IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY TANZI,

Appellant,

v.

CASE NO. SC17-1640
L.T. No. 00-CF-573-A-K
DEATH PENALTY CASE

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On May 16, 2000, Michael Tanzi was charged by indictment with the first-degree murder of Janet Acosta. (R1/13-14). He was also charged by amended information with carjacking with a weapon, kidnapping to facilitate a felony with a weapon, armed robbery and two counts of sexual battery with a deadly weapon. (R7/1235-37). On January 31, 2003, Tanzi announced that he wanted to plead guilty to first-degree murder, carjacking, kidnapping and armed robbery. (R11/1886). Tanzi submitted a written guilty plea, which indicated that the plea had not been induced by any promises. (R7/1242-44; R11/1886-87). The trial court conducted a colloquy with Tanzi about his decision to enter his plea. (R11/1887-1903). The trial court then accepted the plea and the case proceeded to the penalty phase.[1] (R11/1903).

After considering this evidence and the parties' arguments, the jury returned a unanimous recommendation of death. (R8/1430; R26/1821-22). Following a Spencer[2] hearing, the trial court followed the jury's recommendation and sentenced

[1] The historical facts are found in this Court's opinion on direct appeal. Tanzi v. State, 964 So. 2d 106, 110-11 (Fla. 2007), cert. denied, 552 U.S. 1195 (2008).

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

Tanzi to death.[3] (R10/1804-32; R12/2197-2213). In doing so, the trial court found that the State had proven seven aggravating factors: under a sentence of imprisonment--great weight; during the course of a kidnapping--great weight; during the course of sexual batteries--great weight; avoid arrest--great weight; pecuniary gain--great weight; heinous, atrocious or cruel (HAC)--utmost weight; and cold, calculated and premeditated (CCP)--great weight. (R10/1805-17).

In mitigation, the trial court found Tanzi's personality disorders--some small weight; his history of substance abuse--some weight; his institutionalization in his youth--some weight; his positive response to treatment with psychotropic medication--some weight; the loss of his father--some weight; sexual abuse as a child--some weight; his attempts to join the military--some weight; his cooperation with the police after his arrest--some weight; his assistance to other inmates and love of reading--some weight; and his family's loving relationship with him--some weight. (R10/1817-30). The trial court also considered and rejected as mitigation the assertion that Tanzi was under the influence of an extreme mental or emotional disturbance at the time of the crime, the assertion that Tanzi's capacity to appreciate the criminality of his conduct or to conform his conduct to the

[3] The trial court also sentenced Tanzi to consecutive life sentences for the carjacking, kidnapping and robbery. (R10/1831). And, the State nolle prossed the two counts of sexual battery. (R10/1803).

requirements of the law was substantially impaired.[4] (R10/1817-30).

Tanzi filed a successive motion for post-conviction relief in the trial court asserting that the Supreme Court decision in Hurst v. Florida, 136 S. Ct. 616 (2016), invalidates his death sentence. The State filed its response on March 3, 2017 and a case management conference was held March 31, 2017. The trial court denied the successive motion on April 24, 2017. Tanzi's motion for rehearing was denied August 3, 2017. This appeal follows.

SUMMARY OF THE ARGUMENT

The lower court properly denied Tanzi's successive motion for post-conviction relief. The record conclusively establishes that any Hurst[5] error was harmless beyond a reasonable doubt. The aggravators were either supported by prior or contemporaneous convictions or uncontestable and the jury unanimously recommended the death penalty. As this Court has made clear, the jury's unanimous recommendation is "precisely what [this Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis v. State, 207 So. 3d 142, 175 (Fla. 2016).

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[4] Prior to the instant motion, Tanzi previously sought post-conviction relief in state court and in a habeas petition in federal court. These attempts to obtain relief from the judgment and sentence were unsuccessful. See Tanzi v. State, 94 So. 3d 482 (Fla. 2012) and Tanzi v. Secretary, Florida Dept. of Corrections, 772 F.3d 644 (11th Cir. 2014), cert. denied, 136 S. Ct. 155 (2015).

[5] Hurst v. State, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).

STANDARD OF REVIEW

The trial court's summary denial of Tanzi's successive motion for post-conviction relief is reviewed by this Court *de novo*, accepting the defendant's factual allegations as true to the extent they are not refuted by the record, and affirming the ruling if the record conclusively establishes that the defendant is entitled to no relief. Walton v. State, 3 So. 3d 1000, 1005 (Fla. 2009).

ARGUMENT

ISSUES I-II

ANY HURST V. FLORIDA, 136 S. CT. 616 (2016) ERROR WAS HARMLESS IN LIGHT OF THE UNANIMOUS DEATH RECOMMENDATION IN THIS HEAVILY AGGRAVATED CASE.

In rejecting Tanzi's challenge to his sentence based upon Hurst, the lower court properly analyzed the facts of this case and relevant precedent from this Court and provided in part:

> Tanzi notably failed to challenge any of the facts upon which these aggravators were based either in his successive motion for postconviction relief, or in argument before this Court during the case management hearing. See King, 2017 WL 372081 (affirming as harmless any Hurst error where "the evidence of the HAC, CCP, and avoid arrest aggravating circumstances-which King did not contest on direct appeal-was overwhelming and essentially uncontroverted."). Notably, Tanzi also did not challenge the sufficiency of the evidence supporting these aggravators on direct appeal.[fn4]

> fn4. Tanzi did challenge the trial court's assessment of the course of a felony aggravator twice in the sentencing order.

Had the jury been instructed, this Court is convinced the jury would have found each of the aggravating factors relied upon by the court to impose a death sentence in this case. In addition, the jury was repeatedly told by the trial court to weigh the aggravators proven against the mitigation presented before making its recommendation. See T. 1811 ("Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances."; (T. 1813) ("You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations."). The jury's unanimous recommendation leaves no doubt that it viewed the aggravation as outweighing the mitigation presented.

The Court notes that the Florida Supreme Court has repeatedly found Hurst errors harmless in cases like this one with unanimous jury recommendations. See e.g. Truehill v. State, ___ So. 3d ____, 2017 WL 727167, at *19 (Fla. Feb. 23, 2017); King v. State, 2017 WL 372081, at *19 (Fla. Jan. 26, 2017); Knight v. State, ___ So. 3d ____, 2017 WL 411329 (Fla. Jan. 31, 2017); Kaczmar v. State, ___ So. 3d ____, 2017 WL 410214 (Fla. Jan. 31, 2017); Hall v. State, ___ so. 3d ____, 2017 WL 526509, at *23 (Fla. Feb. 9, 2017). The jury's unanimous recommendation is "precisely what [the Florida Supreme Court] determined in Hurst to be constitutionally necessary to impose a sentence of death." Davis, 207 So. 3d at 175. Thus, given the jury's recommendation and the powerful evidence establishing the aggravators, the Court finds the Hurst error is harmless beyond a reasonable doubt in this case.[fn5]

> fn5. 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.

(SC17-1640:R. 101-02).

As the post-conviction court found below, it is clear that no rational juror would have failed to find all of the aggravators that the trial court found in imposing a death sentence in this case. The trial court found that the State had proven seven aggravating factors: under a sentence of imprisonment; during the course of a kidnapping (affirmed as a single consolidated aggravator); during the course of sexual batteries; avoid arrest; pecuniary gain; heinous, atrocious or cruel (HAC) and cold, calculated and premeditated (CCP).

Two of these aggravating factors [in the course of a kidnapping and pecuniary gain] were directly based upon Tanzi's guilty plea to first degree murder, carjacking, kidnapping and armed robbery. (R11/1886). Therefore, these aggravators are established and uncontestable.[6] Further, Tanzi was on felony probation at the time he committed the murder and therefore unquestionably qualified for the under sentence of imprisonment or probation aggravator.[7] The

[6] The State does not concede a Sixth Amendment error in this case. Tanzi's prior violent and contemporaneous felony convictions rendered him eligible for a death sentence in this case. See Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2162-63 (2013) (the Court explained that "[t]he essential point is that the aggravating fact produced a higher range, which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime."). In addition, Alleyne recognized the "narrow exception . . . for the fact of a prior conviction" (citing Almendarez-Torres v. United States, 523 U.S. 224 (1998)). Alleyne, 133 S. Ct. at 2160 n.1.

[7] As the trial court noted in the sentencing order. "On February 1, 1999, the Defendant, who was represented by counsel, entered a plea of guilty to the felony

remaining aggravators are uncontestable under the facts of this case, which included Tanzi's detailed confession to the crimes.

The in the course of a felony aggravator was supported by both kidnapping and **two** sexual batteries. As noted, the kidnapping was supported by Tanzi's guilty plea. The sexual batteries were established by Tanzi's confession to forcing the victim to perform oral sex on him, and the following facts, recited in the sentencing order:

> The Monroe County Medical Examiner testified that the victim had suffered a vaginal tear before her death. He testified that this tear was consistent with the victim having had a nonconsensual sexual assault before her death. He also testified that the DNA of blood found on the inside surface of the victim's pants pocket matched the Defendant's. The location of the blood stain leaves no other explanation other than the victim's jeans had been partially removed at some point and that the Defendant had bled inside of his victim's pants. The subject blood splatter was not found on the outer surface of the victim's jeans.
>
> The Defendant's DNA also matched semen found on a towel in the rear of the van. The State had established that over one and one-half hours were unaccounted for on the time line between the victim's abduction and her murder, enough time for the second sexual battery to have occurred. Thus, in addition to the admitted sexual battery of the forced oral sex in Florida City, a second sexual battery was committed when the Defendant united an object with the victim's vagina against her will.

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offense of breaking and entering in the nighttime with intent to commit a felony. He was sentenced to an 18-month term of imprisonment to be followed by two years of probation. Six months of the incarcerative portion of his sentence were suspended." (R10/1806).

> The court emphasizes that the facts set out above constitute two separate aggravators: kidnapping and sexual battery. The two are discussed together and treated as one aggravating circumstance simply because the two are factually so intertwined. The Defendant committed two separate sexual batteries on the victim during the course of her four hour ordeal which the court is counting as one aggravator even though the two sexual batteries could have been separated in time and place.

(R10/1808-09).

The avoid arrest aggravator was based upon the following:

> The Defendant was apprehended by police officers two days after the victim's disappearance when he reentered her van. The van was parked in downtown Key West. In response to questions about his reasons for killing the victim, the Defendant stated, "If I had let her go I was gonna get caught quicker. I didn't want to get caught. I was having two [sic] much fun." The answers also revealed that he made the victim aware of his intention to kill her: "I told her, I says I can't let you go. If I let you go then I'm gonna be in a lot of trouble."
>
> The Defendant answered to the same effect when Detective Casanovas asked what would have happened if the victim had been freed. He said, "I would have probably gotten caught quicker than I had." And, again, when the detective questioned, "And the motive for that was so you wouldn't get caught, correct?" He responded, "Right, no witnesses."
>
> These statements alone are sufficient to establish this fourth aggravator. *See Kokal v. State*, 492 So.2d 1317 (Fla. 1986). Moreover, the Defendant told police officers that if he had not been caught that day he had intended to alter the appearance of the vehicle. He said that to avoid detection he would have tinted the van's windows and changed the license plate to Texas tags.
>
> Janet Acosta was kidnapped and driven over 130 miles prior to her murder. Her body was hidden in underbrush in a secluded place. The Defendant felt he had concealed her body so well that, as he put it in his video taped confession, "someone could walk right up and piss on her and not even know she was there."

(R10/1810-11).

As the trial court noted, Tanzi's confession provided ample evidence of this aggravator. It was established beyond a reasonable doubt.

As for HAC, the state notes that again the trial court's order spells out the ample evidence supporting this aggravator. The court stated, in part:

> The murder of Janet Acosta can only be described as horrific. The medical examiner testified that the victim had been dealt seven severe blows to her face. There were also at least five more severe blows to the victim's head, all of which caused swelling of the brain. All of the blows to the victim's face and head caused painful injuries. Her front incisor was loosened.
>
> There were ligature marks on the victim's wrist and neck showing that she was bound during her ordeal. The Defendant admitted to the police that he repeatedly beat her about the head and face and tied her up. He gagged her with towels over her head, which made it difficult for her to breathe. The medical examiner testified that he found no defensive wounds on her and her fingernails were intact. These demonstrate that the victim was defenseless against her captor and offered little or no resistance to him.
>
> The Defendant confessed that on three or four occasions he threatened to cut the victim from ear to ear with his razor if she did not cooperate with him. One of those occasions was when he warned her of his intention to cut her throat if she bit him during the forced oral sex.
>
> The Defendant promised the victim that he would free her if she cooperated with him. But after finding the secluded spot on Cudjoe Key, he approached her with a large rope and said, "It's time for you to go." The Defendant said that the victim asked him, "Why?" His reply was "I just can't have you around me. I couldn't." The victim was injured from her beatings and sexual assaults. She was tied to her seat and powerless to resist him.

> With the van's radio playing loudly, the Defendant put the rope around the victim's neck and began to choke her. When the victim screamed, the Defendant stopped just long enough to place duct tape over her eyes, nose, and mouth. Then the Defendant returned to his gruesome task that continued for 25 minutes until the victim ceased to shake.
>
> The Defendant stated to the police, "I was just waiting for her to get over." He carefully checked her neck for a pulse to make sure that he had accomplished the victim's murder. He said he was relieved to be finally "rid" of her. The evidence showed through a second set of ligature marks on her neck that the victim was alive at the start of the second strangulation.
>
> The medical examiner concluded that the cause of death was strangulation compounded by blunt force trauma to the head.
>
> Under the circumstances set forth, it is obvious that in the moments before her death, the victim must have suffered great terror as well as pain. Proof of death by strangulation crates a prima facie case for finding this aggravator. *Orme v. State*, 677 So.2d 258 (Fla. 1996).

(R10/1812-14).

Under any conceivable view of the facts, the murder of Janet Acosta was heinous, atrocious, and cruel. Any rational juror would have found this aggravator.

Finally, as to CCP, the trial court found and reviewed the overwhelming evidence supporting this aggravator:

> The cold and calculated nature of the murder is shown by the Defendant's purchase in Tavernier of the specific tools needed to carry out his already formed intention. And it is further demonstrated by the Defendant's time-consuming search for the right place to put his plan into action. He rejected Sugarloaf Key because he could not find a place that provided enough cover and was distant enough from residential areas and people who might interfere with his plans. And

> obviously, it is made clear by the act itself. The Defendant had to continue to strangle the victim for 25 minutes before she quit shaking.
>
> From the Japanese Gardens Park up to and including the doing of the murder itself, the Defendant had a great deal of time to reflect upon the act he was contemplating. He could have changed his course of conduct at any time, yet he continued until Janet Acosta was dead.

(R10/1816-17).

Under any rational view of the facts in this case, the CCP aggravator was proven beyond and to the exclusion of any reasonable doubt.

Tanzi's motion notably failed to challenge any of the facts upon which these aggravators were based. As the foregoing illustrates, Tanzi's death sentence is supported by six aggravating circumstances that any rational juror would have found under the facts of this case. And, notably, some of Tanzi's aggravators are directly based upon his guilty pleas or his prior conviction [on probation or community control aggravator] and are therefore established facts in this case. See Almendarez-Torres v. United States, 523 U.S. 224 (1998) Since the aggravators supporting Tanzi's death sentence were either supported by prior convictions, contemporaneous convictions or on uncontroverted facts, no rational juror would have failed to find any of the aggravators supporting Tanzi's death sentence in this case.

In Davis, 207 So. 3d at 174, this Court found that when the jury unanimously recommends a death sentence, their unanimous recommendation

"allow[s] 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." This Court has consistently followed Davis and found harmless error in cases involving unanimous recommendations.[8] See, e.g. Davis v. State, 207 So. 3d 142 (Fla. 2016); King v. State, 211 So. 3d 866 (Fla. 2017); Morris v. State, 219 So. 3d 33 (Fla. 2017); Cozzie v. State, 225 So. 3d 717 (Fla. 2017); Knight v. State, 225 So. 3d 661 (Fla. 2017), Kaczmar v. State, 2017 WL 410214, 42 Fla. L. Weekly S127 (Fla. Jan. 31, 2017); Tundidor v. State, 221 So. 3d 587 (Fla. 2017); Oliver v. State, 214 So. 3d 606 (Fla. 2017); Middleton v. State, 220 So. 3d 1152 (Fla. 2017). Given the massive case in aggravation presented by the State and the twelve to zero vote for death, any error was clearly harmless in this case.

Tanzi also argues that this Court should consider a violation of Caldwell for granting relief.[9] Tanzi's suggestion that Caldwell mandates relief in this case is

[8] The one case with a unanimous recommendation which was not affirmed by the Florida Supreme Court was Wood v. State, 209 So. 3d 1217, 1238 (Fla. 2017). However, in Wood the court struck two of the three aggravating circumstances as not being supported by the evidence and held that the defendant's death sentence was not proportional.

[9] Caldwell v. Mississippi, 472 U.S. 320 (1985) (holding that it is unconstitutional to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere).

patently without merit. Any complaint about jury instructions at this point is untimely and procedurally barred from consideration in this successive post-conviction motion. Troy v. State, 57 So. 3d 828, 838 (Fla. 2011). This Court has not reversed any post-Hurst case on the basis of a perceived Caldwell violation. Moreover, the jury was not misled as to its role under the law as it existed at the time of Tanzi's trial. Indeed, in closing argument defense counsel emphasized that it was the jury's "responsibility" to determine the sentence because the judge would give "great weight" to the recommendation and in "only the rarest of circumstances would he not follow it..." (T27/1757). "The infirmity identified in Caldwell is simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." Romano v. Oklahoma, 512, U.S. 1, 9 (1994). In this case, Tanzi's claim of Caldwell error must fail because the court correctly informed the jurors of their advisory function under Florida law. Even now, post-Hurst, the trial judge imposes the sentence. Consequently, the court's instruction informing the jury that it was making a recommendation as to Tanzi's sentence does not constitute a Caldwell violation.

In his second claim on appeal, Tanzi argues that his Hurst claim must be combined with his previously rejected ineffective assistance of counsel and Brady

claims. There is no legal support for this position.[10] Neither Hurst nor Perry v. State, 210 So. 3d 630 (Fla. 2016), operate to breathe new life into previously denied claims.

There is no authority for such a plenary review as Tanzi seeks here. The Hurst error is a trial error to be measured for harmlessness against the trial record. As argued above, under the proper harmless error standard, the Hurst error was clearly harmless in this case. If Hurst applied to Tanzi's case and the error is not harmless, then Tanzi will receive a new penalty phase. If the Hurst error was harmless on the face of the record, Tanzi is entitled to no relief, much less new post-conviction proceedings to explore claims that were disposed of long ago. Tanzi cannot mix and match his guilt-phase claims with his penalty-phase claims based on Hurst, or any other case law for that matter.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm the lower court's order denying Appellant post-conviction relief.

[10] In any case, even if all of the post-conviction evidence was considered, there is no chance of a different outcome. The mitigation case collateral counsel presented during the post-conviction hearing, which was largely cumulative, must also be balanced against the revelation of, and the horrifying facts of Tanzi's murder of another woman prior to killing Janet Acosta. Since the additional evidence was hardly compelling, the balance of beneficial and harmful evidence developed during the evidentiary hearing tilts decidedly against Tanzi.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court by using the Florida Courts E-Portal Filing System which will send a notice of electronic filing to the following: Paul E. Kalil, Assistant CCRC and Scott Gavin, Staff Attorney, Law Office of the Capital Collateral Regional Counsel – South, One East Broward Boulevard, Suite 444, Fort Lauderdale, Florida 33301, **kalilp@ccsr.state.fl.us** and **gavins@ccsr.state.fl.us.**

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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