Filing # 59943420 E-Filed 08/04/2017 09:41:41 AM

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC17-931

KENNETH DARCELL QUINCE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, STATE OF FLORIDA
Lower Tribunal No. 80-00048CFAES

REPLY BRIEF OF THE APPELLANT

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RECEIVED, 08/04/2017 09:43:26 AM, Clerk, Supreme Court

The Appellant, Kenneth Darcell Quince ("Quince") relies on his Initial Brief for all purposes, and does not concede nor waive any argument or issues asserted in his Initial Brief of the Appellant. The Initial Brief of the Appellant sufficiently replies to the arguments put forth by the Appellee in the Answer Brief of the Appellee. However, Quince wants to highlight to the Court the following two assertions in the Appellee's Answer Brief.

First, on pages 6 to 7, the Appellee argues that Quince ***always*** possessed the right to have a jury render an advisory recommendation as to what the appropriate sentence should be in his case. The right to a bare majority jury advisory recommendation is glaringly different from the right created by *Hurst v. Florida*, 136 S.Ct. 616 (U.S. 2016) and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). In *Hurst v. Florida*, the Supreme Court noted that former Fla. Stat. § 921.141(3) required the trial court *alone* to find "'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" 136 S. Ct. at 622 (emphasis in original). It furthermore specifically rejected the State's argument that the jury's advisory recommendation could serve as the required factual finding. *Id.* This Court specifically laid out the newly created rights when it held 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*, 202 So. 3d at 57-58. These specific sentencing rights have changed and could never exist at the time of Quince's trial. The Appellee's premise is erroneous and that is why the Legislature had to re-write Florida's sentencing laws in accordance with *Hurst v. Florida* and *Hurst v. State*. Therefore, Quince could never waive a right that was never afforded to him, at no fault to him. Quince's sentencing was unconstitutional.

Second, the Appellee on page 10 of the Answer Brief highlighted that "[m]ore importantly, although Appellant argues extensively regarding his alleged intellectual disability, **during the colloquy, Appellant advised the trial court that he was not intellectually disabled at the time, or at any other time in the past**." (emphasis in original). There is no citation to the record on appeal as to this assertion that Quince advised the trial court he was not intellectually disabled and never was. There is no evidentiary support for the Appellee's statement that Quince advised the Court he was not intellectually disabled or mentally retarded. *See* Appellant's Initial Brief at 15-17; S1/8-17. There were no specific questions by the trial court regarding Quince's intellectual capabilities with regard to mental retardation or intellectual disability, despite evidence of deficits[1]. *See* Appellant's Initial Brief at p.2-4; 17-19;

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[1] Dr. Barnard confirmed his finding that "[c]linically [Quince] is judged to be of dull

S1/8-17.

The lower court's analysis is not in accordance with federal and state law and must be reversed. Quince requests that this Court reverse the lower court's rulings, vacate his sentence, and grant him a new penalty phase.

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normal level of intelligence." R4/128; R1/54. Dr. Barnard also testified that based on defense expert Dr. Ann McMillan's data, "he would say [Quince] is borderline level intelligence." R4/128; R1/54. Dr. Rossario clearly wrote that Quince's "intelligence can be described as slightly below average." R1/54. Dr. McMillan opined that Quince suffered from borderline mental retardation, severe specific learning disability and neurological impairment. R4/144; R1/57. Dr. McMillan further opined that "Quince has permanent learning and judgment disability and limited ability to perceive the consequences of his actions." R4/144; R1/57. Dr. McMillan testified that Quince had a "low intelligence score, which is functioning on an eleven-year-old basis." R4/145. Dr. Stern testified that Quince "is not a bright gentleman" and that Quince "is functioning at a borderline level of intellectual capability." R4/158; R1/58.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing document was generated in Times New Roman fourteen-point font.

s/ Raheela Ahmed
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the PDF copy of the foregoing document has been transmitted to this Court through the Florida Courts E-Filing Portal on this 4th day of August, 2017.

I HEREBY CERTIFY that a copy of the foregoing has been served through the Florida Courts E-Filing Portal to **Tayo Popoola**, Assistant Attorney General, Office of the Attorney General, at tayo.popoola@myfloridalegal.com and CapApp@myfloridalegal.com on this 4th day of August, 2017.

I HEREBY CERTIFY that a copy of the foregoing was mailed to **Kenneth Quince**, Union Correctional Institution, P.O. Box 1000, Raiford, Florida 32083, on this 4th day of August, 2017.

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