IN THE SUPREME COURT OF FLORIDA

MICHAEL SHANE BARGO, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC14-125

ON APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR MARION COUNTY, FLORIDA

SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

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THE ERRORS BELOW WERE HARMLESS BEYOND A REASONABLE DOUBT BECAUSE INCONTROVERTIBLE EVIDENCE ESTABLISHED SERIOUS AND WEIGHTY AGGRAVATORS WHILE BARGO FAILED TO PRESENT SIGNIFICANT WEIGHT IN MITIGATION.

I. *Hurst* and *Perry* decisions.

In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing structure violated *Ring* because it required a judge to conduct the fact-finding necessary to enhance a defendant's sentence. *Hurst v. Florida*, 136 S. Ct. 616, 622, 193 L. Ed. 2d 504 (2016). In its decision, the Court pointed to Florida's sentencing statute which provided that a death sentence could not be imposed unless there has been "findings *by the court* that such a person shall be punished by death." *Id*. (citing Fla. Stat. § 775.082(1) (emphasis in original). Ultimately, the United States Supreme Court held that the provisions of Florida's capital sentencing statute, "which required the judge alone to find the existence of an aggravating circumstance," was inconsistent with it decision in *Ring* and the Sixth Amendment. The *Hurst* decision also specifically overruled *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055.[1] However, while leaving the decision to the state courts to consider, the

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[1] *Spaziano v. State*, 433 So. 2d 508, 512 (Fla. 1983), upheld the jury's role in sentencing a defendant to capital punishment as advisory. *Spaziano*, 433 So. 2d at

United States Supreme Court also noted that the harmless error doctrine would apply to any death sentence imposed in violation of *Ring* or *Hurst*:

> Finally, we do not reach the State's assertion that any error was harmless. See *Neder* v. *United States*, 527 U. S. 1, 18–19 (1999) (holding that the failure to submit an uncontested element of an offense to a jury may be harmless). This Court normally leaves it to state courts to consider whether an error is harmless, and we see no reason to depart from that pattern here. *See Ring*, 536 U. S., at 609, n. 7.

Hurst v. Florida, 136 S. Ct. 616, 624, 193 L. Ed. 2d 504 (2016).

In *Perry v. State*, 2016 WL 6036982 (Fla. Oct. 14, 2016), and *Hurst v. State*, 2016 WL 6036978 (Fla. Oct. 14, 2016), the Florida Supreme Court declared the 10-2 provision in Chapter 2016-13 to be unconstitutional under *Hurst v. Florida*. The Court concluded that the Sixth and the Eighth Amendment required a unanimous jury verdict recommending a death sentence before one could be imposed, and now a jury must unanimously find that sufficient aggravators existed to justify a death sentence and must find that the aggravators outweigh the mitigating factors.

II. The trial court error in finding and weighing the aggravating and mitigating factors and in failing to require a unanimous death recommendation was harmless.

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512. In *Hildwin*, the United States Supreme Court held that the Sixth Amendment "does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 490 U. S. at 640–641.

A. Harmless error.

Since Appellant's capital conviction and corresponding death sentence is not yet final, Appellee agrees with Appellant's claim that *Hurst v. Florida* and *Hurst v. State* apply to his case and that the trial court below did not conduct his trial in conformity with the holdings therein. However, Appellant is not entitled to relief because the error the trial court committed by finding Appellant's aggravators was harmless in light of the unique facts of Appellant's case.

This Court has explained the harmless error test as follows:

> The harmless error test, as set forth in *Chapman* and progeny, 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 or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. *See Chapman*, 386 U.S. at 24, 87 S.Ct. at 828.

State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). While the trial court errors at issue are one of procedure rather than evidence, the State may nonetheless rely upon the quality and strength of the evidence when endeavoring to prove that a trial court error was harmless:

> Application of the [harmless error] test requires not only a close examination of the permissible evidence on which the jury could have legitimately relied, but an even closer examination of the impermissible evidence which might have possibly influenced the jury verdict.

State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986).

B. The trial court's CCP finding was harmless error.

During the guilt phase of trial, the State proved beyond a reasonable doubt that on Sunday, April 17, 2011, Bargo's codefendant, Amber Wright, ("Wright") lured a minor, Seath Jackson, ("Jackson") to the home of codefendant, Charlie Ely ("Ely"), so that Bargo, Kyle Hooper ("Hooper") and Justin Soto ("Soto") could ambush Jackson. When Jackson arrived, Bargo ultimately killed Jackson with Bargo's .22 caliber handgun; however, the state also demonstrated that Jackson's death was far from instantaneous. After Jackson had been shot, beaten, chased down, and dragged back into Ely's house, Bargo placed Jackson into the tub of Ely's residence where Bargo battered and verbally assaulted him further before finally killing him. Jackson's killers then burned and dismembered Jackson's body, collected the majority of Jackson's remains into paint buckets, and dumped the buckets into a pond located at a remote quarry in Ocala, Florida. The State also proved that Bargo planned Jackson's murder because of ongoing quarrels Bargo, Hooper, and Wright had with Jackson. These facts were found to be true beyond a reasonable doubt by Bargo's jury and the facts conclusively demonstrate that Jackson's murder was heinous, atrocious and cruel and that Bargo murdered Jackson in a cold, calculated and premeditated manner.

The evidence demonstrating that Jackson's murder was cold, calculated and premeditated is indisputable and Bargo's CCP aggravator is accordingly inescapable in light of the facts of Bargo's case. Despite having confessed to

shooting Jackson to various witnesses who testified to such at trial, Bargo testified during his guilt phase that he came home on the night of the murder to find, to his surprise, that his codefendants had killed Jackson. Bargo nonetheless admitted at trial that he was involved in the attempted cover up of Jackson's murder, including the burning, dismembering, and dumping of Jackson's body. However, Bargo's jury rejected his wholly unsubstantiated testimony about being uninvolved in Jackson's murder by finding him guilty beyond a reasonable doubt of Murder with a Firearm, and his CCP finding is inescapable regardless of whether the determination is made by the jury or the trial court in light of the incontrovertible evidence the State introduced in support. The following incontrovertible text message evidence showed the jury exactly how the defendants used Jackson's interest in rekindling his relationship with Wright to lure him to his impending death, which clearly establishes beyond any reasonable doubt that the facts of this case satisfy the heightened premeditation and planning finding necessary to conclude that the Jackson's murder was committed in a cold, calculated, and premeditated manner:

> Wright to Jackson: Hey can yuu tlk? (Message 45/52 Sent 8:12 p.m.)
>
> Jackson to Wright: You sed you needed to talk (Message 56/70 Sent 8:37 p.m.)
>
> Wright to Jackson: Well I kinda need to tlk to yuu aboiut us working things out? (Message 44/52 Sent 8:46 p.m.)
>
> Jackson to Wright: What you mean (Message 55/70 Sent 8:47 p.m.)

Jackson to Wright: What you mean (Message 54/70 Sent 8:47 p.m.)

Wright to Jackson: Can yuu plz call me like now (Message 43/52 Sent 8:48 p.m.)

Jackson to Wright: Yeah sher. (Message 53/70 Sent 8:49 p.m.)

Wright to Jackson: Hey my friend Charlie is coming wit I'v been telling her everything between me and yuu and shes coming bc i need her to help through this. Is that okay? But don tell any body whats going on bc i wanna make sure we can work things out before anyone knows (Messages 42/52 and 41/52 combined - Sent time undeterminable from photo)

Jackson to Wright: Amber if you have me jumpt I will never give you the time of day so if I git jumpt say goodby alrite (Message 52/70 Sent 8:56 p.m.)

Wright to Jackson: I swear your not seath. I could never do that to yuu. I just want yuu and me back (Message 40/52 Sent time undeterminable)

Jackson to Wright: Ok (Message 51/70 Sent 8:58 p.m.)

Wright to Jackson: Im walking up the hill now. (Message 39/52 Sent 9:00 p.m.)

Wright to Jackson: I am at the neighborhood road. Where are yuu? (Message 37/52 Sent 9:08 p.m.)

Jackson to Wright: Srry I didint wunt will to here me but stay around the courner wher me and you fot just wait rite ther il be ther in a minit (Message 50/70 Sent time undeterminable)

(V5, R860-90).

While the United States Supreme Court did overrule prior decisions that were contrary to its holding in *Hurst v. Florida*, such as *Hildwin* and *Spaziano*, it did not overrule cases that denied death sentenced inmates *Ring*-based relief due to

common sense exceptions, such as aggravators established by the jury verdicts or aggravators established by admission of the defendant. *See Blakely v. Washington*, 542 U. S. 296, 303 (2004) (a judge may impose any sentence authorized "on the basis of the facts reflected in the jury verdict or admitted by the defendant."). *Blakely* was considered and discussed in the *Hurst* opinion, and while the United States Supreme Court found that *Blakely* did not apply to Hurst's facts, the Court's consideration of *Blakely* demonstrates that *Blakely* exceptions to *Ring* and *Apprendi* remain valid law. Although *Blakely* does not apply to Bargo's aggravators directly, the survival of *Blakely* post *Hurst* demonstrates that the United States Supreme Court recognizes that *Ring* violations are not *per se* reversible errors, particularly where an aggravator found by a trial court would be logically inescapable on remand. Because Bargo's CCP aggravator was established by irrefutable text message evidence demonstrating how his victim was lured into an ambush and because Bargo's involvement in the killing itself was found beyond a reasonable doubt by his jury, there is no reasonable possibility that the error made by the trial court in making the CCP finding in lieu of the jury contributed to Bargo's death sentence and the error should therefore be deemed harmless.

C. The trial court's HAC finding was harmless error.

This same logic applies to Bargo's remaining aggravator; that Jackson's murder was heinous, atrocious and cruel (HAC). Medical examiner, Dr. Kyle Shaw,

testified that he observed a pattern of bright dots consistent with a projectile or bullet impact in an x-ray of a skull fragment found in Jackson's remains. (V36, R1004). This finding, combined with the projectile found near the lumbar vertebra, his review of the crime scene, law enforcement's investigation, and Dr. Warren's investigation, led Dr. Shaw to conclude that Jackson's cause of death was homicide by gunshot wound or wounds and blunt force trauma. (V36, R1004-5).

This medical evidence was wholly consistent with eyewitness testimony from Bargo's codefendant as to how the ambush-style, violent, and prolonged murder of a seventeen year old boy occurred. Bargo told James Williams, Jr. that he shot a boy eight (8) times, busted the boy's kneecaps when he was in the bathtub, burned him, and put him in paint cans. (V37, R1099-1101). Bargo also told James Williams, Sr.'s girlfriend, Crystal Anderson, that they beat Jackson inside the house, chased him when he ran outside, shot him and drug him back into the house, placed him in the bathtub, then Bargo shot him twice in the face to kill him. (V37, R1111-2). Bargo also told Crystal Anderson that they placed Jackson's body in a sleeping bag and burned it, but that the body did not burn all the way – teeth were still in his skull so Bargo "took pliers and pulled his teeth out one by one." Luminal testing discover blood on the bathroom floor, living room floor and in the kitchen which further substantiates the testimony of the State witnesses Hooper as

well as Bargo's account of the murder as he relayed them to James Williams, Jr. and Crystal Anderson. (V34, R787).

This Court has explained what is required for a HAC finding as follows:

> The HAC aggravator is proper "only in torturous murders—those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Guzman v. State,* 721 So. 2d 1155, 1159 (Fla. 1998) (citing *Kearse v. State,* 662 So. 2d 677 (Fla. 1995)). We have repeatedly upheld the HAC aggravating circumstance in cases where the victim has been stabbed numerous times or been beaten to death and has remained conscious for at least part of the attack. *See Guardado v. State,* 965 So. 2d 108, 116 (Fla. 2007) (HAC proper where the defendant repeatedly stabbed the victim), *cert. denied,* 552 U.S. 1197, 128 S.Ct. 1250, 170 L.Ed.2d 90 (2008); *Simmons v. State,* 934 So. 2d 1100, 1122 (Fla. 2006) (HAC proper where victim suffered blunt trauma injuries and nonfatal stab wounds), *cert. denied,* 549 U.S. 1209, 127 S.Ct. 1334, 167 L.Ed.2d 80 (2007). Further, we have held that when a victim sustains defense-type wounds during the attack, it indicates that the victim did not die instantaneously and in such a circumstance HAC was proper. *See Rolling v. State,* 695 So. 2d 278, 296 (Fla. 1997); *see also Reynolds v. State,* 934 So. 2d 1128, 1155 (Fla. 2006) (HAC proper where victims exhibited defensive wounds, indicating that they were conscious during part of the attack and attempting to ward off their attacker).

Hall v. State, 107 So. 3d 262, 276 (Fla. 2012).

Clearly, the events as described in Bargo's own words, the words of his codefendant Hooper, and ultimately verified through highly credible medical and scientific evidence demonstrate that Bargo indeed evinced "the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Bargo's admission that he "busted the boy's kneecaps" while Jackson was trapped, injured by gunshots and beatings, and otherwise helpless in a bathtub

can only be reasonably viewed as having been done for the purpose of inflicting a high degree of pain. Further, Hooper testified that Bargo's plan called for Jackson to "still be alive" when Jackson was placed into the bathtub so Jackson would know who was killing him. (V39, R1345). Hooper and Soto then helped Wright and Ely clean blood evidence in the kitchen and living room while Bargo stayed in the bathroom with Jackson. (V39, R1343). While Hooper was cleaning, he heard more gunshots. *Id.* Hooper ran into the bathroom and saw that Bargo had shot Jackson a few more times and was hitting Jackson and yelling and cursing at Jackson. Hooper eventually convinced Bargo to stop because Hooper was concerned about neighbors. *Id.* In light of these facts, there can be no reasonable doubt that Jackson's murder was tortuous and that the HAC aggravator indisputably applies to Bargo. Accordingly, there is no reasonable possibility that the error made by the trial court in making the HAC finding in lieu of the jury contributed to Bargo's death sentence and the error should therefore be found to be harmless.

D. The trial court's failure to require unanimity was harmless error.

While Bargo's death sentence was based upon a 10 – 2 death recommendation contrary to this Court's holding in *Perry*, the State respectfully suggests this procedural error was also harmless in light of the weight of the mitigation presented compared to the fact that HAC is among the weightiest aggravators set

out in the statutory sentencing scheme and CCP is one of the most serious. *See Zommer v. State,* 31 So. 3d 733, 751 (Fla. 2010); *Buzia v. State*, 926 So. 2d 1203, 1216 (Fla. 2006). Bargo's life history was relatively normal. Bargo's friends and neighbors testified that the Bargos were great neighbors and were a normal family. (V41, R38, 54). The two families camped and fished together when Bargo was a child. (V41, R33, 38, 42, 58). Faith Christianson had good memories of the times spent with the Bargos. (V41, R44). Amanda Christianson occasionally babysat for the Bargo children. (V41, R95). Amanda found the Bargos to be a friendly, fun-loving, normal family. (V41, R99). Bargo was an active child—"clever at times." (V41, R96, 99). Bargo has normal intelligence and although Bargo's expert, Dr. Berland, concluded that Bargo suffers "at most" from a schizoaffective disorder, he did not make a specific diagnosis by reference to the Diagnosis and Statistical Manual of Mental Disorders. (V43, R290, 296). Bargo also appeared to be the intellectual leader of his group of codefendants. Bargo testified that he was "paying the damn bills" and could live "pretty much wherever I want." (V38, R1232-3) Bargo also counseled them all about their drug use and Hooper about his temper and his work ethic. (V38, R1201, 1213, 1223-4). The fact that the jury was not instructed that their death recommendation, like their guilty verdict, had to be unanimous, casts doubt as to the conviction of the two life voters when faced with a super majority of death votes which was, at the time, more than enough to secure

a death sentence. This, in conjunction with the incontrovertible evidence establishing two of the most serious and weighty aggravators and the lack of significant weight Bargo presented in mitigation supports a finding of harmless error with regard to the trial court's failure to comply with this Court's *Hurst* and *Perry* decisions.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e-portal to the following: Valarie Linnen, Esq., vlinnen@live.com, P.O. Box 330339, Atlantic Beach, Florida 32233, on November 10, 2016.

CERTIFICATE OF COMPLIANCE

I certify this brief was generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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