IN THE SUPREME COURT
STATE OF FLORIDA

Case: **SC14-125**
LT No.: **2011-CF-1491-A-Z**

MICHAEL SHANE BARGO, JR.,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

On appeal from the Circuit Court of the Fifth Judicial Circuit,
In and For Marion County, Florida

SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

VIII. Under Hurst v. State, the trial court harmfully erred by sentencing Appellant to death when the jury did not make the factual findings necessary to impose a sentence of death and their recommendation was not unanimous.

Appellant, MICHAEL SHANE BARGO, JR., moved pretrial to have the jury to return findings of fact as to aggravating and mitigating circumstances in concert with the jury's recommendation as to the appropriate penalty in order to preserve meaningful appellate review. (R4.753) Appellant also moved to bar the imposition of a death sentence, arguing that the Sixth Amendment prevents a trial judge from making the necessary factual findings to impose the death sentence, but the trial court also denied the motion. (R4.759) His counsel also moved to declare Section 921.141 unconstitutional as the statute, at the time, allowed a death penalty recommendation by the jury with only a bare majority vote. (R4.756) The trial court denied both motions. Ultimately, Appellant was sentenced to death by the trial court after a non-unanimous vote of 10-2 by the jury in favor of death. (R16.3117; R.1137)

In light of this Court's opinions in Hurst v. Florida, SC12-1947 (Fla. Oct. 14, 2016), the trial court harmfully erred by sentencing Appellant to death when the jury did not make the factual findings necessary to impose a sentence of death and their recommendation was not unanimous.

Law: All critical findings necessary before a trial court may consider imposing a death sentence must be found unanimously by the jury. Hurst, *2. "In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." Id. at *4. Further, the Eighth Amendment requires that the jury's recommended sentence of death must be unanimous in order to impose a sentence of death. Id.

In the context of a Hurst error, the burden is on the State as the beneficiary of the error to prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary to impose of a death sentence did not contribute to the death sentence. Id. at *55. This Court reiterated:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Id. at *55 (quoting State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error affected the [sentence]." Id. In the absence of an interrogatory verdict, it cannot be determined what aggravators the jury unanimously found proven beyond a reasonable doubt or

if the jury unanimously concluded that there were sufficient aggravating factors to outweigh mitigating circumstances. Hurst, *56.

The remedy for a Hurst error is to remand for a new penalty phase proceeding. Hurst, *58.

Argument: In this case, the trial court harmfully erred by sentencing Appellant to death when the jury did not make the factual findings necessary to impose a sentence of death and their recommendation was not unanimous. (R47.3-4; R.3117)

When the trial court made findings of fact as to aggravating and mitigating circumstances necessary to impose the death penalty, the trial court violated Appellant's constitutional rights to have a jury determine the facts on which the legislature conditioned an increase in his maximum punishment. See Hurst, *2-4. Neither the jury's 10-2 recommendation nor the fact that the trial court afforded that recommendation "great weight" comply with the requirements of Hurst. By a 10-to-2 non-unanimous vote, the jury simply recommended that the trial court sentence Appellant to death and made no finding that the murder was especially heinous, atrocious, or cruel, and the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Additionally, the jury did not unanimously find that the aggravating factors outweighed the mitigating circumstances.

While Appellant maintains that the non-unanimous jury recommendation and findings of fact to impose the death sentence are a structural error, the death sentence in this case also fails under the harmless error analysis. See id. *55-56. Given the magnitude of the mitigating evidence presented on Appellant's behalf, there is a reasonable probability that Appellant would not have been sentenced to death if the jury had made the requisite findings of aggravating versus mitigating circumstances. See id. at *55.

While the trial court found the existence of two aggravators, Appellant presented the substantial mitigating evidence. Appellant was only 18 years old at the time of the murder and was one of five co-defendants who all played a part in the victim's death.[1] Dr. Ming testified Appellant's brain was still functioning as an adolescent, susceptible to peer influence and risky behavior. See R46.82-98. Multiple witnesses testified about the effect upon Appellant of being medicated for ADD/ADHD, the effect of his parents' bitter divorce upon Appellant, how his small stature led to being bullied, and about how the victim beat Appellant in a previous confrontation.

Further, the unrebutted mental health evidence established that Appellant had been misdiagnosed and treated for ADD/ADHD when he actually suffers from a

[1] Appellant accepts the State's theory of the case as true simply for the sake of argument.

neurological disorder in addition to schizophrenia and paranoia. See R43.279. Specific to the abnormal frontal lobe and complex partial seizure disorder, Drs. Wu and Berland agreed that the neurological disorder diminished Appellant's control over his inhibitions and impulses. See R43.288.

Given the extreme mitigating evidence presented on Appellant's behalf (52 mitigation factors total), it cannot be said that the error in failing to require the jury to unanimously recommend a sentence of death and make the requisite factual findings to impose a death sentence did not affect their verdict beyond a reasonable doubt. See id. at *55-56. Accordingly, the death sentence imposed by the trial court violated Appellant's constitutional right to have a jury unanimously determine the facts on which the legislature conditioned an increase in his maximum punishment and Appellant is entitled to a new penalty phase proceeding.

CONCLUSION

For the aforementioned reasons, Appellant requests that this Court vacate his conviction and death sentence.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a copy of the foregoing has been served upon the following on this 31st day of October 2016:

Office of the Attorney General—Criminal Appeals Division
via electronic delivery to capapp@myfloridalegal.com

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CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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