IN THE SUPREME COURT OF FLORIDA

Case No. SC17-1640

Lower Court Case No. 2000-CF-573-K

MICHAEL ANTHONY TANZI,
Appellant,
v.
STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SIXTEENTH JUDICIAL CIRCUIT, IN AND FOR MONROE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Tanzi's successive motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.851.

The following symbols will be used to designate references to the record in this appeal:

"(R. ___)" -- record on direct appeal to this Court;

"(T. ___)" -- trial transcripts on direct appeal to this Court;

"(PCR. __)" – postconviction record on appeal to this Court;

"(PCR-2. ___)" – successive postconviction record on appeal to this Court.

Additional citations will be self-explanatory.

REQUEST FOR ORAL ARGUMENT AND FULL BRIEFING

Mr. Tanzi has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Tanzi, through counsel, accordingly urges that the Court permit oral argument.

This case is before the Court on appeal of the denial of postconviction relief. Mr. Tanzi's successive motion for postconviction relief, the subject of this appeal, was premised on the Supreme Court's decision *Hurst v. Florida*, 136 S. Ct. 616

(2016) and this Court's decisions in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. Dec. 22, 2016). (PCR-2. 1) Mr. Tanzi alleged that his death sentence was unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Mr. Tanzi also alleged that developments in the law required the court to revisit his previous postconviction claims under *Strickland v. Washington*, 104 S. Ct. 2052 (1984) and *Brady v. Maryland*, 83 S. Ct. 1194 (1963) to determine if, in light of *Hurst v. State* and *Hurst v. Florida*, confidence in the outcome was undermined. The circuit court denied relief as to all claims.

Court has directed the parties to file briefs limited to "addressing why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)."

Mr. Tanzi's right to appeal the denial of postconviction relief, and to be meaningfully heard, implicate his right to due process and equal protection. Individualized appellate review of all capital appeals, whether in the course of direct or collateral proceedings, is required by the Florida Constitution. *See Proffitt v. Florida*, 428 U.S. 242, 258 (1976)("The Supreme Court of Florida reviews each death sentence to ensure that similar results are reached in similar cases.").

Individualized appellate review is as necessary as individualized sentencing in a capital case. *See Mosley v. State*, 209 So. 3d 1248, 1282 (Fla. 2016)("In this case, where the rule announced is of such fundamental importance, the interests of fairness and 'cur[ing] individual injustice' compel retroactive application of *Hurst* despite the impact it will have on the administration of justice."); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)("we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.") "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014). Denying Mr. Tanzi the opportunity to fully present and argue his claims, which are different than Mr. Davis's, Mr. Mosley's and Mr. Hurst's, and which were not decided by this Court in those cases, does not comport with due process.

Mr. Tanzi respectfully requests that the Court permit full briefing in this case in accord with the rules of appellate practice and Article I, §§ 13 and 21, and Article V, § 3(b)(1) of the Florida Constitution.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Sixteenth Judicial Circuit, in and for Monroe County, Florida, entered the final judgments of conviction and death sentence at issue. Mr. Tanzi was subsequently indicted for the first-degree murder of Janet Acosta on May 16, 2000. (R. 13-14). An amended information was filed on March 26, 2002, charging Mr. Tanzi with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery with a deadly weapon, and two counts of sexual battery with a deadly weapon. (R. 299-301).

Initially, Mr. Tanzi pled not guilty to all charges. (R. 22). On January 31, 2003, Mr. Tanzi entered a guilty plea to the counts of first-degree murder, carjacking, kidnapping, and armed robbery. Mr. Tanzi elected to be tried in Miami-Dade County for the two counts of sexual battery.[1] Mr. Tanzi also sought to waive his right to a jury recommendation of sentence. (R. 1242-44; 2269; 2276; 2423-25). The trial court denied Mr. Tanzi's request for a waiver of a penalty phase jury. (R. 1925-26).

Later that same day, Mr. Tanzi attempted, without the assistance of counsel, to withdraw his guilty plea. (R. 2044). The trial court inquired into his relationship with his trial attorneys, but did not rule on Mr. Tanzi's motion to withdraw his plea.

[1] After the two sexual battery charges were severed, the State elected to not prosecute those charges. (R. 1803).

(R. 2044).

At the penalty phase, counsel presented Linda Sanford, a forensic social worker who had evaluated Mr. Tanzi for the Chamberlain School and supervised his treatment there. (T. 1080; 1100). Ms. Sanford reviewed Mr. Tanzi's extensive history, and his continuous commitment in various mental institutions from 1991 through 1995. (T. 1082-1101). She also testified to the failure of Mr. Tanzi's sexual offender treatment. It was not until 1993 that Mr. Tanzi was finally placed in an appropriate program at Brightside. After ten months he was discharged, against medical advice, due to budget constraints and his mother's overestimation of his progress. (T. 1093).

The defense also presented William Vicary, M.D., a California forensic psychiatrist. Dr. Vicary found several diagnoses, "the most important" being Bipolar Disorder. Dr. Vicary also found substance abuse, paraphilia and antisocial personality disorder. (T. 1159). Mr. Tanzi was suffering from all of these psychiatric disorders at the time of the offenses, which would not have occurred otherwise. (T. 1167-68). These illnesses substantially affected Mr. Tanzi's ability to appreciate the criminality of his conduct, and to conform his conduct to the requirements of the law. (T. 1168).

Dr. Vicary had a disciplinary history as a result of his conduct in the highly sensationalized murder case involving Eric and Lyle Menendez's violent murder of

their parents in Los Angeles, California. As the treating psychiatrist for Eric Menendez, Dr. Vicary made notes about things that Eric Menendez said. When Dr. Vicary met with Leslie Abramson, Mr. Menendez's attorney, she told him to remove certain things from the notes that were potentially harmful to Menendez that could be used by the prosecution in his criminal case. Abramson instructed that Dr. Vicary remove those statements from his notes and conceal it from the prosecution or he would be removed from the case. (T. 1148-51). Dr. Vicary chose to "commit the ethical violation and continue being involved in the case." (T. 1205-9). He also rewrote his notes so that it wouldn't be apparent that he had removed things from them, and the "doctored up" notes were then sent to the prosecution. (T. 1205). The executive director of the California Medical Board initiated the complaint himself based on media accounts of the case. (T. 1205-09). As a result of his conduct, Dr. Vicary's license was revoked by the State of California. That revocation was suspended, however, Dr. Vicary was required to pay the costs of the investigation, and was placed on professional probation and required to take an ethics course. (T. 1151).

Before Dr. Vicary took the stand at the penalty phase, the defense moved in limine to exclude evidence of the California Medical Board matter and the resulting license suspension and probation. (R. 1290-91; 1293-1302; T. 1121-36). The court permitted the State to present the California disciplinary record over defense

objection. (T. 1204-08).

Alan Raphael, Ph.D., a Florida forensic psychologist also testified at the penalty phase. Dr. Raphael diagnosed Mr. Tanzi with eleven disorders spanning all five diagnostic categories. (T. 1299). Dr. Raphael testified that Mr. Tanzi suffers from Axis 1 disorders including Polysubstance Dependence, Posttraumatic Stress Disorder, Exhibitionism, sexual sadism, voyeurism, R/O Schizophrenia, schizoaffective disorder, and psychotic disorder. These are all psychotic disorders, meaning you have hallucinations, you're hearing voices, seeing things. Your ability to perceive the world you live in accurately is falsely distorted. (T. 1302). Mr. Tanzi was put on Haldol while he was in jail because he was psychotic. (T. 1302). In addition, Dr. Raphael testified that Mr. Tanzi suffers from Attention-Deficit Hyperactivity Disorder, learning disability and bereavement. (T. 1302-3). Dr. Raphael also diagnosed Antisocial Personality Disorder (Axis 2), physical problems (Axis 3), and problems with family, imprisonment and homelessness (Axis 4). Mr. Tanzi's Global Assessment of Functioning was 40-45, which is well below the normal range. (T. 1305). Dr. Raphael opined that Mr. Tanzi was suffering from these disorders at the time of the offense, and that they affected his ability to appreciate the criminality of his conduct. (T. 1312).

The jury recommended Mr. Tanzi be sentenced to death by a vote of 12-to-0.

(R. 1820-24). On March 14, 2003, the Court conducted a *Spencer*[2] hearing. (R. 2214-34). On April 11, 2003, the circuit court entered its sentencing order sentencing Mr. Tanzi to death for the murder of Janet Acosta, and consecutive life sentences for each count of carjacking, kidnapping and robbery. (R. 1804-1832).

The trial court found seven (7) aggravating factors: (1) the murder was committed by a person previously convicted of a felony and under sentence of imprisonment or on felony probation (great weight); (2) the murder was committed during the commission of a kidnapping (great weight); (3) the murder was committed during the commission of two sexual batteries (great weight); (4) the crime was committed for the purpose of avoiding arrest (great weight); (5) the murder was committed for pecuniary gain (great weight); (6) the murder was especially heinous, atrocious, or cruel ("utmost" weight); and (7) the murder was committed in a cold, calculated, and premeditated manner (great weight). (R. at 1804-1832).

In mitigation, the court found: (1) Mr. Tanzi suffered from Axis II personality disorders (some weight); (2) Mr. Tanzi was institutionalized as a youth (some weight); (3) Mr. Tanzi's behavior benefited from psychotropic medications (some weight); (4) Mr. Tanzi lost his father at a young age (some weight); (5) Mr. Tanzi

[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

was sexually abused as a child (some weight); (6) Mr. Tanzi twice attempted to join the military (some weight); (7) Mr. Tanzi cooperated with law enforcement (some weight); (8) Mr. Tanzi assists other inmates by writing letters and he enjoys reading (some weight); (9) Mr. Tanzi's family has a loving relationship with him (some weight); and (10) Mr. Tanzi has a history of substance abuse (found, but given no weight). (R. at 1804-1832).

On direct appeal, this Court determined that the circuit court had improperly doubled the "murder in the course of a felony" aggravator, but that the error was harmless beyond a reasonable doubt. The court affirmed the conviction and sentences. *Tanzi v. State*, 964 So. 2d 106 (2007). The United States Supreme Court denied certiorari. *Tanzi v. Florida*, 128 S. Ct. 1243 (2008).

Mr. Tanzi sought postconviction relief pursuant to Fla. R. Crim. P. 3.851. After an evidentiary hearing (PCR-T. 1-433), the circuit court denied all relief. (PCR. 511-520). Mr. Tanzi appealed and petitioned this Court for a writ of certiorari. This Court affirmed the denial of postconviction relief and denied habeas corpus relief. *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012).

Mr. Tanzi filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Florida, alleging, *inter alia*, that his death sentence was unconstitutional under *Ring v. Arizona*. That petition was denied and Mr. Tanzi appealed to the Eleventh Circuit Court of Appeals, which affirmed. *Tanzi v.*

Secretary, DOC, 772 F.3d 644 (Fla. 2014). Mr. Tanzi petitioned the United States Supreme Court for a writ of certiorari, which was denied. *Tanzi v. Secretary, DOC*, 136 S. Ct. 155 (2015).

On January 12, 2017, Mr. Tanzi filed a successive motion for postconviction relief premised on the Supreme Court's decision *Hurst v. Florida,* 136 S. Ct. 616 (2016) and this Court's decisions in *Perry v. State*, 210 So. 3d 630 (Fla. Oct. 14, 2016), *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). (PCR-2. 1) Mr. Tanzi alleged that his death sentence was unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. Mr. Tanzi also alleged that developments in the law required the court to revisit his previous postconviction claims under *Strickland v. Washington* and *Brady v. Maryland* to determine if, in light of *Hurst v. State* and *Hurst v. Florida*, confidence in the outcome was undermined. After conducting a case management conference, the circuit court denied relief, which is the basis of this appeal.

SUMMARY OF THE ARGUMENT

I. Mr. Tanzi's death sentence is unconstitutional under the Sixth and Eighth Amendments in light of *Hurst v. Florida* and *Hurst v. State*. The *Hurst* decisions are retroactive to Mr. Tanzi, whose sentence became final after the United States Supreme Court issued its decision in *Ring v. Arizona*. The *Hurst* error is not harmless where the State cannot demonstrate beyond a reasonable doubt that the

error did not contribute to Mr. Tanzi's sentence. The circuit court's denial of postconviction relief on this claim should not be affirmed on the basis of this court's decisions in *Davis v. State* or *Mosley v. State* because harmless error analysis must be performed on a case-by-case basis.

II. Changes in Florida law require this court to revisit Mr. Tanzi's previously presented *Brady* and *Strickland* claims to determine whether the evidence presented to support each claim undermines confidence in the outcome of the penalty phase in light of new law. The denial of relief on this claim should not be affirmed on the basis of this court's decisions in *Davis v. State* or *Mosley v. State* because the claim was not before the Court in those cases, and was not addressed by the court in its previous decisions.

STANDARD OF REVIEW

Florida Rule of Criminal Procedure 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing "[i]f the motion, files, and records in the case conclusively show that the movant is entitled to no relief." A postconviction court's decision regarding whether to grant a rule 3.851 evidentiary hearing depends upon the written materials before the court; thus, for all practical purposes, its ruling is tantamount to a pure question of law and is subject to de novo review. *See, e.g.*, *Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008).

ARGUMENT I

MR. TANZI'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*. THIS DENIAL OF RELIEF ON THIS CLAIM SHOULD NOT BE AFFIRMED ON THE BASIS OF THIS COURT'S DECISIONS IN *DAVIS V. STATE* OR *MOSLEY V. STATE* BECAUSE HARMLESS ERROR ANALYSIS MUST BE PERFORMED ON A CASE-BY-CASE BASIS.

In *Hurst v. Florida*, 136 S. Ct. 616 (2016), the United States Supreme Court declared Florida's capital sentencing scheme unconstitutional because the "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S.Ct. at 619. In *Hurst v. State*, this Court explained the change in law that resulted from *Hurst v. Florida*:

> In so holding, the Supreme Court overruled its decisions in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), to the extent they approved Florida's sentencing scheme in which the judge, independent of a jury's factfinding, finds the facts necessary for imposition of the death penalty. *See Hurst v. Florida*, 136 S.Ct. at 624. The Supreme Court's ruling in *Hurst v. Florida* also abrogated this Court's decisions in *Tedder v. State*, 322 So.2d 908 (Fla.1975), *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002), *Blackwelder v. State*, 851 So.2d 650 (Fla.2003), and *State v. Steele*, 921 So.2d 538 (Fla.2005), precedent upon which this Court has also relied in the past to uphold Florida's capital sentencing statute.

Hurst v. State, 202 So. 3d at 44. The Sixth Amendment right enunciated in *Hurst v.*

Florida and found applicable to Florida's capital sentencing scheme guarantees that all facts that are statutorily necessary before a judge is authorized to impose death are to be found by a jury, pursuant to the capital defendant's constitutional right to a jury trial. *Hurst v. Florida* invalidated Fla. Stat. §§ 921.141(2) and (3) as unconstitutional. Under those provisions, a defendant who had been convicted of a capital felony could be sentenced to death only after the sentencing judge entered written fact findings that: 1) sufficient aggravating circumstances existed that justify the imposition a death sentence, and 2) insufficient mitigating circumstances existed to outweigh the aggravating circumstances. 136 S. Ct. at 620-21. *Hurst v. Florida* found Florida's sentencing scheme unconstitutional because "Florida does not require the jury to make critical findings necessary to impose the death penalty," but "requires a judge to find these facts." *Id.* at 622.

On remand, this Court held in *Hurst v. State* that *Hurst v. Florida* means that, "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So. 3d at 57.

In *Hurst v. State*, this Court held that Sixth Amendment error under *Hurst v.*

Florida would be subject to a strict harmless error test:

> Where the error concerns sentencing, the error is harmless only if there is no reasonable possibility that the error contributed to the sentence. *See, e.g., Zack v. State*, 753 So.2d 9, 20 (Fla. 2000). Although the harmless error test applies to both constitutional errors and errors not based on constitutional grounds, "the harmless error test is to be rigorously applied," [*State v.*] *DiGuilio*, 491 So.2d [1129,] 1137 [Fla. 1986], and the State bears an extremely heavy burden in cases involving constitutional error. Therefore, 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 for imposition of the death penalty did not contribute to Hurst's death sentence in this case. We reiterate:
>
> > 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.
>
> [*State v.*] *DiGuilio*, 491 So. 2d at 1139. "The question is whether there is a reasonable possibility that the error affected the [sentence]." *Id.*

202 So.3d at 68 (alteration in original).

A. *Hurst* Applies Retroactively To Mr. Tanzi.

The State has conceded that *Hurst* is retroactive to Mr. Tanzi's case because his conviction and sentence were final after the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). (PCR2. 74-75). *See Mosley v. State*, 209 So. 3d 1248, 1276 (Fla. 2016) ("*Hurst* should be applied to Mosley and other defendants whose

sentences became final after the United States Supreme Court issued its opinion in *Ring.*")

B. The State Cannot Meet Its Burden of Demonstrating That The *Hurst* Error Was Harmless Beyond A Reasonable Doubt.

In *Hurst v. State*, this Court held that Sixth Amendment error under *Hurst v. Florida* would be subject to a strict harmless error test in which "the State bears an extremely heavy burden" of proving beyond a reasonable doubt that "the jury's failure to unanimously find all the facts necessary for imposition of the death penalty did not contribute to Hurst's death sentence in this case." *Hurst v. State*, 202 So. 3d at 68. *See Mosley v. State*, 209 So. 3d at 1283-84 (applying the *Hurst v. State* harmless error analysis when *Hurst v. Florida* is retroactively applied in collateral proceedings); *Johnson v. State*, 44 So. 3d 51, 69 (Fla. 2010) (as to constitutional error established in a successive 3.851 motion, death sentence was vacated because "the State has not met its burden of showing that Smith's testimony was harmless beyond a reasonable doubt."); *Way v. Dugger*, 568 So. 2d 1263, 1266 (Fla. 1990) (in collateral appeal, this Court held: "we are not convinced that the error was harmless beyond a reasonable doubt."); *Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) (*Hitchcock* error presented in collateral review was subject to the harmless beyond a reasonable doubt standard); *Mikenas v. Dugger*, 519 So. 2d 601, 602 (Fla. 1988) (in a collateral appeal, the court held: "we cannot say beyond a reasonable doubt that had the jury known that nonstatutory mitigating evidence could be considered, it

would not have recommended life rather than death.").

The outcome of Mr. Tanzi's case should not be determined based on this Court's precedent in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) because a harmless error analysis must be performed on a case-by-case basis. There is no one-size-fits-all harmless error analysis. Rather, there must be a "detailed explanation based on the record" supporting a finding of harmless error. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *see also Sochor v. Florida*, 504 U.S. 527, 540 (1992).

Although Mr. Tanzi's jury voted 12-0 in favor of death, the jury did not return a verdict making any findings of fact. The only document returned by the jury was an advisory death recommendation. Although the recommendation was unanimous, it does not reflect anything about the jury's findings. Without jury fact finding, "[e]ven though the jury unanimously recommended the death penalty, whether the jury unanimously found each aggravating factor remains unknown." *Truehill v. State*, 2017 WL 727167, at *23 (Fla. Feb. 23, 2017) (Quince, J., dissenting).

A final 12-0 recommendation does not necessarily mean that the other findings leading to the recommendation were unanimous. It could well mean that after the other findings were made by a majority vote, jurors in the minority acceded to the majority's findings. *See Wood v. State*, 209 So. 3d 1217 (Fla. 2017). *Hurst v.*

State made exactly this point:

> Because there was no interrogatory verdict, we cannot determine what aggravators, if any, the jury unanimously found proven beyond a reasonable doubt. We cannot determine how many jurors may have found the aggravation sufficient for death. We cannot determine if the jury unanimously concluded that there were sufficient aggravating factors to outweigh the mitigating circumstances.

202 So. 3d at 69.

The unanimous votes could also mean the jurors did not attend to the gravity of their task, as they were told the judge could impose death regardless of the jury's recommendations. Therefore, first, this Court cannot rely upon a legally meaningless recommendation by an advisory jury. *Hurst v. Florida*, 136 S. Ct. at 622 (Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding"). For a court to reweigh aggravators and mitigators or otherwise substitute its judgment rather than focusing on the effect of the error on the trier of fact is improper. *See Truehill*, 2017 WL 727167, at *23 (Fla. Feb. 23, 2017) (Quince, J., dissenting) ("The majority's reweighing of the evidence to support its conclusion [that the *Hurst* error was harmless] is not an appropriate harmless error review. . . . By ignoring the record and concluding that all aggravators were unanimously found by the jury, the majority is engaging in the exact type of conduct the United States Supreme Court cautioned against in *Hurst v. Florida*."). *See U.S. v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

Mr. Tanzi's jury was repeatedly told its recommendation was merely advisory. In order to treat a jury's advisory recommendation (especially one returned by a unanimous vote at the end of a one-day penalty phase), the jury must be correctly instructed as to its sentencing responsibility under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This means that for a unanimous verdict to be constitutionally sound, the individual jurors who returned it had to know that each juror bore responsibility for a death sentence and a defendant's execution since each juror possesses the power to require the imposition of a life sentence simply by voting against a death recommendation. *See Perry v. State*, 210 So. 3d 630 (Fla. 2016). Mr. Tanzi's jury was told the exact opposite–that Mr. Tanzi could be sentenced to death regardless of the jury's recommendation, thus relieving jurors of individual responsibility. As was explained in *Caldwell*, jurors must feel the weight of their sentencing responsibility if the defendant is ultimately executed after no juror exercised his or her power to preclude a death sentence. Indeed, because the jury's sense of responsibility was inaccurately diminished in *Caldwell*, the Supreme Court held that the jury's unanimous verdict imposing a death sentence in that case violated the Eighth Amendment and required the resulting death sentence to be vacated. *Caldwell*, 472 U.S. at 341 ("Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that

the Eighth Amendment requires."). [3]

The outcome of Mr. Tanzi's case should not be determined based on this Court's precedent in *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016) because, unlike in *Davis* and *Mosley*, Mr. Tanzi's jurors

[3] This is especially so in Mr. Tanzi's case where it is apparent that the jury, despite the court's instruction that it may not consider "lack of remorse" as an aggravating factor, improperly considered lack of remorse as the justification of its death recommendation. After trial, an un named juror explained the rationale for the jury's death recommendation: "He didn't care. He had no regrets, no remorse. We spent 2 1/2 hours trying to find a way not to give him the death penalty." Charles Rabin, "Confessed Murderer Gets Death Sentence," The Miami Herald, April 12, 2003. This juror's statement clearly demonstrates that the jury considered mitigating factors, but justified its ultimate death recommendation because Mr. Tanzi showed "no regrets, no remorse." Furthermore, the juror's comments to the Miami Herald demonstrate that lack of remorse was considered as an aggravator in its own right, and not merely as rebuttal evidence offered to support diagnoses of Conduct Disorder and Antisocial Personality Disorder, considered proper by the trial court and this Court on direct appeal.

At Mr. Tanzi's penalty phase proceeding, trial counsel repeatedly objected to the state's introduction of evidence that Mr. Tanzi lacked remorse. (T. 1459, 1463, 1464, 1468, 1492-93, 1576). Trial counsel also objected when the state referred to Mr. Tanzi's "lack of remorse" in its closing argument. (T. 1669, 1724-25, 1733-34). During the charge conference, trial counsel requested a special jury instruction to the effect that lack of remorse was not an aggravator. (T. 1668). The State agreed that lack of remorse would not be argued (T. 1669), and the court agreed to give the requested instruction (T. 1675). However, the state argued in closing that Mr. Tanzi "tended to exhibit little to no remorse or guilt for his misbehavior in the community and talked about his misbehavior in a very matter of fact ," prompting a defense objection. (T. 1724-25) The court concluded the argument was not improper because lack of remorse was "one of the ways they conclude that he qualifies as a narcissistic personality," and noted he would be giving the instruction that lack of remorse was not an aggravator. (T. 1728). Ultimately, the court instructed the jury, "Lack of remorse is not an aggravating factor and you are not to consider it as such." (T. 1811).

were not told they could exercise mercy by not joining a death recommendation, irrespective of their views on the aggravation and mitigation. In *Davis*, this Court placed great emphasis on the fact that Mr. Davis's jury *was* instructed that "it was not required to recommend death even if the aggravators outweighed the mitigators" and that it nonetheless returned unanimous death recommendations. *Davis*, 207 So. 3d 142, 175 (Fla. 2016). Mr. Tanzi's jury was given no such instruction. The State cannot show beyond a reasonable doubt that a juror, properly instructed, would not have decided to dispense mercy to Mr. Tanzi.

In addition, Mr. Tanzi's jury's sentencing decision was skewed by the instructions on the aggravators, which allowed the jury to consider aggravators that this Court later ruled did not apply. On direct appeal, this Court determined that the circuit court had improperly doubled the "murder in the course of a felony" aggravator, but that the error was harmless beyond a reasonable doubt. The jury's consideration of inapplicable aggravating factors placed several extra "thumb[s]" on "death's side of the scale." *Stringer v. Black*, 503 U.S. 222, 232 (1992). *See also Wood v. State*, 209 So. 3d 1217 (Fla. 2017). Alone and in conjunction with the other matters discussed here, the court "may not assume it would have made no difference" that the jury was instructed on inapplicable aggravating factors.

Moreover, the fact that the court found weighty aggravation does not foreclose *Hurst* relief. In *Hurst v. State*, this Court concluded that although "[t]he evidence of

the circumstances surrounding this murder can be considered overwhelming and essentially uncontroverted," "the harmless error test is not limited to consideration of only the evidence of aggravation, and it is not an 'overwhelming evidence' test." *Hurst v. State*, 202 So. 3d at 68-69. The Court found that "the evidence of mitigation was extensive and compelling" but, absent an interrogatory verdict, it could not "say with any certainty how the jury viewed that mitigation." *Id*. at 69. In light of the mitigation and the jury's 7 to 5 death recommendation, the Court could not "find beyond a reasonable doubt that no rational jury, as the trier of fact, would determine that the mitigation was 'sufficiently substantial' to call for a life sentence." *Id.* (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

In *Davis*, where the jury recommended two death sentences by 12-0 votes, this Court found the *Hurst* error harmless because the unanimous jury recommendations "allow us to conclude beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravators to outweigh the mitigating factors." The Court based this conclusion in part on the jury instructions, including an instruction saying, "Regardless of your findings in this respect, however, you are neither compelled nor required to recommend a sentence of death." *Id*. The court also relied upon "the egregious facts of this case" in which "Davis set two women on fire, one of who was pregnant, during an armed robbery, and shot in the face a Good Samaritan who was responding to the scene." *Id*. The

Court said, "[t]he evidence in support of the *six* aggravating circumstances found as to both victims was significant and essentially uncontroverted." *Id*. At one point, the Court wrote, "This case is truly among the most aggravated and least mitigated." *Id*. at 172.

In *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016), this Court noted that "the jury that recommended death did not find the facts necessary to sentence him to death" because the jury returned a non-unanimous recommendation. The Court rejected "the State's contention that Franklin's prior convictions for other violent felonies insulate Franklin's death sentence from *Ring* and *Hurst v. Florida*." *Id*.

In *Johnson v. State*, 205 So. 3d 1285 (Fla. 2016), the jury recommended three death sentences by votes of 11 to 1. There were three victims in *Johnson*, as opposed to one here. The trial court found three aggravating factors in the deaths of victims Evans and Beasley, including the cold, calculated and premeditated aggravator, and two aggravating factors in the death of victim Burnham. *Id*., at n.1. The trial court also found three statutory and ten nonstatutory mitigating circumstances. *Id*. at 1289, nn.2, 3. The trial court gave most of the mitigating factors slight or very slight weight. *Id*. In addressing whether the *Hurst* error was harmless, this Court first rejected "the State's contention that Johnson's contemporaneous convictions for other violent felonies insulate Johnson's death sentences from *Ring* and *Hurst v. Florida*." *Id*. The court found the case "obviously include[s] substantial

aggravation":

> Johnson set out on a drug-fueled hunt for money to purchase more drugs, so determined to succeed that "if he would have to shoot someone, he would have to shoot someone." Johnson murdered a taxi driver who had been dispatched to pick up a fare, a Good Samaritan who Johnson tricked into believing that his car was broken down, and a deputy sheriff who had stopped Johnson as part of the manhunt for the perpetrator of Johnson's two earlier murders.

Id., at 1290. However, the court also found that "the evidence of mitigation was extensive and compelling." *Id*. Based on "a nonunanimous jury recommendation and a substantial volume of mitigation evidence," the court could not conclude "'beyond a reasonable doubt, that no rational trier of fact would determine that the mitigating circumstances were sufficiently substantial to call for leniency.'" *Id*. (quoting *State v. Ring*, 65 P.3d 915, 946 (Ariz. 2003)).

Under these cases, the State cannot show beyond a reasonable doubt that the *Hurst* error in Mr. Tanzi's case was harmless. First, as the Court held in *Johnson*, Tanzi's contemporaneous convictions do not render the error harmless. Second, as in *Hurst v. State* and *Johnson*, Mr. Tanzi's case involved substantial and compelling mitigation. Third, although as in *Davis*, Mr. Tanzi's jury returned a unanimous recommendation, the other factors this Court relied upon in finding harmless error in *Davis* are not present in Mr. Tanzi's case. In addition to the unanimous recommendations in *Davis*, the court found the error harmless because the jury

received a mercy instruction which Mr. Tanzi's jury did not receive, and the case involved six aggravating factors applied to both victims for which the evidence "was significant and essentially uncontroverted." *Davis*, 207 So. 3d at 175.

Consideration must also be given to the fact that trial counsel would have tried the case differently under *Hurst v. Florida* and the resulting new Florida law. This is further evidence that it is more likely than not that at least one juror would have voted for a life sentence, but for the *Hurst* error. Equally important is any failure by counsel to properly present mitigating evidence to the jury because of Florida law that the jury vote was merely an advisory recommendation and the judge was the actual sentencer and fact finder.

Mr. Tanzi's death sentence stands in violation of the Sixth Amendment and *Hurst v. Florida*. His jury did not return verdicts making any findings of fact statutorily necessary to authorize the imposition of death sentence.

The *Hurst* error in Mr. Tanzi's case warrants relief. The State simply cannot show the error to be harmless beyond a reasonable doubt when consideration is given to erroneous jury instructions which infected the process with bias in favor of voting to recommend death sentences. As *Hurst v. Florida* noted, the advisory recommendation cannot be treated as something more that it was—an advisory recommendation. A 12-0 advisory death recommendation does not mean that, beyond a reasonable doubt, a properly instructed jury (*i.e.* a jury that was limited to

considering only aggravators unanimously found, that understood its verdict was not merely advisory, but would decide whether Mr. Tanzi could receive a death sentence, and that knew that each juror individually was authorized to be merciful and by voting in favor of a life sentence could precluded a death sentence) would have returned a unanimous death recommendation. Unless it is proven beyond a reasonable doubt that no juror would have voted for a life sentence and through such a vote mandated that Mr. Tanzi receive a life sentence, his death sentence must be vacated and a resentencing ordered. Because the State cannot meet its burden here, Rule 3.851 relief is required.

ARGUMENT II

CHANGES IN FLORIDA LAW REQUIRE THIS COURT TO REVISIT MR. TANZI'S PREVIOUSLY PRESENTED *BRADY* AND *STRICKLAND* CLAIMS AND DETERMINE WHETHER THE EVIDENCE PRESENTED TO SUPPORT EACH CLAIM UNDERMINES CONFIDENCE IN THE OUTCOME OF THE PENALTY PHASE IN LIGHT OF NEW LAW. THE DENIAL OF RELIEF ON THIS CLAIM SHOULD NOT BE AFFIRMED ON THE BASIS OF THIS COURT'S DECISIONS IN *DAVIS V. STATE* OR *MOSLEY V. STATE* BECAUSE THIS CLAIM WAS NOT ADDRESSED BY THE COURT IN ITS PREVIOUS DECISIONS.

In his initial motion for postconviction relief, Mr. Tanzi alleged, *inter alia*, that trial counsel rendered ineffective assistance under *Strickland v. Washington* at the penalty phase by failing to investigate and present available mitigation evidence, including the fact that Mr. Tanzi suffers from a genetic disorder which affected his

character and development. On appeal of the denial of his ineffective assistance claim, this Court determined explained that, in order to prove prejudice pursuant to a claim under *Strickland v. Washington*, a defendant "must show that but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence." *Tanzi v. State*, 94 So. 3d 482, 490 (Fla. 2012). Applying this standard, the Court determined that prejudice had not been shown. *Id*., at 491-93.[4]

This Court's prejudice findings were premised upon the understanding that a jury's advisory recommendation would not be altered in favor of life unless six jurors would have been convinced to vote in favor of life -- a standard which has since been rejected by this Court. *See, e.g.*, *Bevel v. State*, 221 So. 3d 1168 (Fla. 2017). Thus, the need for more than one juror to switch their vote in order for a life recommendation to be an option undoubtedly became part of the yardstick for measuring the prejudice Mr. Tanzi suffered as a result of the alleged errors. Yet, under Florida law it no longer takes six jurors voting for a life recommendation for an advisory life recommendation to be an option. Now, one juror voting for life means a life sentence is the only sentence permitted to be imposed for a first degree

[4] Mr. Tanzi also argued that the State violated *Brady v. Maryland*, 83 S. Ct. 1194 (1963), by withholding material, exculpatory mitigation evidence, *i.e.*, the fact that Mr. Tanzi suffers from a genetic disorder which affected his character and development. This Court affirmed the summary denial of this claim. *Tanzi v. State*, 94 So. 3d 482, 494 (Fla. 2012).

murder conviction.

Given this change in law -- which would apply to Mr. Tanzi at any potential resentencing -- the calculus formerly employed for assessing prejudice under *Brady* and *Strickland* must be now be reevaluated. At a resentencing, Mr. Tanzi could not be sentenced to death unless the jury unanimously determined that sufficient aggravating factors exist to justify a death sentence. The jury would likewise be required to unanimously find that the aggravators outweigh the mitigating factors that are found to exist, and unanimously recommend a sentence of death. A single juror voting in favor of a life sentence would mean that death was not a sentencing option.

The circuit court disposed of this claim with only a footnote:

> The Hurst error does not resurrect Tanzi' s previously denied Brady or Strickland claims. Hurst represents a trial error that should be viewed and balanced against the evidence presented in the penalty phase.

(PCR2. 102).

The denial of relief should not be affirmed on the basis of this Court's decisions in *Davis v. State* or *Mosley v. State* for the simple reason that no such claim was before the Court in those cases. This Court should remand to the circuit court to revisit Mr. Tanzi's previously presented *Strickland* and *Brady* claims and determine whether the reliability of the outcome of his trial has been undermined given that only one juror's vote for life, rather than six, is enough to insulate Mr. Tanzi from a

death sentence. When the proper analysis of his claims is conducted, the record establishes that Mr. Tanzi is entitled to Rule 3.851 relief on his *Strickland* and *Brady* claims.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Tanzi respectfully urges this Court to allow full briefing on the issues resulting from the trial court's summary denial. In the alternative, Mr. Tanzi requests that this Court hold that the Hurst error which occurred in his case is not harmless beyond a reasonable doubt, vacate his death sentence, and remand to the circuit court for imposition of a life sentence or a new penalty phase that comports with the requirements of the Sixth, Eighth and Fourteenth Amendments.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by electronic service to counsel for Appellee, Scott A Browne, Assistant Attorney General, at *capapp@myfloridalegal.com*, this 13th day of November, 2017.

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CERTIFICATE OF FONT

I HEREBY CERTIFY that the foregoing Initial Brief has been reproduced in 14 Times New Roman type, pursuant to Rule 9.100 (l), Florida Rules of Appellate Procedure.

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