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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. Dan L. Vaughn, Circuit Court Judge

REPLY BRIEF OF APPELLANT

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REPLY TO ARGUMENT

POINT I

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[1]

The nub of this double jeopardy dispute is whether the amendments, Chapter 2016-13, apply retroactively to require a life sentence, or whether the amendments do not require a life sentence for Tisdale.

The State might logically argue that the amendments are not retroactive, but to do so would imperil the disposition of a multitude of other death penalty cases; and contradict established precedent which states that Section 921.141 is procedural and not substantive. *See Victorino v. State*, _____ So.3d _____ (Fla. March 8, 2018), *rehearing denied,* (Fla. May 3, 2018) (Florida's new capital sentencing scheme "[n]either alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable"). In light of the complications which might be posed by a finding that Chapter 2016-13, as well as the superseding amendments set forth in Chapter 2017-1, are not retroactive, it is unsurprising that the State avoids arguing that these amendments are not retroactive.

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[1]The State's Answer Brief "restates" this argument heading to state the inverse: "The statutory amendments to Sections 775.082(1)(a), 782.04(1)(b) and 921.141 of the Florida Statutes do not require a life sentence for Tisdale."

The State might have argued, but did not, that Chapter 2016-13 is retroactive, but does not require a life sentence for Tisdale. Such a concession would have to overcome the plain language of Chapter 2016-13 which would require a life sentence for Tisdale. No other logical conclusion could be drawn, because Tisdale's jury recommended death by less than a vote of 10 - 2.

The State is left only to argue that Chapter 2016-13, although retroactive, does not apply to Tisdale's special circumstance, because the penalty phase proceeding had already concluded before the legislature enacted Chapter 2016-13 which became effective on March 7, 2016. The State's only plausible argument is that Chapter 2016-13 does not apply to Tisdale because of a statutory "carve out" for cases, like Tisdale's, which were pending for sentencing on March 7, 2016.

The correllary to the State's argument is that the amendments, either Chapter 2016-13 or 2017-1, apply to all cases except Tisdale or any other case pending for sentencing on March 7, 2016. The clear language of §782.04(1)(b), Florida Statutes (2012), does not support such an argument: "In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment...". (emphasis supplied).[2] The State has not pointed to any

[2]The all inclusive language of §782.04(1)(b) was not changed by Ch. 2016-13.

language in the amendments which would justify an interpretation which "carved out" from retroactive application either Tisdale's case or any other case which was pending for sentencing on or after March 7, 2016, but where the penalty phase recommendation had been made before *Hurst v. Florida*, 136 S.Ct. 161 (2016), was decided.

Tisdale argues, simply, that Chapter 2016-13 is a retroactive procedural amendment to Section 921.141. There being no "carve out" or savings clause, Tisdale contends that Chapter 2016-13 is no less applicable to his sentencing than to the sentencing of any other case sentenced under Section 921.141. To the extent that Chapter 2016-13 applies to his sentencing, Tisdale maintains that the plain language requires a life sentence; and that any sentence of death imposed in violation of Chapter 2016-13 constitutes a direct double jeopardy violation. The plain language of Chapter 2016-13, §3, provides "[I]f a jury has recommended a sentence of...[l]ife imprisonment without the possibility of parole, the court shall impose the recommended sentence." (emphasis supplied). The jury recommends life whenever the vote is less than 10 - 2.

The State contends that Chapter 2016-13 is not retroactive because of the "carve out" for a case pending for sentencing on March 7, 2016. The State's contention runs afoul of due process, because no such carve out, or savings clause,

can be found in the amendment. Art. I, §9, Fla. Const.; Amend. V and XIV, U.S. Const. The State seeks to apply a statutory construction which is contrary to the express terms of the amendment that the jury determination must be in favor of death by at least a vote of 10 - 2. This innovative argument is not supported by the text of Chapter 2016-13. The text requires a life sentence for any sentencing on or after March 7, 2016, where the jury recommendation is less than 10 - 2.

The Answer Brief's discussion of *Perry v. State*, 210 So.3d 630 (Fla. 2016), omits the procedural posture of that case. The Fifth District decided, in *State v. Perry*, 192 So.3d 70, 75 (Fla. 5th DCA 2016), on March 16, 2016, that the amendments set forth in 2016-13 were procedural in nature and applicable to pending prosecutions. The Fifth District's decision would have been binding on Tisdale's trial court at the time of sentencing, but for the Florida Supreme Court's decision on May 5, 2016, to accept jurisdiction to review the Fifth District's decision on May 5, 2016. *Perry v. State*, 210 So.3d at 641, fn 2. The Supreme Court, in *Perry v. State*, would later concur with the Fifth District that Chapter 2016-13 applies retroactively, but further found that it would be unconstitutional to impose the death penalty with less than a unanimous jury recommendation. *Perry*, 210 So.3d at 633; *Hurst v. State*, 202 So.3d 40, 44-45 (2016).

The State's Answer Brief suggests that *Perry v. State* rendered Chapter 2016-

13 a “nullity” with no application to Tisdale. (AB at 6). Tisdale contends that, far from being a nullity, Chapter 2016-13 applied to his sentencing and compelled a life sentence, because it was the death penalty law in effect at the time of Tisdale’s sentencing.

Chapter 2017-1 did not materially change the life sentence which was required under Chapter 2016-13. The 9 - 3 Tisdale jury recommendation for death did not satisfy the minimum requirements for either Chapter 2016-13 or Chapter 2017-1.

The Answer Brief cites *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003) for the proposition that a retrial of a capital defendant does not violate double jeopardy. (AB at 7). There are two factual distinctions between Tisdale’s case and the *Sattazahn* case. First, the *Sattazahn* jury hung on the issue of life or death.[3] Second, the defendant successfully appealed and obtained a reversal on trial error. Plainly, the State is entitled to retry an accused, and to seek the death penalty, when the initial conviction and death sentence is set aside due to trial error. “We have also held that the Double Jeopardy Clause does not bar imposition of a greater sentence on retrial if a defendant successfully appeals a conviction.” *Sattazahn,* 537 U.S. at 128, fn 6 (citations omitted).

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[3]The hung jury required a sentence of life under the applicable Pennsylvania law. *Sattazahn*, 537 U.S. at 104.

The Answer Brief cites *Victorino v. State*, _____ So.3d _____ (Fla. March 8, 2018), rehearing denied, _____ So.3d _____ (Fla. May 3, 2018), for the proposition that "[a] retrial of a capital defendant does not implicate double jeopardy...". (AB at 7). *Sattazahn* distinguished jury findings which result in an acquittal from a required life sentence, such as where the *Sattazahn* jury had hung on the issue of life or death. *Sattazahn*, 537 U.S. at 104. The *Sattazahn* court found that the mandatory life sentence based upon a hung jury did not constitute an "acquittal" for double jeopardy purposes:

> If a jury unanimously concludes that a state has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)."

Sattazahn, 537 U.S. at 112. (Citations omitted).

Unlike *Sattazahn*, Tisdale's jury did not "hang". It returned a 9 - 3 recommendation which was, according to Chapter 2016-13, mandated a life sentence. This part of *Sattazahn* clearly supports Tisdale's contention that the State is double jeopardy barred from seeking a death penalty in any future proceeding.

The *Sattazahn* court alternatively found that Pennsylvania could seek the death penalty after reversal on appeal because of trial error:

> [W]hen [Sattazahn] appealed and succeeded in invalidating his conviction of the lesser offense, there was no double-jeopardy bar to

> Pennsylvania's retrying petitioner on both the lesser and the greater offense; his "jeopardy" never terminated with respect to either *cf. Green v. United States*, 355 U.S. 184, 189 (1957) (citing *United States v. Ball*, 163 U.S. 662 (1896)); *Selvester v. United States*, 170 U.S. 262, 269 (1898).

Sattazahn, 537 U.S. at 113.

Of great significance is *Sattazahn's* discussion of capital punishment as murder plus an aggravating circumstance. It cited *Apprendi v. New Jersey*, 530 U.S. 466, 482-84 (2000), for the proposition that an element of an offense, for Sixth Amendment purposes, is any fact, other than a prior conviction, which increases the maximum punishment. *Sattazahn* at 111.

Sattazahn cited *Ring v. Arizona*, 536 U.S. 584, 609 (2002), for the proposition that any aggravating factor that may make a defendant eligible for the death penalty operates as the functional equivalent of an element of the greater offense.[4] *Sattazahn* at 111.

Sattazahn cited *Arizona v. Rumsey*, 467 U.S. 203 (1984), for the proposition that the judicial finding of no aggravating factor constituted an acquittal for double jeopardy purposes. The *Sattazahn* court described the holding in *Rumsey* as follows:

> The trial court, however, found that no statutory aggravator existed, and

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[4]*Alleyne v. United States*, 133 S.Ct. 2151 (2013), and *Hurst v. Florida*, *supra*, both stand for the proposition that any fact that exposes a defendant to greater punishment must be proved to the jury beyond a reasonable doubt.

> accordingly entered judgment in the accused's favor on the issue of death. On the State's cross-appeal, the Supreme Court of Arizona concluded that the trial court had erred in its interpretation of one of the statutory aggravating circumstances, and remanded for a new sentencing proceeding, which produced a sentence of death. *Id*, at 205-206. In setting that sentence aside, we explained that "[t]he double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington [v. Missouri,* 451 U.S. 430 (1981)*]*: an acquittal on the merits by the sole decision maker in the proceeding is final and bars retrial on the same charge." *Id*, at 211.

Sattazahn, 537 U.S. at 107.

In sum, *Sattazahn* treated the jury's decision in *Bullington v. Missouri* as an acquittal on the merits by the sole decision maker. Tisdale contends that Chapter 2016-13 made the jury the sole decision maker in his case. The jury's "determination", as that term is used in Chapter 2016-13, constitutes the acquittal on the merits. Thus, *Sattazahn* and *Bullington* and *Rumsey* and *Ring* all stand for the proposition that the jury's 9 - 3 determination constitutes an acquittal on the merits by the sole decision maker of the sentencing enhancement. Double jeopardy, therefore, bars the sentence of death imposed by the trial court in violation of Chapter 2016-13.

POINT II

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 STATUTES

The State appears to argue that relief should be denied because *Hurst* declared the death penalty procedure unconstitutional, not the penalty itself. (AB at 8-9). Tisdale contends that he is entitled to a life sentence if Chapter 2016-13 is not applicable to his special circumstances because of a special carve out for cases which had already gone to penalty phase, but were pending for sentencing as of March 7, 2016. What then?

The State offers no argument opposing Tisdale's claim that no death penalty procedure would applicable to his case if his case were not controlled by Chapter 2016-13. In such a case, the outcome must be a life sentence, since there would be no statutory procedure for imposition of a death penalty for Tisdale's special circumstance. *See Donaldson v. Sack*, 265 So.2nd 499, 502 (Fla. 1972).

POINT III

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 State seeks to apply a "rational-jury standard" in determining whether there was harmless error beyond a reasonable doubt. (AB at 11). Tisdale's jury recommended death by a vote of 9 - 3. There is no need to resort to hypothetical or "rational-jury standards". The actual Tisdale jury voted for what would be a mandatory life sentence under Chapter 2016-13 and Chapter 2017-1.

The State further asserts that the convictions for a contemporaneous violent felony of an assault on a law enforcement officer using a gun and the murder of a law enforcement officer constitute jury findings of two aggravating circumstances. (AB at 11-12). Even if, *arguendo*, such findings were to make Tisdale eligible for imposition of the death penalty, the existence of those two aggravating factors would not be determinative of the jury's other findings. The jury must, under *Hurst v. Florida* and *Hurst*, weigh aggravating and mitigating circumstances. The existence of the two aggravaters hypothesized by the State would only establish eligibility and not constitute a determination of either the existence of mitigating circumstances, or a determination of the apropriateness of death after conducting a weighing process.

No jury is required to recommend a death sentence even if the aggravating factor(s) outweigh the mitigating circumstances. *Hurst*, 202 So. 3d at 57-58 ("We...[e]mphasize...[w]e do not intend to diminish or impair the jury's right to recommend a sentence of life even if it finds aggravating factors were proven, were sufficient to impose death, and that they outweigh the mitigating circumstances"). The State, as the beneficiary of the error, has failed to establish harmless error beyond a reasonable doubt.

CONCLUSION

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

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

2. Based on the arguments set forth in Point III, this Court should vacate the death penalty and remand for further proceedings in accordance with *Hurst v. Florida*, *Hurst*, and Chapter 2017-1.

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 19th day of June, 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.

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