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IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1032
L.T. CASE NO.

ERIESE ALPHONSO TISDALE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee,

On Appeal from the Circuit Court of the
Nineteenth Judicial Circuit, St. Lucie County, Florida
Hon. , Circuit Court Judge

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant was the Defendant, and Appellee was the prosecution in the criminal division of the Circuit Court for the Nineteenth Judicial Circuit in and for St. Lucie County, Florida. In this brief, the Appellant will also referred to by name or as Defendant. Appellee will additionally referred to as the State.

The following symbols will be used:

"R ___" equals record on appeal, where the blank is the page number or numbers. The record is comprised of seven unnumbered volumes. The record is paginated consecutively from 1 - 2076.

"T ___" equals transcript on appeal, where the blank is the page number or numbers. The original trial transcripts are included in 47 volumes, numbered 1 - 47. The trial transcripts are paginated consecutively from 1 - 5766.

STATEMENT OF CASE AND FACTS

Arrest, Indictment and Pre-trial Motions

Tisdale was indicted for the February 28, 2013 murder, and related charges, of St. Lucie County Sheriff's Office (SLCSO) Sgt. Gary Morales as follows:

1. First degree murder of Gary Morales, who was then a law enforcement officer then engaged in the lawful performance of his duties, and that Defendant did actually possess and discharge a firearm in violation of Sections782.04(1)(a)(1),

775.0823, 782.065 and 775.087, Florida Statutes.

2. Aggravated assault on Deputy Clarence Bennett, who was then a law enforcement officer engaged in the lawful performance of his duties, and that Defendant carried, displayed, used, threatened to use, or actually possessed a firearm in violation of Sections 784.021, 784.07, 775.0823 and 775.087, Florida Statutes.

3. Possession of a firearm or ammunition by a convicted felon in violation of Section 790.23, Florida Statutes.

4. Fleeing or eluding - lights and siren in violation of Section 316.1935(2), Florida Statutes. (R 41-42).

The defense filed an array of pre-trial motions attacking the constitutionality of the death penalty and death penalty procedures.[1] The defense raised *Ring* issues[2] pre-trial via five motions and one notice (R 322-47; 252-95, 390-91; 398-99; 318-21; 406-12), which were denied by written order on May 20, 2015 (R 505-10).

Trial/Guilt Phase

Sgt. Gary Morales radioed dispatch that he was performing a traffic stop at

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[1]Such motions included constitutional challenges to Sections 921.141 and 921.141(5)(a) (R 308-11); 921.141(5)(c) (R 190-94); 921.141 and 921.141(5)(d) (R 195-98); 921.141(5)(e) (R 252-95); 921.141 and 921.141(5)(h) (R 199-208); and 921.141(5)(i) (R 209-51).

[2]*Ring v. Arizona*, 536 U.S. 584 (2002).

9:28 A.M. on February 28, 2013. As Dep. Clarence Bennett was driving to back up the stop, he heard Sgt. Morales tell dispatch, "[H]e's taking off on me."[3] (T 3767). Dep. Bennett turned on his emergency lights and siren. (T 3757-58, 3772-73, 3788).

Dep. Bennett heard 2 - 3 gunshots at the corner of King Orange and Naylor. Dep. Bennett turned the corner and saw a black man with dreadlocks run up to Sgt. Morales' car with a gun in the hand of an extended arm. The driver's door to Sgt. Morales car was open. The man shot into Sgt. Morales' car five or six times in rapid succession. He identified Tisdale as the shooter. (T 3769-72, 3785-88, 3794).

Tisdale ran from Sgt. Morales' patrol car to the red car. Dep. Bennett said that Tisdale started to point a gun at him, and that he felt threatened, but that Tisdale did not actually shoot at him. (T 3773-74, 1386-87, 3799-3800).

Dep. Bennett slammed on his brakes and jumped out. He fired several rounds at Tisdale, but Tisdale was able to get inside the red car and flee. Dep. Bennett shouted "shots fired" into the radio. At that same time, the subject was fleeing in the red car. (T 3774-77).

Dep. Bennett identified his Glock 21, .45 caliber semi-automatic pistol, SE 24, and confirmed that he used super bonded bullets issued for this weapon by the

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[3]The 911 dispatch recording was introduced into evidence as State Exhibit 12. The recording was played for the jury. (T 3860-61).

SLCSO. (T 3788-90).

After finishing yard work and loading the pickup, Jerry Pilarsky and Albert Krajniak were about to leave. (T 3680-81). They saw a red car coming quickly down the street and suddenly stop. (T 3685). The patrol car was behind it with emergency lights on, but no siren. The patrol car slid past the red car. Pilarsky said the driver of the patrol car was trying to put it in reverse. (T 3686, 3716-17).

The red car backed up to where the pickup truck was parked on the side of the road. (T 3731). Pilarsky and Krajniak were standing next to the pickup truck just several feet from the red car. Krajniak described the driver of the red car as a black man with dreadlocks. (T 3721-22). The driver of the red car jumped out with a gun in his hand and shot at the police car. (T 3687-89). As the shooter was running toward the patrol car, the deputy kicked open his driver's door. The last shot was fired from almost inside the patrol car. (T 3690, 3700, 3617-20, 3732-33).

Pilarsky identified the driver as Tisdale. He saw the second patrol car arrive. At that point, Tisdale ran back to the red car and drove off. (T 3687-94). Krajniak said Tisdale was also pointing the gun down the street as he ran, but did not fire as he returned to the red car. At this point, both men ran for cover. Krajniak heard two more shots from another deputy who was shooting at Tisdale and then at the fleeing red car. (T 3723-26, 3733, 3738).

Two other civilians, Casey Fedynik and Michelle Eid, corroborated that a black male with dreadlocks was driving a red car faster than the speed limit and being pursued by a patrol car with its emergency lights on. Fedynik identified a picture of the red car. (T 3634-35, 3642, 3654, 3658-60). Neither Fedynik nor Eid identified the driver of the red car. Eid saw the red car turn sharply onto Naylor, nearly hitting a stop sign. (T 3659). Eid said the patrol car slid past the red car on loose gravel or sand. (T3686-87). Both Fedynik and Eid heard gunshots. (T 3638-39). Eid saw the second deputy fire his weapon as he got out of the car. (T 3660-62).

Dep. Nathaniel Stubley heard Bennett yell "shots fired" on the radio. He saw a red car proceeding at a high rate of speed out of the area where the stop had been attempted. Dep. Stubley turned on his overhead lights and siren and followed the red car as it turned east on Glenview. The red car got to U.S. 1 and did a full turnaround. (T 3812-15).

Dep. Stubley got a close look at the driver of the red car as it drove past. Dep. Stubley had his gun drawn, but did not shoot at the red car for fear of hitting civilians in the background. He identified Tisdale as the driver, and sole occupant, of the red car. At that point, Dep. Stubley got back into his patrol car and chased the red car through various side streets in the Silver Lake Subdivision, and even followed the red car through a grassy field. (T 3815-22).

Dep. Mark Sarvis was already nearby when he heard that shots had been fired. Dep. Sarvis saw a red car and followed it onto at least six streets within the Silver Lake Subdivision and also across a grassy field. At all times, he was only 1 - 2 car links behind the red car. He rammed the red car three times. The last time he completed a PIT maneuver on Oleander Avenue which caused the red car to spin out. (T 3821-22, 3842-44). He identified Tisdale as the driver of the red car. (T 3821-22, 3841-44).

Wade Tindall, a St. Lucie County Fire District paramedic, responded to Sgt. Morales' car. There were no signs of life. (T 3872-78).

Master Deputy Kevin Lindstadt heard the pursuit call and arrived at Sgt. Morales' car before Fire Rescue. He removed Sgt. Morales' weapon from the holster. (T 3884-87).

Sgt. Grant King was already at Lawnwood Regional Medical Center when Sgt. Morales' body arrived. He collected articles and turned them over to the crime scene unit. He identified a bullet, SE 29, which was removed from the victim's right shoulder. The victim's gun belt was placed into evidence as SE 31, and his ballistic vest panel was placed into evidence as SE 34. (T 3909-24).

Det. Richard Young, with the crime scene unit, described two bullet holes on the red car. He found a still loaded pistol (SE 49) on the right floor board and a nylon

gun holster in the glove compartment. He processed the gun for DNA. DNA swabs were admitted into evidence as SE 52. The 10-round magazine from the gun which was admitted as SE 51. There were two cartridges remaining in the magazine and one in the chamber, which were admitted as SE 50. (T 3927-58).

Recovered from the area where Dep. Bennett fired at Tisdale and the red car were five Speer .45 caliber gold dot shell casings. (SE 85-89, T 4012-20). Firearms examiner Mark Chapman test fired Dep. Bennett's pistol, SE 24, and found that all five of these shell casings were fired from Dep. Bennet's pistol. (T 4085-93).

Seven .45 caliber shell casings were recovered from the area where Tisdale had exited the red car and ran to Sgt. Morales' car. (SE 65-71, T 4033-36, 4076). Chapman test fired the gun recovered from the red car, SE 49. He found that all seven shell casings had been fired from Tisdale's pistol. (T 4098-99).

Five projectiles were recovered from Sgt. Morales' patrol car or body: one from the victim's bullet proof vest, SE 62; one from the passenger door, SE 80; one from the heater coil, SE 83; bullet fragment from the victim's arm during the autopsy, SE 90; one recovered from the victim's shoulder which was recovered at the hospital, SE 29. Two projectiles were not recovered. (T 4064-77).

Chapman determined that the following four projectiles had been fired from Tisdale's pistol: the one from the bullet proof vest, SE 62; the one from the passenger

door, SE 80; the one from the heater coil, SE 83; and the one recovered from the victim's shoulder, SE 29. (T 4103-09). He could only determine "class agreement" as to the bullet fragment, SE 90, which was removed from the victim's arm. While a positive identification could not be made, the bullet fragment showed core separation which would not be typical for a bonded bullet like the ones used by Dep. Bennett. (T 4105-06). Thus, the bullet fragment could not have been fired from Dep. Bennett's gun.

Jessica Maldonado was Defendant's girlfriend. They were living together in a quadplex on Mura Drive. She owned a 1997 red Toyota Corolla. She identified the vehicle as being the one involved in this incident. (T 3985-98). He was to go to the corner store for her, because she was eight months pregnant with Tisdale's baby. (T 3989, 3995).

Maldonado knew that Tisdale kept a gun in the glove compartment. She was not able to provide much of a description of the gun which was kept in the glove compartment and could not positively identify the pistol, SE 49, as the weapon she had previously seen. She said the magazine was kept in the glove compartment next to the pistol. (T 3990-92).

Julie Casals was a forensic biologist at the Indian River Crime Laboratory. (T 4123-24). She compared swabbings taken from Tisdale's weapon, SE 52, to DNA

samples obtained from Tisdale, SE 10. She made a positive identification that the DNA swabbings from the weapon, SE 52, matched Tisdale's DNA. She explained that the statistical probability of someone else having this same DNA are about one in 15 quintillion 240 quadrillion. (T 4135-38).

Dr. Roger Mittleman, the District 19 medical examiner found three gunshot wounds: (T 4142-44, 4148-59).

A. Head shot - entered left side of head and exited through the right cheek area.

B. Neck shot - entered left front of neck and came to rest on right side. Penetrated right carotoid artery and right jugular vein.

C. Left arm.

Dr. Mittleman was unable to determine which of the projectiles, A, B or C, was the first, second or third shot. (T 4147, 4154).

Dr. Mittleman opined that the victim's heart was still beating at the time of gunshot A. (T 4168). Gunshot A was fatal. If gunshot A came first, the victim would not have been able to feel anything after that. (T 4171).

Dr. Mittleman opined that the victim was still alive at the time of gunshot B, and that the victim would still have been able to move despite this injury. (T 4165). However, loss of consciousness would have occurred quickly - in less than a minute.

Upon loss of consciousness, sensation and pain would be dulled. (T 4171-73).

Dr. Mittleman noted that projectile C shattered the bone in the left arm. As a result of this injury, the victim would not have been able to use the arm, but this injury was not fatal. (T 4161).

Dr. Mittleman stated that all three gunshots were oriented from the left side to the right side of the victim's body. There was a slightly downward angle as to each shot. The cause of death was multiple gunshots. (T 4169-70).

Sgt. Kyle King had been employed by the Indian River County Sheriff's office for the past 26 years. His experience has included being the supervisor of the forensics services unit and, specifically, performing shooting crime scene reconstructions. (T 4203-12). Based upon his analysis, King agreed the evidence was consistent with the hypothetical proposed by the prosecutor: that Tisdale was armed with a .45 caliber Glock approaching the patrol car from the rear; that one of the earlier shots hits the rear quarter panel; that Tisdale moves closer to the open door and shoots into the patrol car hitting the computer, the passenger door, the victim's left arm, the victim's breast plate, the victim's throat and the victim's head. (T 4270-74).

The trial court read stipulations to the jury entered into by the Defendant and the State. First, the parties stipulated that the Defendant's driver license was

suspended as of February 28, 2013. Second, the parties stipulated that Defendant was a convicted felon as of February 28, 2013, with no restoration of civil rights. The State rested. (T 4277-78).

The defense called Bertha Gay Huskey. At the time of the incident, she lived on Naylor and was in her living room looking out the window. She said the patrol car was facing north, and the red car was facing south "like driver window-to-window".[4] (T 4299-4300).

The defense moved for admission of SE 21, which was a judgment of sentence and convictions for Tisdale for possession of cocaine and hydromorphone. Although this was done in the defense case-in-chief, the State stipulated to retroactive admission of the document as SE 21. (T 4365-67).

The defense rested. (T 4445).

The State offered no rebuttal testimony or evidence. (T 4445).

The Defendant was found guilty on October 1, 2015, by the jury "as charged" on all counts. As to Count 1, the jury made additional findings that the Defendant personally possessed a firearm, and that the Defendant discharged that firearm causing the victim's death. The jury made special findings, as to Counts 2 and 3, that

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[4]Huskey was the only witness to describe the cars as going in opposite directions.

the Defendant actually possessed a firearm. (R 1225-27, T 4734-40).

Trial/Penalty Phase

The defense orally renewed the constitutional objections just before evidence presentation began in the penalty phase. The renewed motions were overruled orally. Tisdale waived the statutory mitigating factor of no significant criminal history. (T 4966, 4997).

Victim impact statements which were read into the record by St. Lucie County Sheriff Ken Mascara (R 1335-42, T 5008-14), Jeff Whelan (R 1332-34, T 5017-27), the victim's mother, Candy Morales (R 1330-31, T 5025-27), and the victim's wife, Holly Morales (R 1327-29, T 5028-31). In addition, the State admitted a photograph of Sgt. Morales as SE 128 (R 1343-44, T 5014-15).

The State rested.

The defense called 11 witnesses to testify during the penalty phase, introduced multiple photographs of Tisdale at various ages, introduced documents showing that he graduated from high school, and that he received an AA.

The following witnesses testified:

1. Dr. James Garbarino was an expert in child and adolescent development. (T 5043). He opined that Tisdale's development was adversely affected by racism and the southern culture of honor. He discussed how adversity affected Tisdale's

childhood development, including corporal punishment, feelings of abandonment, not having an effective father in the home, having a household member go to prison, having domestic violence in the home, and having abusive behavior by adults. (T 5061-66). He opined that Tisdale fell in the top 2% of adversity, but pointed out that he did not have a childhood history of antisocial aggressive behavior and was able to graduate high school. (T 5101). Tisdale was adversely affected by incidents in which a friend, Googie, was killed by police during the course of a domestic situation (T 5138); and being repeatedly stopped by police.

2. Vanessa Tyree is Tisdale's aunt. She was the first in the family to graduate from college. She stated that Tisdale's family is very close. She lived for many years next door to her sister, Noretta, in Jupiter, Florida. (T 5155-56). Vanessa, having known Tisdale well since he was a baby, testified that Tisdale had no disciplinary problems in school (T 5172), and that, when he was a kid, he made everyone laugh. (T 5159-60). She confirmed that Tisdale spent his senior year in high school living in Vanessa's household with her husband, William. Tragically, William died suddenly in December, 2004. Just a week later, Tisdale's cousin, Raijon, who lived next door, was murdered. (T 5161). She confirmed that Tisdale worked multiple jobs and attended church regularly. At one point, she explained, there was a family intervention in 2005, where the family arranged to have Tisdale

Marchman Acted.

3. Holly Beer was Tisdale's seventh grade teacher at Jupiter Middle School. She testified that, despite the passage of time, she distinctly remembered him as a funny, silly kid, who made you laugh.

4. Mary Ann Brown lived in the same Limestone community in Jupiter as Tisdale. Her children were about the same age, and they all played together. She described Tisdale as respectful and very mannerable.

5. Ahmaad Carson was Tisdale's second cousin and about the same age. Ahmaad's father was Raijon, who had been murdered when Ahmaad was 18 years old. He testified about being very close with Tisdale and, in fact, living in the same household for a year. He described several instances of unfair treatment by law enforcement officers. He described another incident when he and Tisdale were robbed while trying to make money selling clothes and sneakers. After the robbery incident, he explained that both of them began to arm themselves. He said that Tisdale never acted aggressively when he was younger (T 5209), and suggested that the numerous negative situations had affected him. (T 5196-17).

6. David Reidy was the proprietor of Sun Cool Energy Co. He confirmed that Tisdale worked for the company for 7 - 8 months, and described him as a "very good employee". Tisdale was hired to perform energy audits and did so, until the

grant money was used up. He described Tisdale as punctual and dependable. He said that Tisdale was a "smart kid" who had good interactions with homeowners, learned quickly and seemed to enjoy the work. (T 5239-40).

7. Alice Hudson was the proprietor of Surface Chemists of Florida. She met and interacted with Tisdale form the time he was a child, because his mother worked for many years cleaning for the company. Tisdale worked for Surface Chemists part-time in high school, and full-time from July, 2012 - January, 2013. Although Hudson did not believe Tisdale had the aptitude for scientific and technical work, she liked him very much and gave a letter of recommendation. (T 5242-49).

8. Ronald McAndrew was a prison and jail consultant who had 22 years of experience with the Florida Department of Corrections (DOC), where he started at the bottom and retired as a prison warden. He noted Tisdale's educational accomplishments, close family contacts, good jail disciplinary record and solid work history. He opined, based upon these considerations, that Tisdale would be a positive contributor in prison; and that Tisdale could live in open population without being a danger to himself or to others. (T 5264-71).

9. Dr. Mark Cunningham, a clinical and forensic psychologist, testified that there was a low likelihood that Tisdale would be involved with serious violence in prison. (T 5329, 5395). He based his forecast upon a statistical analysis of multiple

factors, including age, past behavior, education and continuing contacts with friends and family. (T 5344-59).

10. Noretta Tisdale Jenkins is Tisdale's aunt. She is the sister of Vanessa Tyree and Charmaine Tisdale, Tisdale's mother. She also described the family as close. (T 5415). She stated that Charmaine had been using cocaine during her pregnancy with Tisdale; that Tisdale had been born with tremors and cried a lot (T 5417-18); and she believed that Tisdale had been born addicted to cocaine. (T 5438). She confirmed that her son, Raijon, had been murdered in 2004 at the age of 37. (T 5419). She described a very close relationship between Raijon and Tisdale that had many positive characteristics, even though Raijon was involved with using and selling marijuana. (T 5420). The sudden death of Vanessa's husband, William, followed 10 days later by Raijon's murder, were hard on Tisdale. William had been a positive male influence on Tisdale over many years, but she also noted that William had been an alcoholic and a regular marijuana user. (T 5424-27). Even after William died, and Raijon was murdered, Tisdale completed high school. Before their deaths, Tisdale had been funny and told jokes. (T 5431-34).

11. Charmaine Tisdale described Tisdale's son, Zamir, and the positive interactions between Tisdale and his very young son, who was just 2-1/2 years old at the time of trial. (T 5181-82).

The defense rested.

The trial court read the penalty phase jury instructions to the jury and provided them a written copy. (R 1407-18). The trial court repeatedly referred to an "advisory sentence". The trial court told the jury that "[t]he final decision as to which punishment shall be imposed rests with the judge of this court..." (T 5562-63).

At the conclusion of the penalty proceeding, the jury returned an advisory sentence in favor of death by a vote of 9 - 3. (R 1419, T 5582-86). The jury did not specify what aggravating factors may have been found beyond a reasonable doubt.

SPENCER HEARING

The court conducted a Spencer hearing on November 17, 2015. The defense admitted a summary of school information as DE 27, Palm Beach County school records as DE 28, and an employment history for 2002 - 13, as DE 29. (T 5594-96).

The State submitted into evidence a transcript of Tisdale's statement to police following his arrest as SE 129, and a certified transcript of the hearing previously conducted on the motion to suppress as SE 130. (T 5596-98). The State also called Charmaine Tisdale as a witness. (T 5599).

HURST V. FLORIDA AND CHAPTER 2016-13

On January 12, 2016, the United States Supreme Court held that Florida's death penalty sentencing scheme was unconstitutional. *Hurst v. Florida*, 136 S.Ct.

161 (2016). The trial court continued the final sentencing indefinitely, and invited the parties to submit supplemental memoranda.[5] (R 1866-67).

While Defendant's case was pending for sentencing, the Florida legislature, effective March 7, 2016, substantially amended Florida's death penalty scheme. Among other things, these amendments required that at least 10 jurors must concur in the death recommendation. Under this amended death penalty scheme, the trial court would be required to impose a life sentence if the jury recommends life. Chapter 2016-13, Laws of Florida.

The defense maintained that the legislature's recent amendments were retroactive, and that the new statute did not authorize imposition of the death penalty upon an advisory death sentence of less than 10 jurors. (R 1898-1902).

FINAL SENTENCING

The final sentencing hearing went forward on April 29, 2016. The defense renewed its argument that the jury's 9 - 3 advisory recommendation did not meet the minimum requirement of Chapter 2016-13. (T 5673-95).

The trial court found the existence of two aggravating circumstances: 1) previously convicted of a felony involving the use or threat of violence to the person,

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[5]The defense raised *Ring* issues in the initial defense sentencing memorandum. (R 1815-44). The defense addressed the effects of *Hurst v. Florida* in a supplement. (R 1882-90).

§921.141(5)(b), and 2) victim of capital felony was law enforcement officer engaged in lawful performance of his duties, §921.141(5)(j). The trial court assigned great weight to each of these aggravating factors. (R 1976-78).

The trial court found the existence of 40 mitigating circumstances. Although most were given little weight, eight were assigned moderate weight: father's absence, Raijon's murder, Tisdale is a devoted, loving son who graduated from high school, earned an AA degree, had a good employment record, no juvenile history, and no violent criminal history before February 28, 2013. (R 1978-1992).

The trial court imposed a sentence of death on Count 1 and a 15-year prison sentence on Count 2 to run consecutive to Count 1. A 15-year prison term was imposed on Count 3 to run consecutive to Counts 1 and 2. A 5-year prison term was imposed on Count 4 to run consecutive to Counts 1, 2 and 3. (R 1992-93, T 5746-47) Credit for 1,156 days time served in county jail was allowed against each count.

The trial court entered a written amended sentencing order on May 9, 2016, which found that death was still an option, despite the defense claims that *Hurst v. Florida, Hurst*, and Chapter 2016-13 required a life sentence. (R 1967-93).

This timely appeal follows. (R 1994).

SUMMARY OF ARGUMENT

POINT 1

A. and B.

Hurst v. Florida was decided three days before the trial court was to pronounce sentence, but after the jury had returned an advisory sentence recommending death by a vote of 9 - 3. The trial court delayed the final sentencing hearing until April 29, 2016. Meanwhile, the legislature enacted Chapter 2016-13 which became effective March 7, 2016. These amendments are procedural and, therefore, retroactive to his case. The trial court rejected Tisdale's argument that the 9 - 3 advisory "recommendation" was converted into a life sentence under the terms of Chapter 2016-13.

C.

Under the express terms of Chapter 2016-13, Tisdale was entitled to a sentence of life without the possibility of parole. Chapter 2016-13 required a minimum jury determination of 10 - 2. Any ambiguity in Chapter 2016-13 must be resolved in favor of Tisdale in accordance with the rule of lenity, §775.021(1), Fla. Stat. (2015), and by due process considerations. The rule of lenity requires that he receive the most beneficial interpretation of Chapter 2016-13, to-wit: that Chapter 2016-13 is a retroactive procedural statute, applies to Tisdale's case, raises the minimum number

of jurors voting for death to 10, mandates a life sentence if less than 10 jurors vote for death, and precludes a jury override.

Perry v. State, 210 So.3d 630 (Fla. 2016),held that Chapter 2016-13 is to be applied retroactively. The amendments to the death penalty sentencing procedure transformed Tisdale's 9 - 3 "recommendation" in favor in death into a 9 - 3 "determination" in favor of life. There being no exception to the retroactivity of Chapter 2016-13, Tidale's 9 - 3 jury vote constitutes a partial jury acquittal.

D.

Double jeopardy principles in the State and federal Constitutions prohibit a second proceeding, because the jury returned an acquittal on the enhancing element. The double jeopardy bar would prohibit a new penalty phase under either the 10 - 2 rule in Chapter 2016-13, or the unanimous rule in Chapter 2017-1.

E.

The trial court erred in failing to apply Chapter 2016-13 to Tisdale's jury determination of life. The trial court's "carve out" of a special retroactivity exception was an error of law. This "carve out" was an arbitrary and capricious application of Chapter 2016-13 in violation of the Eighth Amendment, equal protection and due process.

The "carve out" of a special retroactivity exception violates Article I, Section

17, of the Florida Constitution, which specifies that "[a] change in a method of execution may be applied retroactively". Article I, Section 17, has no provision, or authority, for "partial" retroactivity or for a judicial carve out for a special retroactivity exception. The method of execution, as defined by Chapter 2016-13, required a minimum jury determination of 10 - 2.

POINT 2

If it is determined that Chapter 2016-13 has a special retroactivity exception for cases which had already been submitted to a jury, but not yet sentenced, then there would be no death penalty procedure in place for Tisdale's case. In this situation, Tisdale maintains that he would be eligible for the life sentence without the possibility of parole provided by Section 775.082(2). First, he is a person "previously sentenced to death for a capital felony" and, second, the "method of execution" would have been declared unconstitutional.

Hurst v. Florida declared Florida's death penalty sentencing scheme unconstitutional, under the Sixth Amendment, for failing to have juries determine the existence of specific aggravators and to make specific recommendation after balancing the aggravating factors and mitigating circumstances. The "carve out" which might preclude Chapter 2016-13 from being applicable to Tisdale's case means that there would be no death penalty procedure available for his unique situation.

Tisdale contends that the judicial concoction of a special retroactivity exception violates due process, equal protection and the Eighth Amendment, as well as Article I, Sections 9, 16, 17 and 22, of the Florida Constitution. Tisdale contends that any attempt to retry the penalty phase would unconstitutionally place him twice in jeopardy and run afoul of due process considerations. Thus, the express terms of Section 775.082(2) requires that Tisdale be sentenced to life without the possibility of parole.

POINT 3

If arguments made in Points 1 and 2, *supra*, are rejected, then Tisdale contends that he is entitled to a new penalty procedure under *Hurst v. Florida* and *Hurst v. State*, 202 So.2d 40 (Fla. 2016) (*Hurst*), *cert. denied*, 137 S.Ct. 2161 (2017). Tisdale's jury was not instructed in accordance with the requirements of *Hurst v. Florida* and *Hurst*. The defense preserved for appellate review these errors. The jury was told their recommendation was "advisory". The jury was not instructed how to weigh aggravating factors and mitigating circumstances. Still, the jury rendered a 9 - 3 recommendation in favor of death.

The Florida Supreme Court has held that *Hurst* error is applicable to all cases which became final after *Ring* issued. Thus, *Hurst v. Florida* and *Hurst* both apply to Tisdale's case. The record demonstrates extensive evidence of mitigation. This

court has held that a jury vote to recommend death by 9 - 3 is not harmless error.

STANDARDS OF REVIEW

POINTS 1, 2 AND 3

Questions of statutory interpretation are reviewed *de novo*. *State v. Chubbuck*, 141 So.3d 1163, 1168 (Fla. 2014); *Heart of Adoptions, Inc. v. J.A.*, 963 So.2d 189, 194 (Fla. 2007).

Pure questions of law are reviewed *de novo*. *Bryant v. State*, 148 So.3d 1251, 1254 (Fla. 2014); *Jackson v. State*, 64 So.3d 90, 93 (Fla. 2011).

Due process claims are reviewed *de novo*. *State v. Florida*, 894 So.2d 941, 945 (Fla. 2005); *Trotter v. State*, 825 So.2d 362, 365 (Fla. 2002).

Double jeopardy claims are reviewed *de novo*. *State v. Florida* at 945; *Trotter v. State* at 365.

ARGUMENT

POINT 1

THE STATUTORY AMENDMENTS TO FLORIDA SECTIONS 775.082(1)(a), 782.04(1)(b) AND 921.141, EFFECTIVE BEFORE DEFENDANT'S FINAL SENTENCING, APPLY RETROACTIVELY TO REQUIRE A LIFE SENTENCE

A.

INTRODUCTION

The jury herein voted 9 - 3 in favor of death. After that, the United States Supreme Court issued *Hurst v. Florida* on January 12, 2016, which caused the trial court to delay the final sentencing hearing until April 29, 2016. Effective March 7, 2016, the legislature enacted Chapter 2016-13, §§ 1, 2 and 3, Laws of Florida, which significantly amended the death penalty sentencing procedures contained in §§ 775.082(1), 782.04(1)(b) and 921.141, Florida Statutes (2016).

The trial court requested the defense and prosecution to submit memoranda addressing "[w]hether under the facts of this case [the trial court] has discretion pursuant to the amended statute to impose a sentence of death and/or to convene a new jury to determine a second penalty phase". (R 1893-94). The prosecution maintained that the death penalty was still available, despite the enactment of Chapter 2016-13. The defense maintained that the recent amendments applied, and that they

did not authorize the imposition of the death penalty upon a "determination" of less than 10 jurors. As the jury recommendation in this case was 9 - 3, the defense argued that a life sentence was mandated. (R 1895, 1898-1902).

B.

THE AMENDMENTS TO SECTIONS 775.082(1)(a), 782.04(1)(b) AND 921.141 ARE PROCEDURAL

In *Hurst v. Florida*, the United States Supreme Court extended the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), to the Florida death penalty sentencing scheme; and held that aggravating circumstances were an element to be determined by a jury as required by the Sixth Amendment. The Florida legislature promptly responded by enacting amendments to Sections 775.082(1)(a), 782.04(1)(b) and 921.141. By its own terms, these amendments to Florida's death sentencing scheme were procedural.

Section 775.082(1)(a) was amended to require a jury "determination" instead of the "findings of the court" that were previously specified; and that the determination was to be made "[a]ccording to the procedure set forth in s. 921.141":

> [A] person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence <u>according to the procedure set forth in s. 921.141</u> results in a determination that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.

Ch. 2016-13, Section 1 (emphasis supplied).

The description of Section 921.141 as a "procedure" is echoed in the amendments to Section 782.04(1)(b):

> In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment...

Ch. 2016-13, Section 2 (emphasis supplied).

Section 921.141 was amended to require a jury determination of the existence of any aggravating factor, and that any such aggravating factor must be found unanimously by the jury. In the event that at least one aggravating factor is unanimously found to exist beyond a reasonable doubt, then the defendant would be eligible for a sentence of death. However, the amendments go on to require that the jury weigh aggravating factors and mitigating circumstances and return a sentencing recommendation. The amendments require that any such recommendation must be agreed to by at least 10 jurors. A death recommendation by less than 10 jurors must result in a sentence of life without the possibility of parole:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.
>
> ***
>
> (c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.
>
> (3) IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH -

(a) If the jury has recommended a sentence of:
1. Life imprisonment without the possibility of parole, the court shall impose the recommended sentence.
2. Death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury.

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Ch. 2016-13, Section 3 (emphasis supplied).

The Fifth District determined that the amendments to Sections 782.04 and 921.141 were procedural in nature and applicable to pending prosecutions. *State v. Perry*, 192 So.3d 70, 75 (Fla. 5th DCA 2016) (decided March 16, 2016). On certiorari review, *Perry v. State*, 210 So.3d 630 (Fla. 2016) (decided October 14, 2016), the Florida Supreme Court agreed with the Fifth District's underlying rationale that Chapter 2016-13 was procedural in nature, but found that the act was unconstitutional to the extent that it did not require a unanimous jury recommendation. *Id* at 640. *See Hurst*.

Based upon the express terms of Chapter 2016-13, the amendments to Sections 775.082(1)(a), 782.04(1)(b) and 921.141(1) were procedural in nature and apply retroactively to cases arising before its March 7, 2016 effective date. This Court has reversed dozens of cases based on *Hurst* error and remanded them for new penalty proceedings. Those new penalty proceedings will, presumably, be conducted in

accordance with the procedures set forth in Section 921.141 which were not in existence at the time of those underlying crimes.[6]

C.

CHAPTER 2016-13 REQUIRED THAT TISDALE RECEIVE A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE

Tisdale's case was pending for sentencing when Chapter 2016-13 became effective on March 7, 2016. The defense argued, and preserved for review, the claim that Chapter 2016-13 was applicable retroactively and required a sentence of life without the possibility of parole. (R 1892-1902). The trial court erred by failing to apply Chapter 2016-13.

As amended by Chapter 2016-13, Section 921.141(2)(c) specified that a minimum of 10 jurors must vote in order for there to be a recommendation of death. "If fewer than 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole", Section 921.141(3)(a)(1) requires that the trial

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[6]The Florida Supreme Court upheld all parts of Ch. 2016-13 except the non-unanimous jury recommendation of death. *Perry v. State*, *supra*; *Hurst.* The Florida legislature subsequently enacted Chapter 2017-1, Laws of Florida, which requires unanimous jury recommendation of death. §921.141(1), Fla. Stat. (2017). Given that Chapter 2017-1 was enacted after *Perry v. State* was decided, it should be assumed that the Legislature was aware that Chapter 2016-13 was being applied retroactively, and that the Legislature concurred in that decision.

court impose the recommended life sentence.

At the time of Defendant's final sentencing hearing, the amendments to Sections 775.082(1)(a), 782.04(1)(b) and 921.141 were the law applicable to Defendant's case. The applicable law required that Defendant receive a life sentence without the possibility of parole, because fewer than 10 jurors had voted to recommend death. Even if there is ambiguity whether Chapter 2016-13 should apply to a capital case awaiting a final sentencing, the statutory rule of lenity, contained in Section 775.021(1), Florida Statutes (2015), requires that the interpretation most beneficial to the Defendant be employed.[7] The rule of lenity originates from, and is required by due process under the State and federal Constitutions. Art. I, §9, Fla. Const.; Amend. V and XIV, U.S. Const. *See Ladner v. United States*, 358 U.S. 169, 177-78 (1958) ("This policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such

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[7]Styled as a "rule of construction", §775.021(1) provides as follows: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Florida's rule of lenity has been described as "[a] fundamental rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed. We have held that nothing that is not clearly and intelligently described in [a penal statute's] very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms." *Palmer v. State*, 438 So.2d 1, 3 (Fla. 1983) (quotation marks and citations omitted).

interpretation can be based on no more than a guess as to what congress intended."); *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (Lenity applies "[n]ot only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose."). Whether Chapter 2016-13 requires that Tisdale receive a life sentence is an issue of statutory interpretation for which the standard of review is *de novo*. *State v. Chubbuck*, 141 So.3d 1163, 1168 (Fla. 2014).

The most beneficial interpretation for Tisdale of Chapter 2016-13 is that it applies retroactively to his case which was then pending for sentencing. Most significantly, Chapter 2016-13 benefitted Tisdale by raising the minimum number of jurors voting for death to 10, from 7; mandating a life sentence if less than 10 jurors voted for death; and precluding a jury override. Similar retroactive procedural changes were approved when Florida, in 1972, enacted new death penalty procedures.[8] *Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977) ("The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime."). Compare *Miller v. Florida*, 482 U.S. 423, 435 (1987) (Retrospective application of revised guidelines held to be *ex post facto* because they "[d]irectly and adversely affect[ed] the sentence petitioner receive[d]").

[8]Ch. 1972-724, Laws of Florida.

D.

DOUBLE JEOPARDY PRECLUDES A NEW PENALTY PROCEEDING

The legislature chose to include no clause in Chapter 2016-13 to exclude any case, such as Tisdale's, which had already been submitted to a jury, and was pending for sentencing at the time that the amendments became effective. *See Brown v. State*, 358 So.2d 16, 20 (Fla. 1978) ("When the subject statute in no way suggests a saving construction, we will not abandon judicial restraint and effectively rewrite the enactment."). Consequently, the amendments to the death penalty sentencing procedure transformed Tisdale's 9 - 3 "recommendation" in favor of death into a 9 - 3 "determination" in favor of life.

The enactment of Chapter 2016-13 may have been a reaction to *Hurst v. Florida.*[9] The essential holding of *Hurst v. Florida* was that eligibility for a death penalty required additional jury findings which constitute an element of the offense, since such findings are necessary to raise the maximum penalty from life without the possibility of parole to death. *Hurst v. Florida* declared Florida's death penalty sentencing scheme unconstitutional to the extent that juries do not make the findings

[9]"On March 7, 2016, the Florida Legislature, in response to *Hurst v. Florida*, amended Florida's capital sentencing scheme...*See* Ch. 2016-13, Fla. Laws (2016)." *Perry v. State*, 210 So.3d at 634.

necessary to enhance the penalty to death. *See Alleyne v. United States*, 133 S.Ct. 2151, 2162 ("[W]hen a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."). This double jeopardy issue is reviewed *de novo*. *State v. Florida*, 894 So.2d 941, 945 (Fla. 2005); *Trotter v. State*, 825 So.2d 362, 365 (Fla. 2002).

Tisdale specifically argued to the trial court that *Hurst v. Florida* was applicable (R 1883); that the enhancements necessary to impose the death penalty constitute an element of the offense (R 1884-87); and that the jury had recommended a sentence of life in accordance with Chapter 2016-13 (R 1900-01). The State's failure to prove the essential element, absent which death cannot be imposed, constitutes a partial jury acquittal, or, alternatively, a verdict for a lesser included offense. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

The ordinary remedy for *Hurst* error has been a new penalty phase.[10] Tisdale's

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[10]The *Hurst* remedy is subject to harmless error analysis. *Hurst*, 202 So.3d at 67. There would be no remedy where a penalty phase jury was waived, *Mullens v. State*, 197 So.3d 16, 40 (Fla. 2016), *cert. denied*, 137 S.Ct. 672 (2017), or the

case is materially different from other cases, because Chapter 2016-13 was applicable to his case before sentencing. The failure of the State to secure a recommendation of death from at least 10 jurors constitutes the equivalent of a not guilty on that element. The "acquittal" on the death determination precludes a new penalty phase proceeding.[11]

The United States Supreme Court addressed a similar jury finding of life in a capital sentencing proceeding in *Bullington v. Missouri*, 451 U.S. 430, 441-442 (1981). *Bullington* determined that a second death penalty proceeding would violate double jeopardy where the initial jury returned a non-unanimous recommendation, which constituted a life sentence under the Missouri death penalty sentencing scheme:

> A defendant may not be retried if he obtains a reversal of his conviction on the ground that the evidence was insufficient to convict.

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penalty phase jury unanimously recommended death. *Davis v. State*, 207 So.3d 142 (Fla. 2016), *cert. denied*, 137 S.Ct. 2218 (2017). Further, the Florida Supreme Court has limited *Hurst* relief to cases that became final after *Ring* was decided. *Mosley v. State*, 209 So.3d 1248 (Fla. 2016); *Asay v. State*, 210 So.3d 1, 22 (Fla. 2016), *cert. denied*, 138 S.Ct. 41 (2017).

[11]That Ch. 2016-13 has no provision to specifically exclude those cases which might have already been submitted to a jury, but not yet sentenced, suggests that the legislature intended this legislation to apply to all cases not already sentenced. Further, the Legislature had an opportunity to fashion such an exclusion when enacting Chapter 2017-1, but chose not to do so.

Bullington at 441-42.

Bullington quoted *Burks v. United States*, 437 U.S. 1 (1978), as follows:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its cases. As such, it implies nothing with respect to the guilt or innocense of the defendant...
>
> The same cannot be said when a defendant's conviction has been overturned to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it can assemble... Since we necessarily accord absolute finality to a jury's *verdict* of acquittal - no matter how erroneous its decision - it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

Burks, 437 U.S. at 15-16 (emphasis in original).

The Tisdale double jeopardy bar would be the same even if the unanimous jury determination was applied, as specified by *Perry v. State* and *Hurst*, and the subsequently enacted Chapter 2017-1. The 9 - 3 vote fell just as short of a unanimous determination as it had fallen short of the 10 - 2 determination. Thus, Tisdale's 9 - 3 vote was an automatic life sentence under either the 10 - 2 rule in Chapter 2016-13 or the unanimous rule in Chapter 2017-1.

The Fifth Amendment's double jeopardy clause provides that no person shall

“be subject for the same offense to be twice put in jeopardy of life or limb.”[12] Double jeopardy protects against a punishment greater than authorized. In addition, “[i]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction”. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds, Alabama v. Smith*, 490 U.S. 794 (1989).

Unless jeopardy attached to the jury’s “determination” of life, Tisdale is at risk of a successive attempt to secure a death sentence. Regardless of any errors or mistakes which may have occurred at Tisdale’s trial, the acquittal of the death enhancing determination is a bar to any second attempt to secure a death sentence: “[t]he one thing that had always been clear was that no appeal (could) be taken by the Government from an acquittal no matter how erroneous the legal theory underlying the decision’.” *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 577 (1977) (Stevens, J. concurring), *quoting United States v. Sisson*, 399 U.S. 267, 307 (1970). Put another way, “[i]f an acquittal has occurred, double jeopardy bars a retrial even if the acquittal was entered because of an error of law by the trial court”. *State v. Stone*, 42 So.3d 279, 282 (Fla. 4th DCA 2010). “[A]n acquittal on the merits bars

[12]The Florida Constitution provides, in pertinent part, that “[n]o person shall...be twice put in jeopardy for the same offense.” Art. I, §9, Fla. Const.

retrial even if based on legal error." *Id*. *See United States v. Scott*, 437 U.S. 82, 98 (1978) ("[T]he fact that acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles...affects the accuracy of that determination, but it does not alter its essential character.") (internal quotation marks omitted).

Tisdale contends that the 9 - 3 jury determination is a double jeopardy bar to imposition of death under the Fifth Amendment and Article I, Sections 9, 16, and 17, of the Florida Constitution, as well as Florida's constitutional guarantee that the right to jury trial remain inviolate. Art. I, §22, Fla. Const.

E.

THE TRIAL COURT'S FAILURE TO APPLY CHAPTER 2016-13 TO TISDALE'S JURY DETERMINATION OF LIFE WAS ARBITRARY AND CAPRICIOUS

Chapter 2016-13 was in effect at the time of Tisdale's final sentencing. The Florida Supreme Court has since held that Chapter 2016-13 is retroactive to cases which became final after *Ring*. Exempting Tisdale's case from the retrospective application of Chapter 2016-13 would offend due process and equal protection. Art. I, §9, Fla. Const.; Amend. V and XIV, U.S. Const. Such an arbitrary exemption would also offend the Eighth Amendment, as well as the Florida Constitution's

similar provision.[13] Art. I, §17, Fla. Const.; Amend. VIII and XIV, U.S. Const.

Due process requires that Chapter 2016-13 be applied to Tisdale's case, because there is no legislative declaration for it not to. Moreover, the legislature had the opportunity to refine or correct any such oversight when it enacted Chapter 2017-1, but chose not to. Chapter 2017-1 was clearly a response to *Hurst* and *Perry v. State*, which had been decided on October 14, 2016. The legislature modified the death penalty sentencing scheme to require a unanimous jury determination in order to accommodate the then-recent decisions in *Hurst v. State* and *Perry v. State*, but did not amend or modify such retroactivity in light of *Perry v. State*.

Chapter 2016-13 addresses a "method"[14] of execution. No person could be subjected to the death penalty in the absence of compliance with the methods set forth

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[13]Article I, §17, of the Florida Constitution provides in part, "[t]he prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution".

[14]Merriam-Webster's online dictionary defines "method" as "[a] procedure or process for attaining an object...". It can also mean "[a] way, technique, or process of or for doing something...". https://www.merriam-webster.com/dictionary/method (viewed 3/16/18). Nothing in Art. I, §17, states it is focused exclusively on the act of killing as opposed to the procedure for determining that a killing should take place. In any capital case, the method of execution would, Tisdale submits, include the jury determination.

in Chapter 2016-13, as well as in the subsequently enacted Chapter 2017-1. These methods include a minimum jury determination of death by a 10 - 2 vote under Chapter 2016-13, and a 12 - 0 vote under Chapter 2017-1. Article I, Section 17, of the Florida Constitution, permits the legislature to designate methods of execution. "[A] change in a method of execution may be applied retroactively." Art. I, §17, Fla. Const. However, there is no authority for "partial" retroactivity or for a carve out for a special retroactivity exception.

Under these circumstances, the decision of the trial court to carve out a special retroactivity exception was an error of law. This "carve out" denied Tisdale due process, and misapplied a procedure which had been superseded by Chapter 2016-13; and violated Article I, §17, by creating selective or partial retroactivity. Such misapplication of law is reviewed *de novo*. *State v. Chubbuck, supra; Bryant v. State, supra.*

The Eighth Amendment prohibits arbitrary imposition of the death penalty. *See Gregg v. Georgia*, 428 U.S. 153, 199 (1976). At bar, the trial court's carve out of a special retroactivity exception to Chapter 2016-13 was arbitrary and capricious. The carve out was not predicated on any language contained in Chapter 2016-13, nor was it justified by application of precedent. *See Furman v. Georgia*, 408 U.S. 238, 248-49 (1972) ("A penalty...should be considered 'unusually' imposed if it is administered

arbitrarily....") (Douglas, J, concurring) (citations omitted).

To the extent there was precedent at the time of the final sentencing on April 29, 2016, it applied changes to death penalty procedures retroactively. *See Dobbert v. Florida*, *supra*. The Fifth District had decided on March 16, 2016, in *State v. Perry*, that Chapter 2016-13 was retroactive. However, *State v. Perry* was not final, because a petition for review had been filed with the Florida Supreme Court.[15]

Either Chapter 2016-13 is retroactive or not. There is no statutory language to support limited retroactivity, nor is there any constitutional authority for limited retroactivity. The trial court's failure to apply Chapter 2016-13 denied Tisdale due process, equal protection and his right to a jury determination. Art. I, §§ 9, 16 and 22, Fla. Const.; Amend. V, VI and XIV, U.S. Const. It violated Tisdale's Eighth Amendment, and Article I, Section 17, rights, because the trial court's carve out of a special retroactivity exception was arbitrary and capricious.

POINT 2

IF CHAPTER 2016-13 IS NOT RETROACTIVELY APPLICABLE TO TISDALE'S FINAL SENTENCING, THEN TISDALE IS ENTITLED TO A LIFE SENTENCE UNDER SECTION 775.082(2), FLORIDA

[15] The Florida Supreme Court, after accepting jurisdiction, entered an order on May 5, 2016, for *Perry* and the State to "[a]ddress whether the provision within section 921.141(2)(c), Florida Statutes (2016), Chapter 2016-13, Laws of Florida, requiring 'at least 10 jurors to determine that the defendant should be sentenced to death' is unconstitutional". *Perry v. State*, 210 So.3d at 641, fn 2.

STATUTES

Tisdale has asserted that Chapter 2016-13 was applicable to the sentencing in his case. Point 1, *supra*. If it is determined that Chapter 2016-13 has a special retroactivity exception for cases which had already been submitted to a jury, but not yet sentenced, then there would be no death penalty procedure in place for Tisdale's case.

Having already been sentenced to death, Tisdale meets the first part of the eligibility test for the life sentence without the possibility of parole provided by Section 775.082(2) as follows:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a <u>person previously sentenced to death</u> for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

(Emphasis supplied).

If the death penalty procedures enacted by Chapter 2016-13, and subsequently by Chapter 2017-1, are inapplicable due to the "carve out" for Tisdale's case which had already been submitted to the jury, but were awaiting final sentencing then, in that scenario, there was no death penalty procedure in effect at the time of the

Defendant's final sentencing on April 29, 2016. Since the legislature has not acted to recognize and "fix" the special retroactivity "carve out", there would remain no constitutional death penalty procedure applicable to Tisdale's case. *See Donaldson v. Sack*, 265 So.2d 499, 502 (Fla. 1972) (When no death penalty procedure exists, "[l]ife imprisonment upon conviction, inasmuch as that is the only offense left in the statute.").

If there was, and remains, no death penalty procedure applicable to Tisdale's case, then he meets the requirements for the second part of the eligibility test for application of the automatic life sentence provided by Section 775.082(2). Specifically, the previous death penalty procedure was declared unconstitutional by *Hurst v. Florida* for violation of the Sixth Amendment right to a jury determination of all elements which might enhance imposition of sentence; and by *Hurst* for violation of both the Sixth Amendment and the Florida constitutional provisions requiring a unanimous jury determination of all elements of an offense. Art. I, §§ 9, 16, 17 and 22, Fla. Const. Tisdale, at this point, has been "previously sentenced to death". If there was a carve out for a special retroactivity exception, there would be no constitutional death penalty procedure in effect at the time of his final sentencing and none now. Hence, there would be no determination that a "[m]ethod of execution is held to be unconstitutional.." because, under Tisdale's unique facts, there would

be no method of execution applicable to his case.

Tisdale contends that it is unconstitutional under *Hurst v. Florida* to sustain a death sentence upon a 9 - 3 vote. Any attempt to retry the penalty phase would unconstitutionally place Tisdale twice in jeopardy. Thus, any attempt to conduct another penalty phase against Tisdale would run afoul of the Florida Constitution's double jeopardy bar under Article I, Section 9, and the inviolate jury determination under Article I, Sections 16 and 22; and the United States Constitution's double jeopardy bar under the Fifth Amendment, the arbitrary and capricious bar under the Eighth Amendment, the right to equal protection under the Fourteenth Amendment, and the express applicability of Section 775.082(2) to the unique facts of his case to require a sentence of life without the possibility of parole.

POINT 3

WITHOUT PREJUDICE TO TISDALE'S CLAIMS THAT THE DEATH PENALTY IS BARRED BY DOUBLE JEOPARDY PRINCIPLES, THE DEFENDANT MAINTAINS THAT A NEW PENALTY PROCEDURE IS REQUIRED UNDER *HURST V. FLORIDA* AND *HURST*

The Defendant has maintained in Point 1, *supra*, that double jeopardy principles prohibit imposition of death, either now or at a new trial, because the jury determination was 9 - 3. Tisdale maintains that Chapter 2016-13 is retroactive, binding, and preclusive of a new death penalty proceeding. If Chapter 2016-13 is not

applicable to his case due to a carve out of a special retroactivity exception, then Tisdale maintains that he is entitled to the automatic life sentence provided by Section 775.082(2). Point 2, *supra*. If these arguments are rejected, then in the alternative, Tisdale maintains that he entitled to a new penalty proceeding under *Hurst v. Florida* and *Hurst*.

Tisdale's jury was not instructed in accordance with the requirements of *Hurst v. Florida* and *Hurst*.[16] The jury did not return specific findings as to the applicability of aggravating factors or mitigating circumstances.[17] *See Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) ("[I]t is constitutionally impermissible [under the Eighth Amendment] 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."). The jury was told that their recommendation was "advisory". The record reflects extensive evidence of mitigating circumstances, the existence of many of which were found by the trial court in its sentencing order.

On remand, *Hurst* observed:

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[16]Tisdale's pretrial motions asserting the unconstitutionality for multiple reasons, including *Ring*, were denied May 20, 2015, and denied again when orally renewed just before the penalty phase was to begin. (T 4997).

[17]The trial court, during the penalty phase charge conference observed that "[u]nder the Florida scheme the jury is not obligated to disclose which aggravating factors, if any, they found beyond a reasonable doubt". (T 5464).

> [T]hat the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury. We reach this holding based on the mandate of *Hurst v. Florida* and a Florida's constitutional right to a jury trial considered in conjunction with our precedent concerning the requirement of jury unanimity as to the elements of a criminal case.

Hurst, 202 So.3d at 44.

Hurst concluded:

> [T]hese specific findings required to be made by the jury include each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances.

Id.

Tisdale timely raised *Ring* objections before trial. Tisdale reasserted these *Ring* claims after *Hurst v. Florida* issued on January 12, 2016. Having repeatedly raised *Ring* error, the due process fundamental fairness must produce retroactivity in Tisdale's case. *Mosley v. State*, 209 So.3d 1248 (Fla. 2016) ("[W]here Mosley repeatedly raised *Ring* claims that were rejected, the interests of finality must yield to fundamental fairness."). Further, Tisdale's appeal should be considered a pipeline case to which a change in law applies. *Kaczmar v. State*, 228 So.3d 1 (Fla. 2017) ("Because Kaczmar's case was pending on direct appeal when *Hurst v. Florida* was decided, the United States Supreme Court's decision applies to him."); *State v.*

Fleming, 61 So.3d 399, 403 (Fla. 2011) ("When the [United States] Supreme Court announces 'a new rule for the conduct of criminal prosecutions', the rule must be applied to 'all cases state or federal pending on direct review or not yet final'.") (*quoting Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *White v. State*, 214 So. 3d 541, 549 (Fla. 2017) (*Hurst* applies to cases on direct appeal).

The Tisdale penalty phase jury instructions were more favorable to the State than is allowed under *Hurst v. Florida*, *Hurst* and current death penalty sentencing procedure. *See* Chapter 2016-13 and Chapter 2017-1. Based upon the evidence and instructions presented, the jury recommended the death penalty by a vote of 9 - 3. The imposition of a death sentence following such a jury recommendation violates *Hurst* and requires a new penalty phase proceeding.

This court must next determine whether the *Hurst* error was harmless beyond a reasonable doubt:

> The harmless error test, as set forth in *Chapman* [*v. California*, 386 U.S. 18 (1967)], and progeny, places the burden on the State, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction.

Hurst, 202 So.3d at 68 (Fla. 2016) (quoting *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986)).

This court has previously held that a vote to recommend death by 9 - 3 is not harmless error. "We cannot determine that the jury unanimously found that the aggravaters outweighed the mitigation." *Kopsho v. State*, 209 So.3d 568, 570 (Fla. 2017). "We can only determine that the jury did not unanimously recommend a sentence of death." *Id* at 570.

Based upon the jury's 9 - 3 determination in favor of death, as well as the trial court's finding of the existence of 40 mitigating circumstances, the State cannot meet the harmless error standard. In other words, the State cannot prove that there is no possibility that the *Hurst* error did not contribute to the sentence. Therefore, this court must order a new penalty phase proceeding, unless otherwise precluded. The present death sentence violates due process, the right to jury trial and the Eighth Amendment. Art. I, §§ 9, 16, 17 and 22, Fla. Const.; Amend. V, VI, VIII and XIV, U.S. Const.

CONCLUSION

Based on the foregoing argument and citation of authority, Tisdale maintains as follows:

1. Based upon the arguments set forth in Points 1 and 2, this court should vacate the death penalty and impose a sentence of life without the possibility of parole on Count 1.

2. Based upon the arguments set forth in Point 3, this court should vacate the death penalty and remand for further proceedings in accordance with *Hurst v. Florida* and *Hurst.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided via e-service to Lisa Marie Lerner, AAG, 1515 N Flagler Drive, West Palm Beach, FL 33401, at crimappwpb@myfloridalegal.com, and by U.S. First Class Mail to Mr. Eriese Alphonso Tisdale W34427, Florida State Prison, 7818 NW 228th Street, Raiford, FL 32026-1000, this 26th day of March, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This document is submitted in Times New Roman 14 point font.

s/ Jeffrey H. Garland

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