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IN THE SUPREME COURT OF FLORIDA

BRANDON LEE BRADLEY,

Appellant,

vs.

CASE NO. SC14-1412

STATE OF FLORIDA,

Appellee.

_____/

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ON APPEAL FROM THE CIRCUIT COURT,
EIGHTEENTH JUDICIAL CIRCUIT,
IN AND FOR BREVARD COUNTY

APPELLANT'S **SUPPLEMENTAL** INITIAL BRIEF

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

During the guilt phase held below Appellant's co-defendant testified that on the night leading up to the shooting Appellant consumed Xanax, codeine, and marijuana, and possibly cocaine. (XXVI 693-96) A laboratory analyst and a toxicologist corroborated that testimony; a State toxicologist testified, in rebuttal, that the age of the relevant metabolites could not be determined. (XXX 1430-56, 1527-43; XXXI 1722-41) The defendant's self-report also included use of hallucinogenic mushrooms. (XXX 1539-43; XXXV 2490-91; XXVI 693-96) On the dashboard camera footage the defendant can be heard, just before the shooting, asking why the officer is going to shoot him. (State Exhibit 42) When the defendant spoke to police after the incident he stated he had believed the officer was going to shoot him. (XXVIII 1163; XXVIX 1239, 1244)

At the penalty phase neuropsychiatrist Dr. Joseph Wu testified that scans of the defendant's brain show significant abnormalities which were probably the result of physical trauma. (XXXIV 2347, 2360-66, 2368, 2382-83) The anomalies he saw were in parts of the brain "involved with processing fearful emotions;" he believes that what he saw would result in an abnormal "tendency to misperceive and to have a greater fear response to a situation," or else result in disproportionate reactions to provocation. (XXXIV 2364, 2367-69 2397-98) He concluded that

Appellant is able to control his conduct, but is likely to misperceive events and significantly overreact to them. (XXXV 2424-25) Dr. Wu further testified that psychoactive medications like Xanax exacerbate these problems acutely. (XXXIV 2398)

Neuropsychologist Dr. Jacquelyn Olander testified that she believed Appellant's capacity for calm reflection at the time of the shooting was substantially impaired, that he acted under the influence of extreme mental or emotional disturbance, and that his ability to conform his conduct to law was substantially impaired. (XXXV 2496-98) Olander also testified that Appellant had in the past suffered multiple head injuries, the most serious involving loss of consciousness. (XXXI 1642-43, 1675) She concluded, after testing, that the defendant was not malingering and that his demeanor just before the shooting was consistent with paranoia. (XXXI 1627, 1652) A State psychologist, Dr. Patricia Zapf, concluded that the defendant was not impaired when he gave his statement to police, and suggested that malingering would have been disclosed by more searching testing. (XXXI 1779-95)

Counsel for the State suggested to Dr. Olander that the brain damage Dr. Wu discussed might have taken place when Appellant's SUV slipped into a ditch after the shooting. (XXXV 2523-24) She responded that nothing in the police

reports she had read suggested he was injured in that incident. (XXXV 2524, 2544-45) A videotape of the end of the police chase was played for the jury. (State Exhibits 60; XXVII 842) A police officer testified at trial that "I didn't see anything wrong with" Appellant as he emerged from the SUV after the chase. (XXVIII 1084-86)

PENALTY PHASE: INSTRUCTIONS, DELIBERATIONS AND VERDICT

The jury was instructed in accordance with the standard instructions for use in the penalty phase, including statements that the jury's recommendation is advisory. (XXXVI 2793-94) They recommended death 10-2. (XXXVII 2848)

SENTENCING ORDER

In its sentencing order the court found, as aggravators, that the defendant was on felony probation at the time of the shooting, had been convicted of a prior violent felony, had committed the murder in the course of fleeing from a robbery, and had acted in a cold, calculated, and premeditated ("CCP") manner. (IX 1665-68, 1670-75) A fifth "doubled" aggravator found by the trial court consisted of the fact the victim was a law enforcement officer and the conclusion that the defendant acted to avoid arrest. (IX 1669-70) As argued in the initial brief, the jury was never effectively instructed that it should consider those two aggravating factors as one. (See initial brief at 57-60)

In support of the CCP aggravator, the court found that the defendant said during the traffic stop that he had to kill the officer because she had seen his face and his tag; in making that finding the court expressly relied on testimony by co-defendant Andria Kerchner and by Jamie Dieguez, the person listening in on Andria's phone. (IX 1672-73) In support of the CCP factor the court also found that Appellant obtained a gun and pre-planned the outcome of any police stop he might be involved in, citing a statement attributed by police to State witness Amanda Ozburn. (IX 1671-72) Ozburn repudiated any statement to that effect at trial. (XXIX 1313-16, 1318, 1325; SR 7-9, 25-39) Kerchner's testimony was impeached by her favorable plea deal. (XXVI 676-77, 734) Dieguez was impeached by exaggerations he volunteered while testifying and by the many prescription drugs he takes, which he admitted he has been told cloud his memory. (XXV 586-89, 595-600, 626-27, 635-36, 642-43, 646; XXX 1503-05)

As to the statutory mitigating factor "defendant was under the influence of extreme mental or emotional disturbance," the judge ruled that "i[m]pairment due to substance abuse...at the time of the offense cannot be used to support this mitigating circumstance because the Florida Legislature has eliminated this as a mitigating factor at sentencing," citing a provision of the sentencing guidelines. (IX 1676-77) She found that while the defendant proved by competent, substantial

evidence that he suffered from a brain abnormality at the time of sentencing, "it is impossible to determine" whether the brain damage post-dated the shooting, since it "may have been sustained in the crash that ensued." (IX 1678)

As to the separate statutory mitigator "defendant was unable to conform his conduct to the requirements of law," the court noted that the experts' conclusions conflicted, and found the mitigator was not proved. (IX 1679-80)

As to non-statutory mitigation, the court found the defense had proven a deficit in brain function, but gave that factor no weight because the deficit could have post-dated the shooting. (IX 1684) The court gave "some weight" to the nonstatutory mitigating factors of childhood physical abuse, childhood emotional abuse, and absence of a loving father or male role model. (IX 1681-82) The judge assigned "little weight" to other factors, including Appellant's positive relationship with his brother, his generosity to others, and onset of drug abuse at an early age. (IX 1683, 1686-87, 1689) The court gave no weight to the defendant's age of twenty-two. (IX 1680)

The court assigned each aggravating factor great weight, and further stated that each of the aggravating factors standing alone outweighed the combined showing of mitigation. (IX 1664, 1691)

THIS APPEAL

Before oral argument in this matter, after the federal Supreme Court decided Hurst v. Florida, 136 S. Ct. 616 (2016), this court permitted abbreviated supplemental briefing. In that briefing, and at oral argument, Appellant took the position that the error identified in Hurst v. Florida can never be deemed harmless. After this court held that the Hurst error is in fact subject to harmless-error analysis, this court granted Appellant's motion to address whether the record of this case supports a harmless-error finding.

In the earlier supplemental briefing, Appellant also argued that the then-standard jury instructions read in this case ran afoul of Caldwell v. Mississippi, 472 U.S. 320 (1985). Appellant maintains that Caldwell, read in light of Hurst, warrants reversal of his death sentence.

SUMMARY OF ARGUMENT

The record shows noncompliance with Hurst v. Florida, in that the jury did not make all of the findings necessary to allow imposition of the death penalty. The record does not support the conclusion that the error was harmless beyond a reasonable doubt.

In Hurst v. State, 2016 WL 6036978 (Fla. 2016), this court held that a 7-5 death recommendation suggested doubt that Hurst's jury, if correctly instructed, would have made all of the findings essential to imposition of the death penalty both unanimously and beyond a reasonable doubt. The 10-2 split in this case raises the same concern.

The Arizona courts hold that the State must show in similar cases that *no rational jury* could find the State *failed to prove* a disputed aggravator. Here a rational jury might have found the State failed to prove the CCP aggravator beyond a reasonable doubt.

Per this court's Hurst opinion, the State must show in these cases that no rational jury would determine that the mitigating circumstances were sufficiently substantial as to call for leniency. The State cannot make that showing in this case; the judge's rulings were predicated to some extent on a misapprehension of the controlling law, and to a large extent on credibility findings and factual assump-

tions that the jury might not have shared.

The then-standard jury instructions read below repetitively emphasized for the jury that its recommendation to the court would not be binding. As argued in earlier supplemental briefing, those instructions run afoul of the rule announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), and in themselves warrant reversal.

This court must vacate the death sentence reimposed below, and remand for further lawful proceedings.

ARGUMENT

THE SIXTH AMENDMENT ERROR IDENTIFIED IN HURST v. FLORIDA CANNOT REASONABLY BE DEEMED HARMLESS ON THIS RECORD.

Standard of review. "The harmless error test...places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict." Hurst v. State, 2016 WL 6036978 *23, *quoting* State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). Where an error concerns sentencing, it is harmless only if there is no reasonable possibility that the error contributed to the sentence. Hurst at *23. The harmless error test "is to be rigorously applied...and the State bears an extremely heavy burden in cases involving constitutional error." Id.

One aspect of the State's burden, where the Sixth Amendment error identified in Hurst v. Florida, 136 S. Ct. 616 (2016) has taken place, is to show that "no rational jury, as the trier of fact, would determine that the mitigation was sufficiently substantial to call for a life sentence." Hurst at *24.

The Arizona Supreme Court holds that where an aggravating factor is fact-intensive, it will not find Ring error harmless unless convinced beyond a reasonable doubt that no reasonable jury could find the State *failed* to prove that aggravator. State v. Phillips, 205 Ariz. 145, 67 P. 3rd 1228, 1230 (Ariz. 2003).

Argument. The record shows noncompliance with Hurst v. Florida, in that the jury did not make all of the findings necessary to allow imposition of the death penalty. The record does not support the conclusion that the error was harmless beyond a reasonable doubt.

The State, in its "Brief in Surrebuttal" filed in this case in April, 2016, argued that juries in capital cases need find only that a single qualifying aggravating factor was proved beyond a reasonable doubt. (Surrebuttal brief at 3, 5, 8-9) It further argued generally that any Hurst error in this case is harmless beyond a reasonable doubt. (Surrrebuttal brief at 10-11) The former position is untenable in light of this court's holding on remand in Hurst, that "in addition to unanimously finding the *existence* of any aggravating factor, the jury must also unanimously find that the aggravating factors are *sufficient* for the imposition of death and unanimously find that the aggravating factors *outweigh* the mitigation." Hurst v. State, 2016 WL 6036978 *10 (Fla. 2016) (emphasis in original).

The State's harmless-error position is similarly untenable. In Hurst, this court held that it could not be sure the jury in that case would have found the aggravators that were ultimately found by the sentencing judge, *if* the jurors had been clearly instructed that they must, unanimously and beyond a reasonable doubt, find each of them present. Hurst at *24. Here the proof underlying the CCP

aggravator depended on the credibility of three sharply impeached witnesses, bringing into question whether the jurors in this case ever, unanimously, themselves found that weighty aggravator was proved beyond a reasonable doubt. The Arizona Supreme Court, conducting harmless-error analysis after Ring v. Arizona, 536 U.S. 534 (2002), was decided, held that where an aggravating factor is fact-intensive, it would not find Ring error harmless unless it was convinced beyond a reasonable doubt that *no reasonable jury* could find the State *failed to prove* that aggravator. State v. Phillips, 205 Ariz. 145, 67 P. 3rd 1228, 1230 (Ariz. 2003). Fact-intensive aggravating factors include whether a murder was committed for pecuniary gain, as distinct from whether the defendant committed a prior violent felony. See Phillips. Patently, whether a murder was committed in a cold, calculated, and premeditated manner is a fact-intensive inquiry.

Arizona further holds that where testimony supporting an aggravating factor is impeached, the reviewing court cannot conclude that a reasonable jury, hearing the same testimony, would have similarly assessed the witnesses' credibility. State v. Harrod, 204 Ariz. 567, 65 P. 3rd 948 (Ariz. 2003). Here the jury had reason to be skeptical of the testimony given by Kerchner and Dieguez, as well as of the "like a soldier" statement attributed to Andrea Ozburn. Without that proof neither heightened premeditation nor calculated preparation would have been established.

The jury may, consequently, not have unanimously found CCP present. If this court agrees that the CCP aggravator was not clearly proven, the harmless error questions become whether no reasonable jury would have found the remaining aggravators insufficient to warrant death, and whether no reasonable jury would have found that the proof in mitigation outweighed the remaining aggravators. Those questions are complicated by the fact the jury was not clearly instructed that it must consider the "victim an officer" and "avoid arrest" aggravators as one during the weighing process. As argued in the initial brief, the weighing process was skewed by the omission. (See initial brief at 59-60)

In Hurst this court wrote that it could not be sure that Hurst's jury would have found the aggravators sufficient to impose death, or that it would have found that the aggravators outweighed the mitigation. Hurst at *24. This court pointed to the 7-5 split in the Hurst jury's death recommendation as fostering a doubt that his jury would have made the latter essential findings. Id. In this emotion-charged case, the jury recommended death not unanimously but with two dissenters. As in Hurst, that fact on its own creates doubt that if correctly instructed, the jury would have found - unanimously - both that the aggravation was sufficient to warrant death and that the aggravation outweighed the mitigation.

As to mitigation, in Hurst this court expressly adopted the harmless-error analysis the Arizona Supreme Court applied after Ring. Here, as in Arizona, the State must show that no rational jury would determine that the mitigation was such as to call for leniency. Id. The Arizona Supreme Court applied that test in State v. Montano, 206 Ariz. 296, 27 P. 3rd 1246 (Ariz. 2003), a case where, as here, a psychologist testified that the defendant was unable to conform his conduct to the requirements of law. On appeal, the Arizona Supreme Court concluded the Ring error was not harmless, because if a jury had believed that testimony, it might have adopted one or more of Montano's theories of statutory mitigation. In State v. Nordstrom, 206 Ariz. 242, 77 P. 3rd 40 (Ariz. 2003), the trial judge rejected expert testimony to the effect that learning problems, a dysfunctional upbringing, impulsiveness, and alcohol and drug abuse tend to cause violent crime; the supreme court held it could not say beyond a reasonable doubt that a jury would have weighed that expert testimony just as the judge did.

State v. Dann, 206 Ariz. 371, 79 P. 3rd 58 (Ariz. 2003), is also similar to this case. In Dann the trial court found that substance abuse and psychiatric issues had been proved, but had no nexus with the murder. The Arizona Supreme Court noted that the evidence had been in conflict, and held that it could not conclude

- that a jury would not have found additional mitigating factors,

- that a jury would not have differently weighed the factors it found, and
- that a jury would not have then found the mitigation sufficiently substantial to call for leniency.

79 P. 3rd at 61. While in State v. Murdaugh, 209 Ariz. 19, 97 P. 3rd 844 (Ariz. 2004) and State v. Sansing, 206 Ariz. 232, 77 P. 3rd 30 (Ariz. 2003), the court found no harmless error where the respective defendants claimed intoxication without extrinsic support, the court in both Murdaugh and Sansing distinguished cases where - as here - expert testimony supports the claim that impairment at the time of the incident was significant.

Here, as in Montano, Appellant introduced expert opinion to the effect that he acted under the influence of extreme mental or emotional disturbance, and that his ability to conform his conduct to law was substantially impaired. Here Judge Reinman rejected the "extreme mental disturbance" statutory mitigator because of her ruling that substance abuse cannot play any part in determining whether that mitigator is present. As argued in the initial brief, that legal conclusion is incorrect. (See initial brief at 62)

As to the statutory mitigator "ability to conform conduct to law," the judge found no nexus between the proven brain damage and the shooting based on her ruling that the SUV's rolling into a ditch after the police pursuit could have caused

the brain damage. The jury, which saw footage of the SUV's gradual mishap and heard an officer assess Appellant's demeanor afterward, might well have drawn different conclusions from that proof. As the Arizona Supreme Court has noted, whether a nexus exists between mitigation and murder is a question of fact that requires judging the credibility and weight of the mitigation evidence. State v. Cropper, 206 Ariz. 153, 76 P. 3rd 424, 429 (Ariz. 2003). That court, if it followed its decisions in Cropper, Dann, Nordstrom and Montero, would not find the Ring/Hurst error harmless in this case.

The judge in this case also gave "some" or "little" weight to numerous proposed non-statutory mitigating circumstances, including early onset of drug abuse, physical and emotional abuse in the defendant's childhood, positive family ties, and generosity to others. State v. Armstrong, 208 Ariz. 360, 93 P. 3rd 1076 (2004), is similar: Armstrong's judge found that seven of nineteen proposed non-statutory mitigating circumstances were present, but accorded them "minimal" weight and determined they were insufficient to call for leniency. 93 P. 3rd at 1081. The Arizona Supreme Court held that "[b]ased on the conflicting evidence in this record on these issues, we cannot conclude beyond a reasonable doubt that no rational jury would find otherwise...we cannot say that a jury would not have found additional mitigating factors or weighed differently the mitigating factors

that were found." Id. at 1081-82. Here expert testimony conflicted strongly as to the significance of Appellant's drug use.

In this case a rational factfinder could have determined that the mental health-related and toxicology-related proof offered by the defense was credible. That rational factfinder, correctly instructed as to its responsibilities, could well have failed to conclude unanimously that the defense experts' proof, combined with the rest of the showing made in mitigation, was insufficient to warrant leniency. The State accordingly cannot show beyond a reasonable doubt that the absence of crucial jury-made findings should be deemed harmless in this case.

CONCLUSION

Appellant has shown that this court must vacate the resentencing order appealed from, and remand for further proceedings authorized by law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing initial brief has been electronically delivered to Assistant Attorney General Stacey Kircher, at capappdab@myfloridalegal.com, and mailed to Appellant on this 17th day of November, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

s/ Nancy Ryan
Nancy Ryan