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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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.

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STATEMENT OF THE CASE

The State asserts that this Court determined that the trial court engaged in "lengthy colloquy with Brant in which it explained" what Brant's waiver of a penalty phase jury meant. (Answer Brief, p. 2). What this Court said, however, was that "[t]he trial court explained to Brant his constitutional right to be tried by a jury, his right to call and confront witnesses, and, if convicted, his right to present mitigating evidence and *receive an advisory sentence from a jury*." *Brant v. State*, 21 So. 3d 1276, 1288–89 (Fla. 2009) (emphasis added).

The State correctly asserts that this Court found that "credible testimony established Brant's attorneys had laid out all the pros and cons of waiving a jury recommendation." (Answer Brief, p. 3). However, this Court did not find – and could not find – that Brant was advised of his rights to jury fact-finding and a unanimous jury verdict as those rights did not exist.

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.

The State asserts that this Court's opinion in *Mullens v. State*, 197 So. 3d 16 (Fla. 2016) should preclude the denial of Mr. Brant's Eighth Amendment claim. However, *Mullens* did not raise and this Court did not address the waiver of an Eighth Amendment right to a unanimous jury verdict. Nor did this Court address whether a defendant could waive a right that did not yet exist.

The State argues that it is "entirely improper" for Brant to raise "yet another *Hurst* claim," and "accordingly" his claim was "procedurally barred." (Answer Brief, p. 7). However, the lower court only found barred that part of his claim that had been previously raised --- which the lower court did not identify as Brant's Eighth Amendment claim and could not have as it has not been previously raised. It is entirely proper for a capital defendant to raise a constitutional challenge to his sentence of death through a successive motion for post-conviction relief. To find that Brant's Eighth Amendment claim is procedurally barred – when it has never been raised before – would be an arbitrary, unequal and inconsistent application of a procedural bar. The State's argument as to a procedural bar lacks merit.

The State attempts to distinguish *Halbert v. Michigan*, 545 U.S. 605, 623 (2005), but does not address any of the other cases relied upon by Mr. Brant: *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"). Mr. Brant stands on the merits of his Initial Brief as to these cases and his argument that Brant's waiver could not have

been knowing and intelligent as the constitutional right- a unanimous jury verdict – did not yet exist. *Johnson v. Zerbst*, 304 U.S. 458, at 464-465, 58 S.Ct., at 1023 (1938). *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (194(1938)8) (plurality opinion of Black, J.). Brant's waiver is less than knowing and cannot withstand constitutional scrutiny. *Halbert v. Michigan*, 545 U.S. 605, 623 (2005).

The State further did not address Mr. Brant's argument that this Court's disparate treatment of Florida capital defendants results in an arbitrary and capricious application of the death penalty. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). The State further did not address Brant's evolving standards of decency argument as to the evolution of Florida law from allowing a verdict of death based on a bare majority, to ten-to-two, and now to unanimous. Mr. Brant stands on his Initial Brief as to those arguments and respectfully asks this Court to squarely address his claims.

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 27th 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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