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 REPLY BRIEF

Valarie Linnen, Esq.
Attorney for Appellant
P.O. Box 330339
Atlantic Beach, FL 32233
(888) 608-8814
vlinnen@live.com
Florida Bar No. 63291

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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.

In the *Supplemental Answer Brief*, the State argues that the trial court's errors in finding and weighing the aggravating and mitigating factors, and in failing to require a unanimous death recommendation, was harmless beyond a reasonable doubt. See SuppAB.2-12. Specifically, the State cites the evidence presented at trial to support its argument that the trial court's findings of the CCP and HAC aggravators. See SuppAB.2-10. The State goes on to argue that the trial court's failure to require a unanimous jury recommendation was also harmless, despite the two votes against the imposition of a death sentence, because of the two aggravators and "lack of significant weight Bargo presented in mitigation". See SuppAB.11-12.

What the State failed to acknowledge, however, is that two jurors felt that the CCP and HAC aggravators were not established beyond a reasonable doubt, that the aggravators did not outweigh the mitigating circumstances, the mitigation was absent but the aggravating factors alone were sufficient to justify imposition of a death sentence, or that two jurors simply determined justice was best served with mercy.

First and foremost, a jury's factual findings and a jury's recommendation are not synonymous. This Court cannot presume that every one of the twelve jurors

found the existence of both aggravators (CCP and HAC) had been proven beyond a reasonable doubt and that twelve jurors unanimously agreed upon the facts establishing both aggravators. See Davis v. State, SC11-1122 *68-71 (Fla. 2016), Perry, J., dissenting. In Davis, this Court held any Hurst error was harmless given the unanimous jury recommendation of death and existence of eight aggravating factors. But Justices Perry and Quince dissented on the basis that this Court could not presume all twelve jurors found the existence of all eight aggravators beyond a reasonable doubt and agreed upon the facts which established the existence of the aggravators. See id. Of those eight aggravators in Davis, six dealt with the specific factual circumstances of the crime:

(1) that Davis was previously convicted of a felony and on felony probation;
(2) that Davis was contemporaneously convicted of another capital felony or a felony involving the use or threat of violence;
(3) that the capital felony was committed during the course of a felony (robbery/arson);
(4) that the capital felony was committed for the purpose of avoiding lawful arrest;
(5) that the capital felony was committed for pecuniary gain;
(8) that the victim of the capital felony was under the age of twelve.

See id. Removing those six factually-indisputable aggravators, the jury would only have been left with the subjective aggravators of HAC and CCP (as in this case). In the absence of those six aggravators, it becomes much harder for the Court to presume that all twelve jurors found the existence of the subjective HAC and CCP aggravators beyond a reasonable doubt, that the aggravation outweighed the

mitigation, the mitigation was absent but the aggravating factors alone were sufficient to justify imposition of a death sentence, or that any one of the jurors would not have determined the appropriate punishment to be justice tempered with mercy. See Fla. Std. Jury Instr. (Crim.) 7.11.

Nevertheless, the votes of two jurors against a death sentence do not satisfy the Hurst standard that "the finding that the aggravating factors ***outweigh*** the mitigating circumstances." Hurst v. State, SC12-1947 *2 (Fla. Oct. 14, 2016). (Emphasis added.) While the jury was not instructed that its recommendation needed to be unanimous in order for the court to impose a death sentence (R44.436), it also was not instructed that it needed to unanimously agree upon the factual findings supporting each aggravator. Meanwhile, it was indeed instructed that any aggravating circumstances must outweigh the mitigating circumstances in order to recommend a sentence of death:

> If, after weighing the aggravating and mitigating circumstances, you determine that at least one aggravating circumstance is found to exist and the mitigating circumstances do not outweigh the aggravating circumstances, or in the absence of mitigating factors, that the aggravating factors alone are sufficient, you may recommend that a sentence of death be imposed rather than a sentence of life in prison without the possibility of parole.
>
> Regardless of your findings in this respect, however, you are neither compelled or required to recommend a sentence of death. If, on the other hand, you determine that no aggravating circumstances are found to exist, or that the mitigating circumstances are found to exist, or that the mitigating circumstances outweigh the aggravating circumstances, or, in the absence of mitigating factors that the aggravating factors alone are not sufficient, you must recommend

> imposition of a sentence of life in prison without the possibility of parole, rather than a sentence of death.

See R44.445-446. In light of this instruction, two jurors found one of four scenarios: (1) no aggravating circumstances were proven to exist; (2) the mitigating circumstances outweighed the aggravating circumstances; (3) mitigation was absent but the aggravating factors alone were insufficient to justify imposition of a death sentence; or (4) justice was best served with mercy. This Court is prohibited from reweighing the determination of those two jurors who voted to recommend a sentence of life imprisonment and from presuming that all twelve jurors found the existence of both aggravating factors beyond a reasonable doubt.

It is also highly plausible that two jurors permissibly exercised mercy in their recommendation, even if the factual situation warranted capital punishment, in light of Appellant's tender age of 18, the fact that five teenagers all allegedly played some part in this murder, 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, about how the victim beat Appellant in a previous confrontation, the unrebutted mental health evidence establishing that Appellant had been misdiagnosed and treated for ADD/ADHD when he actually suffers from abnormal frontal lobe and complex partial seizure disorder in addition to schizophrenia and paranoia, and Appellant's control over his inhibitions and impulses. It was their right to do so. See Caso v. State, 524 So. 2d 422 (Fla. 1988) (explaining that the

judge and jury may exercise mercy in their recommendation, even if the factual situations may warrant capital punishment). The State's arguments overlooks this possibility and undermines the position that the Hurst error resulting in a sentence of death was harmless beyond a reasonable doubt. See Hurst, *55.

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 11th day of November 2016:

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

Michael Shane Bargo Jr. U41472, Union CI, 7819 NW 228th Street, Raiford, FL 32026

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).

/s/ VALARIE LINNEN
VALARIE LINNEN, ESQ.
Florida Bar No.: 63291
P.O. Box 330339
Atlantic Beach, FL 32233
888-608-8814
vlinnen@live.com
Attorney for Appellant