Filing # 64925476 E-Filed 12/04/2017 03:28:07 PM

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

REPLY BRIEF OF APPELLANT

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 174117

SCOTT GAVIN
Assistant CCRC-South
Florida Bar No. 058651

OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL – SOUTH
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284
COUNSEL FOR APPELLANT

RECEIVED, 12/04/2017 03:28:26 PM, Clerk, Supreme Court

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY 1

REPLY TO ARGUMENT I 1

MR. TANZI'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE SIXTH AND EIGHTH AMENDMENTS IN LIGHT OF *HURST V. FLORIDA* AND *HURST V. STATE*. 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 HARMLESS ERROR ANALYSIS MUST BE PERFORMED ON A CASE-BY-CASE BASIS 1

CONCLUSION AND RELIEF SOUGHT 5

CERTIFICATE OF SERVICE 7

CERTIFICATE OF FONT 7

TABLE OF AUTHORITIES

Cases

Caldwell v. Mississippi, 472 U.S. 320 (1985) 2, 3

Clemons v. Mississippi, 494 U.S. 738 (1990) 3

Davis v. State, 207 So. 3d 142 (Fla. 2016) 4

Hurst v. Florida, 136 S. Ct. 616 (2016)..2

Hurst v. State, 202 So. 3d 40 (Fla. 2016)..1

King v. State, 211 So. 3d 866 (Fla. 2017) 4

Mosley v. State, 209 So. 3d 1248 (Fla. 2016) 1

Perry v. State, 210 So. 3d 630 (Fla. 2016) 3

Sochor v. Florida, 504 U.S. 527 (1992) 3

Truehill v. State, 211 So. 3d 930 (Fla. 2017)..4

ARGUMENT IN REPLY

REPLY TO 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 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.

The State insists that the *Hurst* error was harmless beyond a reasonable doubt in this case because "it is clear that no rational juror would have failed to find all of the aggravators the trial court found in imposing a death sentence in this case." (Answer Brief at p. 6). The State argues that, because several of the aggravating factors were established by Mr. Tanzi's plea of guilty to murder, kidnapping, carjacking and armed robbery, those aggravators have been established beyond a reasonable doubt. However, while the *existence* of these aggravating factors might be "uncontestable" (Answer Brief at p. 6) – a point that Mr. Tanzi does not concede - there is still no indication of what *weight* the jury may have given to these factors. Indeed, the very fact that Mr. Tanzi confessed and pled guilty to the underlying offenses may have led the jury to assign diminished weight to those aggravators.

With regard to the "heinous, atrocious and cruel" and "cold, calculated and premeditated" aggravators, neither the State, the lower court, nor this Court is in a

position to speculate as to the jury's findings of either their existence or the weight to be applied to them. While Mr. Tanzi pled guilty to the underlying felonies used to establish several aggravators, he did not plead guilty to HAC or CCP. More significantly, there is no indication of what weight the jury assigned to these aggravators even if the jury found them to exist. The recommendation rendered by the jury in Mr. Tanzi's case is legally meaningless. "The Sixth Amendment cannot be satisfied by merely treating "an advisory recommendation by the jury as the necessary factfinding." *Hurst v. Florida*, 136 S. Ct. at 622

With regard to Mr. Tanzi's claim that his jury was improperly instructed under *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the State insists that "the jury was not misled as to its role under the law as it existed at the time of Tanzi's trial." (Answer Brief at p. 13). Of course, this argument overlooks the fact that the United States Supreme Court determined "the law as it existed at the time of Tanzi's trial" violates the Sixth Amendment. It necessarily follows that the jury was improperly instructed as to its role because the instructions it was given were patently unconstitutional.

It is axiomatic that a sentencing jury must be correctly instructed as to its responsibility. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985). As *Hurst* makes clear, a properly instructed jury – *at the time of Mr. Tanzi's post-*Ring *trial*, would know that each individual 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). In *Caldwell*, because the jury's sense of responsibility was inaccurately diminished by improper instructions, the Supreme Court held that the jury's **unanimous** verdict imposing a death sentence 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."). In Mr. Tanzi's case, not only were the jurors not properly informed of their responsibility, in violation of *Caldwell*, they were also not told they could exercise mercy by not joining a death recommendation irrespective of their views on the aggravation and mitigation. This significant fact distinguishes Mr. Tanzi's case from the numerous cases cited by the State and lower court where this Court has found *Hurst* error to be harmless in light of unanimous jury recommendations. In relying on these cases, the State and lower court overlook that a harmless error analysis must be performed on a case-by-case basis, and there is no one-size-fits-all analysis. *See Clemons v. Mississippi*, 494 U.S. 738, 753 (1990); *Sochor v. Florida*, 504 U.S. 527, 540 (1992).

The need for individualized consideration is demonstrated by the lower court's reliance on *Davis v. State*, 207 So. 3d 142 (Fla. 2016) for the proposition that "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'." (Answer Brief at p. 3)[1] In *Truehill v. State*, 211 So. 3d 930 (Fla. 2017), on which the lower court relies, the jury was given the same instruction as in *Davis*. *Id*. at 956. Similarly, in *King v. State*, 211 So. 3d 866 (Fla. 2017), also relied on by the lower court and the State (Answer Brief at p. 12), the jury was instructed that "regardless of your findings with respect to aggravating and mitigating circumstances you are never required to recommend a sentence of death." *Id.* at 891. *Mr. Tanzi's jury was given no such instruction*. To the contrary, Mr. Tanzi's jury was only instructed that "You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations." (T. 1819) Other than the unanimous jury recommendation, the factors that this Court relied on to find the *Hurst* error harmless in *Davis*, *Truehill*, and *King* are not present in Mr. Tanzi's case. The Court in those cases found *Hurst*

[1] This Court in *Davis* also relied upon "the egregious facts" of that case. While the facts in Mr. Tanzi's case may be aggravated, "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*.

error to be harmless because the juries in those cases received mercy instructions which Mr. Tanzi's jury did not receive.

Mr. Tanzi's jury returned an advisory recommendation after being improperly instructed that the judge would decide the ultimate sentence. The jury was not instructed that each individual juror was responsible for the sentence imposed, or that any one juror was authorized to foreclose death the imposition of a death sentence with his or her single vote in favor of a life. The jury was not instructed that all of its findings must be unanimous and proven beyond a reasonable doubt. Despite the unanimous vote, there is no indication, other than speculation, that the jury made all of the required findings unanimously. The State cannot prove beyond a reasonable doubt that not one juror, being properly instructed, would have voted for a life sentence, Mr. Tanzi's death sentence must be vacated and a resentencing ordered.

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,

/s/ Paul Kalil

PAUL KALIL
Assistant CCRC-South
Florida Bar No. 0150177

SCOTT GAVIN
Assistant CCRC-South
Florida Bar No. 0058651

CCRC-South
1 East Broward Boulevard, Suite 444
Fort Lauderdale, Florida 33301
Tel. (954) 713-1284
COUNSEL FOR APPELLANT

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 4th day of December, 2017.

/s/ Paul Kalil
PAUL KALIL
Assistant CCRC-South

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.

/s/ Paul Kalil
PAUL KALIL
Assistant CCRC-South