

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 REPLY BRIEF

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## SUMMARY OF ARGUMENT

In support of the aggravating factors found below by the trial court, the State essentially asks this court to view the record in the light most favorable to the verdict. The current caselaw allows no such view of the evidence; the State must at this juncture instead show that a reasonable jury, correctly instructed, would necessarily have agreed - unanimously - with the trial court as to all findings necessary to impose the death penalty. As an analytical step toward deciding whether the State has met that burden, this court, like the Arizona Supreme Court, should require the State to show beyond a reasonable doubt that *no* reasonable jury could find the State *failed* to prove the aggravating factors in question.

The State fails to acknowledge the test this court has adopted for harmless error as to mitigation, *i.e.*, that no reasonable jury would find the defense case sufficient to call for leniency. Here, if one or more jurors found the defense experts credible, those witnesses' testimony clearly would have supported those jurors in voting for leniency.

In any event, the fact that two jurors voted against imposition of the death penalty in this case is at odds with the State's position. *See* Franklin v. State, no. SC13-1632 (Fla. November 23, 2016).

## ARGUMENT

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

### *AGGRAVATING FACTORS*

In its supplemental answer brief the State sets out proof that supports each aspect of the CCP factor, *assuming throughout* that the jury in this case accepted the testimony of its witnesses Dieguez and Kerchner. (Supplemental Answer Brief at 5-6) The State further relies on the fact that the shooting itself can be seen and heard in part on a tape from the victim's dashboard camera, but it does not acknowledge that the defendant can be heard on that tape asking why the officer is going to shoot him. (Supplemental Answer Brief at 5-6) In short, the State asks this court to view the proof in the light most favorable to the verdict and affirm, when its post-Hurst<sup>1</sup> burden of proof challenges it instead to show that any rational jury *unanimously* would have found that the aggravation found by the trial court was present, was sufficient to support death, and was sufficient to outweigh the mitigation. Hurst at \*24. As an analytical step toward deciding whether the State has met its burden, this court should adopt the Arizona Supreme Court's test for

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<sup>1</sup> Hurst v. State, 2016 WL 6036978 (Fla. 2016).

aggravating factors, *i.e.*, whether the reviewing court is convinced beyond a reasonable doubt that no reasonable jury could find the State *failed* to prove the aggravating factors in question. (*See* Supplemental Initial brief at 11)

The State relies on the fact that Appellant did not initially argue the CCP aggravator was unsupported by the evidence. (Supplemental Answer Brief at 2, n.1.) Before Hurst, this court reviewed a trial court's finding that an aggravating factor was proven with an eye to whether competent, substantial evidence in the record supported that finding. Cole v. State, 36 So. 3<sup>rd</sup> 597, 608 (Fla. 2010), *cert. den.*, 131 S. Ct. 353 (2010). That there is some competent, substantial evidence in the record to support the pre-Hurst judicial finding of CCP in this case does not meet the State's burden of showing the Hurst error was harmless.

In its brief the State does not address the potential skewing effect the court's flawed instruction on the "doubled" aggravators may have had on the jury's weighing process. (See supplemental initial brief at 12) Since the weighing process may have been affected by the "doubled" aggravators, *and* since the jury might well not have *unanimously* found CCP, the State has failed to meet its burden of showing the Hurst error was harmless as to the showing in aggravation.

## *MITIGATING CIRCUMSTANCES*

The State fails to acknowledge the Arizona Supreme Court's test for harmless error as to mitigation, although this court expressly adopted that test in Hurst v. State, 2016 WL 6036978 \*24 (Fla. 2016). The post-Hurst test of mitigation is whether the State can show beyond a reasonable doubt that no rational jury would determine that as a whole, the showing made in mitigation was sufficient to call for mercy. Id. As this court noted in Hurst, that test is a rigorous one. Id.

Here the State dismisses the showing in mitigation as “tenuous in comparison to the aggravating factors,” once again relying on its own witnesses’ testimony that the defendant acted on a conscious plan to murder any officer who threatened his freedom. (Supplemental answer brief at 6-7) The credibility of that testimony was tensely disputed below, a fact relevant to the objective Arizona test for harmless error. *See, e.g., State v. Nordstrom*, 206 Ariz. 242, 77 P. 3<sup>rd</sup> 40 (Ariz. 2003) (reviewing court looks to whether beyond a reasonable doubt, any rational jury would have weighed testimony just as the trial court did). The defense experts’ testimony in this case was in no objective sense “tenuous,” since, *if the factfinder found it credible*, it fully supported the theory relied on by the defense at the penalty phase, *i.e.*, that the defendant was not able to correctly assess whether he was in danger during the traffic stop.

### *THE 10-2 DEATH RECOMMENDATION*

The State dismisses the 10-2 death recommendation in this case as “far from the bare majority” recommendation involved in Hurst. (Supplemental Answer Brief at 7) It assures this court that *all* rational juries, if correctly instructed, would *unanimously* condemn the defendant. Its easy assurance on that point is clearly at odds with the fact that two of Appellant’s jurors voted not to impose the death penalty here. *See* Franklin v. State, no. SC13-1632 (Fla. November 23, 2016). The State has failed to meet the burdens assigned to it in Hurst v. State, and this court must accordingly decline to find the Hurst error harmless.

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 supplemental reply brief has been electronically delivered to Assistant Attorney General Stacey Kircher, at [capappdab@myfloridalegal.com](mailto:capappdab@myfloridalegal.com), and mailed to Appellant on this 23<sup>rd</sup> 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.

Nancy Ryan  
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