2016). This Court stated:

> We need not extensively consider the implications of *Hurst* to determine that Mullens cannot avail himself of relief pursuant to *Hurst. Hurst* said nothing about whether a defendant could waive the Sixth Amendment right to jury factfinding in sentencing procedures as recognized by *Ring* and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In light of the fact that Mullens waived this right, his argument that his sentence must be commuted to life imprisonment pursuant to section 775.082(2), Florida Statutes (2008), fails.

Id. at 38 (Fla. 2016). *Mullens* did not address the waiver of an Eighth Amendment right to a unanimous jury verdict because 1) this Court had repeatedly said the right did not exist and 2) Mullens did not raise it in his briefing.

Approximately four months later, on October 14, 2016, this court issued its decisions in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016) and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), and declared the 10-2 provision contained in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. In *Perry*, this Court concluded that the Sixth **and the Eighth Amendments** required a unanimous jury verdict recommending a

death sentence before one could be imposed. As this Court explained in *Hurst*, "Not only does jury unanimity further the goal that a defendant will receive a fair trial and help to guard against arbitrariness in the ultimate decision of whether a defendant lives or dies, jury unanimity in the jury's final recommendation of death also ensures that Florida conforms to 'the evolving standards of decency that mark the progress of a maturing society,' which inform Eighth Amendment analyses." *Hurst v. State*, 202 So. 3d 40, 72 (Fla. 2016) (internal citations omitted).

Accordingly, after those decisions, Florida capital defendants had a right to demand that the State secure a unanimous jury verdict. To justify a death sentence, a unanimous jury must now agree that the aggravators outweigh the mitigating factors present in the case, and, most significantly, if a unanimous death recommendation is not returned, a death sentence cannot be imposed. Thus, a life sentence is mandated if one or more jurors vote in favor of a life sentence due to a desire to be merciful, even if the jury unanimously determined that sufficient aggravators existed and that they outweighed the mitigators that were present. *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016), quoting *Hurst*, 202 So. 3d at 59 ("'the penalty phase jury must be unanimous in making the critical findings and recommendation that are necessary before a sentence of death may be considered by the judge or imposed.'") *See also Hurst*, 202 So.3d at 62, n. 18.

A defendant cannot waive a right not yet recognized by the courts. *Halbert v.*

Michigan, 545 U.S. 605, 623 (2005); *see also Management Health Systems, Inc. v. Access Therapies, Inc.*, No. 10-61792-CIV, 2010 WL 5572832 (S.D. Fla. Dec. 8, 2010) ("It is axiomatic that a party cannot waive a right that it does not yet have.") *Cruz v. Lowe's Home Centers, Inc.*, No. 8:09-cv-1030-T-30MAP, 2009 WL 2180489, at *3 (M.D. Fla. Jul. 21, 2009) (same); *cf. Menna v. New York*, 423 U.S. 61 (1975) (guilty pleas do not "inevitably waive all antecedent constitutional violations" and a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established").

In *Halbert*, the United States Supreme Court held that where the appellate court considers the merits of the claim in ruling on a motion for leave to appeal, a defendant has a constitutional right to appointed counsel in filing the motion for leave to appeal. 545 U.S. at 618-19. Michigan argued that even if the defendant had a constitutional right to appointed counsel he had waived that right when he pled *nolo contendere*. *Id.* at 623. The Supreme Court found, however, that the defendant did not waive his right to counsel because he "had no recognized right to appointed appellate counsel he could elect to forgo." *Id.*

The holding of *Mullens* is contrary to *Halbert*. *Mullens* holds that there is no *Hurst* error where the defendant waived a jury recommendation at sentencing. *Mullens*, 197 So. 3d at 39. Prior to *Hurst*, however, a Florida defendant could not have waived *Hurst*-required jury factfinding because that right was not yet recognized

by the courts, nor could he have waived his right to a unanimous jury verdict under the Eighth Amendment because that right did not yet exist in Florida. The pre-*Hurst* defendant could only waive the right to a jury recommendation of life or death.

At the time of Mr. Brant's death sentencing proceeding, before *Hurst*, Florida's unconstitutional capital-sentencing scheme permitted only the judge, not the jury, to find facts that would expose a defendant to a death sentence. Brant, therefore, waived only the right to a jury recommendation, not to his then-unrecognized Eighth Amendment constitutional right to a unanimous jury fact-finding prior to the imposition of a sentence of death. Under *Halbert*, Brant could not have waived his right to jury fact-finding or a unanimous jury verdict.

Even if this Court concludes that a pre-*Hurst* defendant could waive *Hurst* relief, Brant's waiver was not knowing, voluntary, and intelligent, *Mullens*, 197 So. 3d at 39 (waiver of jury sentencing must be "knowingly, voluntarily, and intelligently made"); *Trease v. State*, 41 So. 3d 119, 123 (Fla. 2010) (waiver of post-conviction counsel and post-conviction proceedings must be "knowing, intelligent, and voluntary"), because it did not consider the possibility that Florida's death-sentencing scheme would be found unconstitutional, *see Rodgers v. Jones*, 3:15-cv-507-RH, ECF No. 15 (N.D. Fla. Aug. 24, 2016) (federal district court order noting Defendant's waiver was pre-*Hurst* and did not address "the possibility that the entire Florida sentencing scheme would be held unconstitutional").

Mr. Brant pled guilty to first degree murder. After one attempt to secure a jury for the sentencing phase of his trial which resulted in a "debacle," Mr. Brant opted to waive his right to a non-unanimous jury recommendation, without any advice from counsel, who had essentially abandoned him at this stage of the proceeding.

Brant asserts unequivocally that the Eighth Amendment *Hurst* error is not harmless in his case and any decision to the contrary is a violation of his rights. Brant recognizes that *Mullens* suggests defendants who waived a jury are not entitled to *Hurst* relief under the ***Sixth Amendment***, and that he has previously raised that claim. However, this Court has not squarely addressed Brant's argument that he could not have knowingly waived his ***Eighth Amendment right to a unanimous fact—finding jury,*** since that right did not yet exist at the time this Court issued *Mullens*.

Specifically, as noted above, the Supreme Court of the United States has held that a waiver of a constitutional right must be "knowingly and intelligently" relinquished. *Johnson v. Zerbst*, 304 U.S., at 464-465, 58 S.Ct., at 1023. *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Therefore, a waiver of rights that does not exist and is thus less than knowing cannot withstand constitutional scrutiny. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005).

Anything less than *Hurst* relief for all post-*Ring* defendants leads to disparate treatment among Florida capital defendants. Ensuring uniformity and fairness in

circumstances in Florida's application of the death penalty requires full retroactive application of *Hurst* and the resulting new Florida law. After all, "death is a different kind of punishment from any other that may be imposed in this country," and "[i]t is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice . . . " *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977).

This Court has granted *Hurst* relief in many cases that were more egregious than Brant's and lacked the powerful mitigation Brant presented in post-conviction, detailing the cruel childhood he suffered, that he was conceived during a rape and thus rejected by his mother, and suffers from severe brain damage. *See e.g., Cole v. State*, 221 So. 3d 534 (Fla. 2017) (two victims buried alive and seven aggravating factors found); *Calloway v. State,* 210 So. 3d 1160 (Fla. 2017) (five men were shot in the head execution style and 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 and five aggravating factors found); *Bradley v. State*, 214 So. 3d 648 (Fla. 2017) (murder of Brevard County Sheriff's Deputy, Barbara Pill, and five aggravating factors found); *Pasha v. State,* 42 Fla. L. Weekly S569 (Fla. May 11, 2017) (defendant murdered his wife and another victim by cutting their throats and four aggravating factors found); *Williams v. State*, 209 So. 3d 543 (Fla. 2017) (defendant was convicted of the kidnapping, robbery, and first degree murder of an

81 year old woman and the jury unanimously found four out of five aggravating factors on a 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 and five aggravating factors found); and *Hertz v. Jones*, 218 So. 3d 428 (Fla. 2017) (two counts of first-degree murder and six aggravating factors found). As all of these cases were more aggravated and exhibit facts that are more heinous, the only way to distinguish Brant's is that he waived his right to a jury and did so as a result of abandonment by his counsel. Brant's situation is unique and warrants, particularly in light of the compelling mitigation presented in post-conviction. There is no doubt that Brant himself would not have waived his right to a jury and a properly instructed jury would not have unanimously returned a death verdict in light of the overwhelming mitigation presented in post-conviction.

In the wake of *Hurst v. Florida* and the resulting new Florida law, any new Florida jury under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) must be correctly instructed as to its sentencing responsibility. Individual jurors must know that they each will bear the responsibility for a death sentence resulting in a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry*, 210 So. 3d 630. As was explained in *Caldwell*, jurors must feel the weight of their sentencing

responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the USSC held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *See Caldwell*, 472 U.S. at 341.

It is likely that at least one juror would not join a death recommendation if Brant was granted a resentencing in front of a jury because the proper *Caldwell* instructions would be required. The probability of one or more jurors voting for a life sentence increases when a jury is told a death sentence could only be authorized if the jury returned a unanimous death recommendation, and that each juror had the ability to preclude a death sentence simply by refusing to agree to a death recommendation. *See Caldwell*, 472 U.S. at 330 ("In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."). Where the jurors' sense of responsibility for a death sentence is not explained or is diminished, a jury's verdict in favor of a death sentence violates the Eighth Amendment and the death sentence cannot stand. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.").

Furthermore, society's evolving standards of decency demand that Brant be granted *Hurst* relief, as the jury vote has evolved from a bare majority, to ten-to-two, to unanimous. In *Hurst*, this Court ruled that on the basis of the Eighth Amendment and on the basis of the Florida Constitution, the evolving standards of decency now require jury "unanimity in a recommendation of death in order for death to be considered and imposed." 202 So. 3d at 61. Quoting the United States Supreme Court, this Court in *Hurst* noted "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" 202 So. 3d at 61 (quoting *Atkins v. Virginia*, 536 U.S. 304, 312, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)). Then from a review of the capital sentencing laws throughout the United States, this Court found that a national consensus reflecting society's evolving standards of decency was apparent:

> The vast majority of capital sentencing laws enacted in this country provide the clearest and most reliable evidence that contemporary values demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.

202 So. 3d at 61. Accordingly, this Court in *Hurst* concluded:

> The United States and Florida Constitutions, as well as the administration of justice, are implemented by requiring unanimity in jury verdicts recommending death as a penalty before such a penalty may be imposed.

202 So. 3d at 63. *See Hurst*, 202 So. 3d at 73 (Pariente, J., concurring); *see also Powell*

v. Delaware, 153 A.3d 69 (Del. 2016).

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. What constitutes cruel and unusual punishment under the Eighth Amendment turns upon considerations of the "evolving standards of decency that mark the progress of a maturing society." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002). "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972)). According to *Hurst v. State*, the evolving standards of decency are reflected in a national consensus that a defendant can only be given a death sentence when a penalty-phase jury has voted unanimously in favor of the imposition of death. The United States Supreme Court has explained that the "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch v. Louisiana*, 441 U.S. 130, 138 (1979). The near-uniform judgment of the states is that only a defendant who a jury unanimously concluded should be sentenced to death, can receive a death sentence. As a result, those defendants who have had one or more jurors vote in favor of a life sentence are not eligible to receive a death sentence. This class of defendants, those who have had jurors formally vote in

favor a life sentence, cannot be executed under the Eighth Amendment.

Therefore, Brant must be granted relief and the opportunity to make a constitutional decision regarding his waiver of a constitutional jury sentencing. It is arbitrary that a defendant who was convicted of triple murders with an eleven-to-one vote receives relief, while Brant is denied the same opportunity. *See Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) ("In light of the non-unanimous jury recommendation to impose a death sentence, we reject the State's contention that any *Ring*- or *Hurst v. Florida*-related error is harmless." *Id*. "We also reject the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*." *Id*.). To find that the *Hurst* error was harmless and deny this right to Brant would be manifest injustice and a violation of his equal protection rights. *See* U.S. Const. amend. XIV.

CONCLUSION

Mr. Brant respectfully requests that this Court reverse the lower court's rulings, vacate his sentence, and grant him a new penalty phase, or, in the alternative, allow him full briefing on this issue.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been electronically filed with the Clerk of the Florida Supreme Court, and electronically delivered to Assistant Attorney General Christina Pacheco, Christina.Pacheco@myfloridalegal.com & cappapp@myfloridalegal.com; on this 2nd day of August, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Response to Order to Show Cause, was generated in Times New Roman 14 point font, pursuant to Fla. R. App. P. 9.100**.**

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