No. _____

October Term 2018

IN THE SUPREME COURT OF THE UNITED STATES

ERIESE ALPHONSO TISDALE

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

CAPITAL CASE

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CAPITAL CASE

QUESTION PRESENTED

1. Whether the Florida Supreme Court's failure to apply a statutory amendment, Chapter 2016-13, Laws of Florida, which required a vote of no less than 10 jurors to impose the death penalty to a 9-3 vote and where sentence was imposed after the effective date of the amendment, violates due process and double jeopardy under the Fifth, Sixth, Eighth and Fourteenth Amendments.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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The Petitioner, Eriese Alphonso Tisdale, an indigent, death-sentenced Florida prisoner, was the Appellant in the Florida Supreme Court.

The Respondent, the State of Florida, was the Appellee in the state court proceedings.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eriese Alphonso Tisdale prays that a Writ of Certiorari issue to review the opinion of the Florida Supreme Court.

CITATIONS TO OPINION BELOW

The opinion of the Florida Supreme Court in this case, reported as *Tisdale v. State*, __ So.3d __ (Fla. Nov. 8, 2018, Case No. SC16-1032), is attached to this Petition as "Exhibit A".

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Florida Supreme Court on the basis of 28 U.S.C. §§ 1257(a) and 2101(d). The Florida Supreme Court issued its original opinion on November 8, 2018, and a corrected opinion on November 29, 2018. This Petition is timely filed.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...
>
> [N]or be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...

The Eighth Amendment to the United States Constitution provides, in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall...deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Eriese Alphonso Tisdale, was indicted for the February 28, 2013 murder, and related charges, of St. Lucie County Sheriff's Office Sargent Gary Morales. He was found guilty of all counts, including first degree murder, on October 1, 2015.

At the conclusion of the penalty proceeding, the jury returned an advisory sentence in favor of death by a vote of 9-3.

Petitioner was sentenced to death on April 29, 2016. His appeal to the Florida Supreme Court was denied by an opinion issued November 8, 2018. On November 15, 2018, the State filed a timely motion for clarification. The Florida Supreme Court issued its corrected opinion on November 29, 2018. The Florida Supreme Court also issued its mandate on November 29, 2018.

STATEMENT OF THE FACTS

Following receipt of the jury's 9-3 advisory sentence in favor of death, the trial court set the final sentencing hearing for January 15, 2016.

On January 12, 2016, the United States Supreme Court held that Florida's death penalty sentencing scheme was unconstitutional. *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 161 (2016). The trial court then continued the final sentencing hearing.

While Petitioner's case was pending for final sentencing, the Florida legislature, effective March 7, 2016, substantially amended Florida's death penalty sentencing procedures contained in Sections 775.082(1), 782.04(1)(b), and 921.141, Florida Statutes (2016). Among other things, these amendments required that at least 10 jurors must concur in the death recommendation. Under the 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.

Petitioner maintained that the Chapter 2016-13 amendments applied to his case, because sentencing had not yet been imposed. Petitioner maintained that the 9-3 vote was the equivalent of an acquittal on the findings necessary to impose a death sentence under the amended sentencing procedures which went into effect before Petitioner's final sentencing.

The trial court overruled these objections and imposed a death sentence on April 29, 2016. Despite a lack of jury findings, the trial court found the existence of two aggravating circumstances and 41 mitigating circumstances. *See Tisdale*, slip opinion at 5 and fn 4.

While Petitioner's direct appeal was pending, the Florida Supreme Court held that Chapter 2016-13 is to be applied retroactively, but that the 10-2 vote requirement is unconstitutional. The Florida Supreme Court modified Chapter 2016-13 to require a unanimous jury recommendation.

Perry v. State, 210 So.3d 630, 640 (Fla. 2016); *Hurst v. State*, 202 So.3d 40, (Fla. 2016), *cert. denied*, 137 S.Ct. 2161 (2017); *Tisdale*, slip opinion at 5-6.

The Florida legislature subsequently enacted Chapter 2017-1, Laws of Florida, which requires a unanimous jury recommendation of death. The Florida Supreme Court has reversed *Hurst* cases for resentencing pursuant to the retroactive procedures set forth in Chapter 2016-13 and Chapter 2017-1.

Petitioner presented arguments to the Florida Supreme Court that the jury's 9-3 vote constitutes an acquittal under both Chapter 2016-13 and Chapter 2017-1; and that the case at bar was entitled to application of the amendments which were explicitly to be applied in a retroactive fashion. The Florida Supreme Court rejected these due process, equal protection and double jeopardy arguments; and further rejected the claim that retroactive application of the amended procedures to all resentencings, but not to Petitioner's sentencing, constitutes an arbitrary and capricious carve out of an exception for Petitioner's case in violation of the Eighth Amendment.

REASONS FOR GRANTING THE PETITION

1. The Florida Supreme Court's failure to apply Chapter 2016-13 to cases pending for sentencing violates double jeopardy, equal protection and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments.

In *Hurst v. Florida*, the United States Supreme Court extended the decision in *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's 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 their own terms, these amendments were procedural.

Section 775.082(1)(a) was amended to require a jury "determination" instead of the judicial

findings 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 according to the procedure set forth in s. 921.141 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.

Chapter 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...

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

Section 921.141 was amended to require that any death 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:

> 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...

Chapter 2016-13, Section 3. Following a jury recommendation of life, the "[c]ourt shall impose the recommended sentence". *Id*.

Petitioner was a person convicted of a capital felony. The amendments did not exclude a person convicted before March 7, 2016, but whose final sentencing was to take place after the effective date of the amendments. The Florida Supreme Court has expressly held that the amendments set forth in Chapter 2016-13 are to be applied retroactively. *Perry v. State*, 210 So.3d at 640; *Evans v. State*, 213 So.3d 856, 859 (Fla. 2017).

Petitioner maintains that he was to be sentenced according to the amended procedure set forth in Section 921.141. There were to be no exceptions. The amended procedure set forth in Section 921.141 "[s]hall be followed" in "[a]ll cases". §782.04(1)(b), *as amended* by Ch. 2016-13, §2.

Petitioner could not be sentenced to death under the amended procedure set forth in Section 921.141, because "[f]ewer than 10 jurors" voted in favor of death. §921.141(3)(a)(1), *as amended* by Ch. 2016-13, §3. If the amended procedures applied to Petitioner's final sentencing, the jury's advisory verdict constituted an acquittal.

At the time of Petitioner's final sentencing hearing, the United States Supreme Court had already struck down Florida's death penalty sentencing scheme to the extent that jurors did not make the determinations of the existence of aggravating and mitigating circumstances, and the balancing required to vote for life or death. *Hurst v. Florida*, *supra*. The only death penalty sentencing procedure in effect at the time of Petitioner's sentencing were Sections 775.082(1)(a), Section 782.04(1)(b) and 921.141, *as amended* by Chapter 2016-13.

Under the unique facts of Petitioner's prosecution, the 9-3 jury recommendation constitutes a verdict of life. The amended death penalty sentencing procedure applied, without exception, to all persons convicted of a capital felony. In such circumstances, all cases are to be determined according to the amended sentencing procedures. Section 921.141(3)(a)(1), of these amended procedures, mandates a life sentence.

The Florida Supreme Court has effectively carved out a special exception for Petitioner's case. In numerous cases, the Florida Supreme Court has routinely reversed death sentences for new sentencing proceedings under the amended sentencing procedures, and in accordance with *Hurst v. Florida* and *Hurst v. State*.

But in Petitioner's case, the Florida Supreme Court failed to apply the amended procedure to a case pending for final sentencing. This carve out has no authorization in the amended sentencing procedure and runs contrary to the express language of the amended sentencing procedures. This carve out of Petitioner from "all" creates a special class and, therefore, denies Petitioner equal protection under law in violation of the Eighth and Fourteenth Amendments.

The amended sentencing procedures do not change the potential penalty applicable to a capital murder. Similar retroactive procedural changes were approved when Florida, in 1972, enacted new death penalty procedures. *See 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.").

Clearly, the amended procedures were beneficial to Petitioner. If the amended procedures were not beneficial, they could not be applied retroactively to Petitioner. *Miller v. Florida*, 482 U.S. 423, 435 (1987) (Retrospective application of revised sentencing guidelines were held to be *ex post facto*, because they "[d]irectly and adversely affect[ed] the sentence petitioner receive[d]".).

The Florida legislature chose to include no clause in Chapter 2016-13 to exclude any case, such as Petitioner's, which had already been submitted to a jury, and was pending for sentencing at the time the amendments went into effect on March 7, 2016. *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 amended death penalty sentencing procedure transformed Petitioner's 9-3 advisory verdict in favor of death into a 9-3 "determination" in favor of life.

Petitioner contends that the Florida Supreme Court's failure to apply the amended sentencing

procedure was a denial of due process under the Fifth and Fourteenth Amendments, and that it was also an arbitrary and capricious application of the amended sentencing procedure in violation of the Eighth and Fourteenth Amendments. *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).

The Florida Supreme Court has reversed Petitioner's sentence, but has allowed the State another "bite at the apple" by remanding for a new death penalty proceedings. *Tisdale*, slip opinion at 10. Such a resentencing is prohibited, submits Petitioner, by double jeopardy considerations. Here, the State had placed Petitioner in jeopardy, but failed to secure the necessary votes to impose the death penalty. That failure to secure the necessary votes is an acquittal of the facts required to enhance the maximum penalty from life up to death. *Alleyne v. United States*, 133 S.Ct. 2151, 2162 (2013) ("[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.").

The State's failure to prove the essential element, absent which death cannot be imposed, constitutes an acquittal of that enhancement. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (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 "acquittal" on the death determination precludes a new penalty phase proceeding.

Bullington v. Missouri, 451 U.S. 430, 441-42 (1981), determined that a second death penalty proceeding would violate 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.

See Burks v. United States, 437 U.S. 1, 15-16 (1978) ("[W]e necessarily accord absolute finality to a jury's *verdict* of acquittal...") (emphasis in original).

Arizona v. Rumsey, 467 U.S. 2003 (1984), considered whether the State could seek the death penalty after a judge had determined that no aggravating circumstances existed, and imposed a life sentence. *Rumsey* observed that Arizona's sentencing procedure, where the penalty was then decided by a judge, was no different than Missouri's, where the penalty was decided by a jury, for double jeopardy purposes. *Id* at 209-10. *Rumsey* held that retrial was barred by double jeopardy in both circumstances:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in *Bullington*: an acquittal on the merits by the sole decision maker in the proceedings if final and bars retrial on the same charge. Application of the *Bullington* principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding - whether death was the appropriate punishment for respondent's offense.

Id at 211.

The Fifth Amendment's double jeopardy clause provides that no person shall "[b]e subject for the same offense to be twice put in jeopardy of life or limb". Double jeopardy protects against 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, Petitioner is at risk of a successive attempt to secure a death sentence. Regardless of any errors or mistakes which may have

occurred at 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*) (citation and internal quotation marks omitted).

The amended death penalty sentencing procedure, put into place effective March 7, 2016, by Chapter 2016-13, was retroactive and applicable to all cases in which a person has been convicted of a capital felony. This amended sentencing procedure designated the jury as the sole decision maker upon which a death penalty may be predicated. In Petitioner's case, just as in *Bullington v. Missouri*, and in *Arizona v. Rumsey*, the decision maker had determined that a life sentence must be imposed, because the 9-3 vote reflects fewer than the 10 jurors required for a recommendation of death. Under such circumstances, the trial court was required to impose a sentence of life. The failure to apply the plain language of the amended sentencing procedure denied due process and equal protection in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments; and was arbitrary and capricious in violation of the Eighth Amendment. The decision of the Florida Supreme Court to permit a new death penalty sentencing procedure, after a jury acquittal on the question whether death should be imposed, violates double jeopardy under the Fifth and Fourteenth Amendments.

CONCLUSION

Although the Florida Supreme Court has ruled that the amended death penalty procedures are to be applied retroactively, it failed to apply those amended sentencing procedures to Petitioner's case which had already been submitted to a jury and was awaiting final sentencing. The language of Chapter 2016-13 provided no special exception for cases, like Petitioner's, which had already been submitted to a jury, but were awaiting final sentencing. The Florida Supreme Court's application of these amended sentencing procedures denied Petitioner due process and equal protection; and was arbitrary and capricious in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. The Florida Supreme Court's decision to permit a new death penalty sentencing procedure violates double jeopardy under the Fifth and Fourteenth Amendments.

Respectfully submitted,

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