IN THE SUPREME COURT
STATE OF FLORIDA

Case: **SC15-2136**
LT No.: **2012-CF-14950-A**

BESSMAN OKAFOR,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

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

SUPPLEMENTAL REPLY BRIEF

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ARGUMENT

X. 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.3-10. Specifically, the State cites the evidence presented at trial to support its argument that the trial court's findings of the prior violent felony, avoidance of arrest/hindrance of government function, and CCP aggravators. See SuppAB.3-8. The State goes on to argue that the trial court's failure to require a unanimous jury recommendation was also harmless, despite the one votes against the imposition of a death sentence, because "a *rational* jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances." See SuppAB.9-10. (Emphasis added.)

What the State failed to acknowledge, however, is that at least one "rational" juror felt that the 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 one "rational" juror 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 all aggravators (prior violent felony, avoidance of arrest/hindrance of government function, 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.

Additionally, it is unclear whether all twelve jurors would have unanimously found beyond a reasonable doubt that the *contemporaneous* felonies of the attempted murders of Remington Campos and Brienna Campos qualified as "*previously* convicted…of a felony involving the use or threat of violence to the person." See Fla. Stat. 921.141(5)(b) (2012). It is also unclear as to whether the jury would have viewed the May 9, 2012, as a previous conviction or whether they would have viewed it as one continuous criminal episode. And while the State claims that a 2005 conviction for aggravated assault with a firearm also would have formed the basis for the finding the previous violent felony aggravator, the trial court gave this conviction "NO WEIGHT". See R.1614.

Nevertheless, the vote of one juror against a death sentence does 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, 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 T33.4171. In light of this instruction, one juror 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 that one juror who voted to recommend a sentence of life

imprisonment and from presuming that all twelve jurors found the existence of all aggravating factors beyond a reasonable doubt.

It is also highly plausible that one juror permissibly exercised mercy in his or her recommendation, even if the factual situation warranted capital punishment, in light of the substantial mitigating evidence:

1. Appellant had a learning disability in early childhood (R.1631-32);
2. Appellant was not toilet trained as a toddler, was abandoned on a stranger's doorstep, and was kept away from his family (R.1633-34);
3. Appellant grew up with poor role models; suffered regular bullying in school; moved homes and changed schools often; lacked psychological care and treatment; and was treated differently from his siblings (R.1634-35);
4. Appellant endured the death of his father and divorce of his parents at a young age (R.1637);
5. Appellant suffered severe physical abuse leading to the arrest of his mother (R.1638);
6. Appellant was sexually abused by a church elder and was not afforded counseling for the abuse (T.1638);
7. Appellant witnessed domestic violence within his family as a child (R.1639);
8. Appellant's stepfathers were alcoholics (or drank excessively), which resulted in mental, physical, and verbal abuse of family members (R.1640);

9. Psychological testing showed Appellant suffers from anxiety, aggression, and poor impulse control (R.1635);
10. Appellant endured the deaths of a son and a daughter (R.1636); and
11. Appellant suffered physical and emotional abuse (R.1639).

It was his or her 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 overlook 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 21st day of November 2016:

Office of the Attorney General—Criminal Appeals Division
via electronic delivery 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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