IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC15-2136
Circuit Case No.: 2012-CF-14950-A

BESSMAN OKAFOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Ninth Judicial Circuit,
In and For Orange County, Florida

REPLY BRIEF

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ARGUMENT

I. JURY SELECTION: Under the Sixth and Fourteenth Amendments, the trial court manifestly erred by excluding Juror 105 because, while his voir dire answers revealed he may have equivocated about his support for the death penalty, his views on capital punishment did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath.

In the *Answer Brief*, the State argues that the trial court did not reversibly err by striking for cause Juror 105 because the juror "never stated that he could impose the death penalty even if the State has proven that it was appropriate. This equivocation about imposing the death penalty would have prevented him from following jury instructions." See AB.47-48. This is a factually inaccurate statement.

When questioned by defense counsel, Juror 105 expressly stated that he would consider recommending the death penalty:

> **MR. IENNACO:** What the law requires is that you can seriously consider imposing the death penalty. Not whether you will, not what circumstances you might, but whether you will consider it. Can you consider the death penalty?
>
> **JUROR NO. 105:** Yes.

See T8.1155; see also IB.37. Because Juror 105 expressly stated that he could impose the death penalty in the event that the State proved it appropriate, the trial court reversibly erred by striking the juror for cause. See Farina v. State, 680 So. 2d 392, 396 (Fla. 1996).

II. VICTIM IMPACT TESTIMONY: Under the Eighth Amendment, the penalty phase jury proceedings were rendered fundamentally unfair by excessive victim impact testimony that became a feature of the penalty phase, that characterized Appellant as "evil" and a "wannabe" gangster similar to the movie *Scarface*, and that was not limited solely to that regarding the sole deceased victim.

Rather than considering the victim impact testimony collectively, the State urges this court to examine separately each of the errors during the penalty phase: that the witnesses characterized Appellant as evil[1] and a "wannabe" gangster similar to the movie *Scarface*; that six victim impact witnesses was excessive; and that the victim impact testimony was not limited to the sole deceased victim in the case, Alex Zaldivar. See AB.48-55. Further, the State argues that the "jury's recommended sentence would not have been any different if the victim impact statements had not been admitted into evidence." See AB.54. Viewing this evidence collectively as the jury and judge heard it, the trial court harmfully erred by permitting the excessive and clearly improper victim impact testimony.

There is no question that Brienna Campos' testimony was improper and impermissible when she referred to Appellant as a "wannabe" gangster similar to the character of Tony Montana in the move *Scarface*. See T.27.3509.

Further, the only victim as issue during the penalty phase was Alex Zaldivar—

[1] Contrary to the State's claim in the *Answer Brief* on page 53, the victim's mother, Kyoto Zaldivar, referred to Appellant as "the evil man sitting over there." See R.2815.

not Brienna Campos or Remington Campos. Appellant received an automatic sentence of life imprisonment for the attempted murder convictions, thus rendering the testimony of how Brienna and Remington were affected irrelevant to the penalty phase proceedings: the sole purpose of the penalty phase was to determine whether Appellant would receive life imprisonment or death for the murder of Alex Zaldivar.

Further, the State argues, "Remington Campos' testimony regarding how he was affected was relevant in regard to how much weight should be given to the *prior* violent felony conviction aggravator for which Okafor was *contemporaneously* convicted." See AB.52. (Emphasis added.) However, the State used the May 2012 robbery as the basis for imposing the prior violent felony aggravator for the September 2012 death. This incident must either be viewed as a prior incident or one continuous, related criminal episode. The State cannot have it both ways to use when it is convenient to their argument. There is no reasonable argument that how Remington Campos was personally affected by the events is relevant to determining Appellant's punishment for the death of Alex Zaldivar.

The problems with the excessive and impermissible victim impact testimony was compounded when the jury was not instructed on how to it should consider the testimony nor how much weight to afford such. Because the victim impact testimony was essentially the only testimony or evidence presented to the jury during the penalty phase, the error reached down to the validity of the trial itself to the extent

that the advisory verdict could not have been obtained without the assistance of the impermissible and excessive testimony. See Wheeler v. State, 4 So. 3d 599, 607 (Fla. 2009). The error rendered the penalty fundamentally unfair, violating Mr. Okafor's rights under the Eighth Amendment and his right to Due Process under the Fourteenth Amendment. Accordingly, the sentence of death must be reversed and remanded for a new penalty phase proceeding.

III. VICTIM IMPACT TESTIMONY: The trial court violated Appellant's constitutional right to due process of law by permitting the State to elicit excessive victim impact testimony from six witnesses during the penalty phase, then failing to instruct the jury how it could consider such.

As for the argument regarding how the jury should consider the excessive victim impact testimony and what weight it should have afforded such, the State argues that this argument is waived because defense counsel filed his own proposed instructions, yet did not include a proposed instruction on the topic, and the trial court properly instructed the jury that it could only consider the testimony as pertaining to the victim's uniqueness. See AB.55-60.

First, the argument is not waived. Defense counsel moved the court to limit the victim impact testimony to the Spencer hearing only on August 27, 2015 and the court denied the motion. See T27.3511. Five days later, on September 1, 2015, defense counsel filed his proposed jury instructions consistent with the trial court's prior ruling. To be clear, defense counsel was not required to file a proposed

instruction on victim impact testimony when asked the court not to allow the jury to hear that testimony.

Second, the State argues that the trial court properly instructed the jury that the victim impact testimony only showed the victim's uniqueness, but could not be considered as an aggravating circumstance. See AB.58. The trial court instructed the jury as follows:

> …This evidence was presented to show the victim's uniqueness as an individual and the resultant loss by Alex Zaldivar's death. However, you may not consider this evidence as an aggravating circumstance. **Your recommendation to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed**….

(T.4170; R.1364. Emphasis added.) If the jury was only to base its recommendation on the aggravating and mitigating circumstances, yet could not consider this testimony as aggravation, then there was no reason for the jury to hear it. The jury certainly would not have considered it as mitigation. While the jury is legally presumed to have followed the judge's instructions, this Court is not prohibited from using its common sense that there is a reasonable probability sufficient to undermine the confidence in the recommendation that that the jury considered the testimony of six victim impact witnesses as nothing other than aggravation. Because the trial court permitted victim impact testimony from six witnesses without instructing the jury how to consider the evidence, the trial court deprived Mr. Okafor of fundamental fairness and his right to Due Process of law.

IV. VICTIM IMPACT TESTIMONY: During the Spencer hearing, the trial court rendered the proceeding fundamentally unfair by permitting the victim impact witnesses to: characterize Mr. Okafor as "evil", "wicked", "vile", and "disgusting"; speculate Mr. Okafor would commit future crimes if sentenced to life imprisonment; repeatedly recommend a sentence of death; and physically threaten Mr. Okafor.

As for the victim impact testimony in the Spencer hearing, the State does not dispute that the testimony was improper, but rather asserts that no error occurred because it was presented outside the presence of the jury. See AB.62. The State urges to this Court to look at the effect of the victim impact testimony during the Spencer hearing alone.

However, this testimony must be viewed collectively. The trial court had already heard the excessive and improper victim impact testimony during the penalty phase. It again endured the improper and excessive victim impact testimony during the Spencer hearing. And it was the trial judge, not the jury, who ultimately imposed Appellant's sentence of death. Simply put, the trial judge could not un-hear what he had already heard.

By permitting victim impact witnesses to recommend a death sentence seven times, to characterize Mr. Okafor as "evil", "wicked", "vile", and "disgusting", to speculate on his future risk of criminality if sentenced to life, and to physically threaten him with death and torture, the Spencer hearing was rendered fundamentally unfair in violation of the Eighth and Fourteenth Amendments. This is especially true

after the trial court had already permitted the State to offer both excessive and impermissible victim impact testimony in the presence of the jury. Because the victim impact testimony violated Mr. Okafor's Eighth Amendment rights and rights to due process of law, his sentence must be reversed and remanded for a new penalty phase proceeding.

V. HURST V. FLORIDA: Under the Sixth Amendment, the trial court reversibly erred by making the requisite factual findings to impose a sentence of death, rather than requiring the jury to determine the existence of any aggravator beyond a reasonable doubt.

In the *Answer Brief*, the State argues that the any error under Hurst v. Florida is harmless because the trial court found the existence of a prior violent felony aggravator. See AB. 64-67. As to this issue, Appellant stands on the argument in the *Initial Brief* that the jury's non-unanimous, "mere recommendation" that Mr. Okafor be sentenced to death was insufficient to support that the State proved the existence of any aggravator beyond a reasonable doubt. See IB.58; see also Hurst v. Florida, 136 S. Ct. 616, 619 (2016). The Supreme Court made no exception for cases where the State alleged the prior violent felony aggravator.

VI. UNANIMITY: Under the Sixth Amendment, the trial court fundamentally erred by declining Mr. Okafor's request that the jury return a unanimous verdict in order to impose a sentence of death.

As for the lack of a unanimous jury verdict, the State argues that: the argument is unpreserved for appellate review; the U.S. Supreme Court has never required unanimity; the Delaware Supreme Court's requirement of unanimity is "not

based upon any valid legal reasoning"; only verdicts of guilt or innocence need be unanimous; and any error is harmless because of the prior violent felony aggravator. See AB.67-71.

Contrary to the State's assertion, the error is properly preserved for review as defense counsel requested an instruction that the verdict be unanimous. See T32.4061.

As for the argument that any error is harmless because of the prior violent felony aggravator, Hurst carved out no such exception for the jury's finding.

While it is true that the U.S. Supreme Court has yet to require unanimity in death penalty cases, the Delaware Supreme Court recently ruled its death penalty unconstitutional altogether because the jury was not required to make a unanimous finding. See Rauf v. Delaware, 2016 WL 4224252 (Del. 2016). There is no reasonable argument that whether the defendant lives or dies (which currently does not require a unanimous jury finding) is somehow less important that whether he is guilty or innocent (which requires unanimity). Stated differently, it is inconceivable that a defendant should suffer the ultimate punishment death, unless a jury of twelve of his peers all agree upon the punishment. See Rauf, 2016 WL 4224252 *4-6.

Both the Sixth Amendment and the Florida Constitution clearly require the jury to unanimously find beyond a reasonable doubt the existence of any aggravating circumstance, and that the aggravation outweighs any mitigation in order to impose

a sentence of death. Without such unanimous findings, both the pre-2016 and post-2016 version of Section 921.141 are patently unconstitutional. Accordingly, Mr. Okafor's sentence must be reversed and remanded for a new penalty proceeding.

VII. HAC: The trial court reversibly erred by finding that the murder was heinous, atrocious, or cruel (HAC), where: the killing took place quickly; the victim did not endure prolonged pain and suffering; the victim did not remain conscious during the shooting; the evidence did not show the assailant intended to inflict a high degree of pain; and the fatal wound indicated the assailant intended to kill the victim, rather than torture him.

As for the heinous, atrocious, or cruel (HAC) aggravator, the State argues that there was sufficient evidence to sustain the imposition of such. See AB.71-81.

In regards to the State's assertion that there is no record evidence to support that the victim did not remain conscious during the shooting. See AB.78. The victim was killed by two gunshot wounds, rather than one, see AB.79, and the medical examiner testified that each of the two shots was "independently lethal". See T.3037. Given that Remington Campos testified the victim was no longer breathing after the first gunshot, see T.2571, it is a reasonable inference that the victim died as a result of the first gunshot and did not endure prolonged pain and suffering.

As for the period of time that the victim may have been aware of his impending death, the time stamps on the surveillance camera videos, viewed in

conjunction with the times on Appellant's ankle bracelet monitor[2], suggests that the events inside of the victim's home happened quickly and do not support any argument that he endured prolonged pain and suffering.

While all murders are indeed cruel, there is no evidence to support that this murder was "*especially* heinous, atrocious, or cruel." See Fla. Stat. § 921.141(6)(h) (2015). (Emphasis added.) The evidence in this case does not support that the HAC aggravator was established beyond a reasonable doubt, as: the victim was not tortured; the killing took place quickly; the victim died instantly and did not endure prolonged pain or suffering; the evidence did not show that the assailant intended to inflict a high degree of pain; and the victim's death, which followed the first gunshot wound to the head, indicate that the assailant intended to kill the victim instantly—rather than to torture him. See Shere v. State, 579 So. 2d 86, 95 (Fla. 1991). Accordingly, the trial court reversibly erred by finding the State proved the existence of the HAC aggravator beyond a reasonable doubt.

VIII. NEXUS: The trial court reversibly erred by requiring a nexus between mitigation evidence and the conduct at issue.

[2] Meg Hughes claimed that Appellant's ankle bracelet did not connect with its base from 4:40 a.m. to 5:46 a.m. on the morning of the murder. See T.2643. Under the State's theory of the case, Appellant traveled to the meetup location, switched cars and cellular telephones with the co-defendants, stopped at a gas station to put gas in one of the vehicles, traveled to the victim's home, murdered the victim, returned to the meet-up location, and then traveled home all within that one hour and six-minute timeframe.

The State argues that the trial court did not require a nexus between the mitigating facts, but rather put them into context. See AB.81-87. However, "plac[ing] them in context and assign[ing] weight on that basis" is simply a thinly-veiled argument to circumvent the directives of this Court. The trial court went well beyond attempting to put the mitigation into context. See Cox v. State, 819 So. 2d 705, 718 (Fla. 2002). As to nine of the proffered fourteen mitigating factors, the trial court required a nexus between the mitigating factor and the context at issue. Of the nine, the trial court afforded seven factors only "little weight" or "some weight". Because the trial court went beyond putting the mitigation into context for nine of fourteen mitigating factors, the trial court reversibly erred by requiring a nexus between the mitigation evidence and the context at issue.

IX. IRRELEVANT EVIDENCE: Under Section 90.402, Florida Statutes (2015), the trial court abused its discretion by allowing a detective to testify about a high-capacity firearm magazine found in the home of a co-defendant which did not fire any of the projectiles retrieved from the crime scene.

As the prosecutor argued at trial, the State asserts in the *Answer Brief* that the magazine cartridge found in the home of a co-defendant was relevant somehow to prove Appellant's identity. See AB.94. However, the decisional law of this State is squarely against this position. See Sosa v. State, 639 So. 2d 173, 174 (Fla. 3d DCA 1994) (a trial court reversibly errs by allowing firearms evidence where no weapon is found, no ballistics tests are performed, and "no link whatsoever [is] established

between the rounds and the case at bar", especially where the firearms evidence could not have been fired by the gun used in the crime); see also Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) (holding that it was error to admit into evidence a gun purchased by the defendant which was not connected with the charged crimes); Rigdon v. State, 621 So. 2d 475 (Fla. 4th DCA 1993) (reversing a conviction for aggravated assault with a firearm where the trial court admitted into evidence a semi-automatic weapon found on the defendant's bed because there had been no connection established between the weapon and the crime).

The State would have a much stronger argument in an actual assault rifle was found matching the description given by firearm-aficionado Remington Campos. But there was no rifle recovered, no ballistics tests performed, and "no link whatsoever established" between the high-capacity 0.22-0.223 caliber magazines found at Wallace's home and the one purportedly carried by one of the assailants. See Sosa, 639 So. 2d at 174. In short, any alleged link between the magazine and the conduct at issue was too tenuous and unreliable for the magazine to be introduced into evidence.

The magazine was incapable of containing the caliber of projectiles actually fired at the crime scene and the State argued in closing that Appellant did not fire a rifle containing those magazines. See T.3299. This evidence was particularly harmful in light of the limited tangible evidence presented to the jurors. Given that

no firearm linked to Appellant or the victim's death was recovered by police, the introduction of the 0.22-0.223 caliber magazines ran a substantial risk of confusing the issues for the jury and could have affected the jury's decision. See O'Connor v. State, 835 So. 2d 1226, 1232 (Fla. 4th DCA 2003). Because the magazines were not linked to Appellant or any other material fact in issue, and because the magazines did not fit any firearm used to kill the victim, the trial court abused its discretion in admitting the exhibits into evidence.

X. EIGHTH AMENDMENT: Under the Eighth Amendment, the trial court violated Mr. Okafor's constitutional rights by sentencing him to death, because capital punishment is inherently cruel and unusual punishment.

As for the Eighth Amendment argument, the State counters that Appellant "fails to allege how his individual death sentence is unconstitutional based upon the conclusions in the studies or articles." See AB.96. It goes without saying that if the death penalty in-and-of itself is unconstitutional, and that it is indeed cruel and unusual punishment for a myriad of reasons, then it is equally unconstitutional as applied to Mr. Okafor.

Bessman Charles Obinna Okafor is a son, a father, a brother, and a human being. The death sentence at issue here is the cruelest of all punishments, because it extinguishes Mr. Okafor's humanity. Death "inflicted" at the hands of the State of Florida destroys Mr. Okafor's very existence and forecloses the possibility of any redemption or exoneration. See U.S. Const. amend. VIII. It was ordered by Judge

John Marshall Kest and, unless and until this Court exercises its power to act as the guardians of genuine justice, it will be carried out at the hands of a government by the people and for the people. In essence, Death is an irrevocable punishment that turns the tables, transforming Floridians—"We The People"—into the role of Mr. Okafor's murderers and Mr. Okafor into the victim. Whatever his past deeds may have been, Mr. Okafor remains a human being with basic human dignity who is worthy of his "inalienable right" to "Life". While "We The People" may permissibly condemn our fellow man to life imprisonment, the decision of when Mr. Okafor departs this Earth is not ours to make.

By sentencing Mr. Okafor to death, the trial court violated his basic "inalienable right" to "Life" and to be free from cruel and unusual punishment. See Declaration of Independence; U.S. Const. amend. VIII. Accordingly, Bessman Charles Obinna Okafor requests that this Court vacate his death sentence and hold that Section 921.141 violates the Eighth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment, and sentence and remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Capital Appeals Division, via electronic mail delivery on this 4th day of October 2016 to capapp@myfloridalegal.com.

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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