

No. _____

October Term 2018

IN THE SUPREME COURT OF THE UNITED STATES

ERIESE ALPHONSO TISDALE

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

INDEX TO APPENDICES
(Separately Bound)

APPENDIX A - Reported Opinion in *Tisdale v. State*

APPENDIX B - Appellee's Notice to Court and for Motion for Clarification (filed 11/15/18)

APPENDIX C - 11/29/18 Notice of Correction

APPENDIX D - 11/29/18 Corrected Opinion in *Tisdale v. State*

APPENDIX E - 11/29/18 Mandate

Executed on February 6, 2019.



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ERIESE ALPHONSO TISDALE,
Appellant,
v.
STATE OF FLORIDA, Appellee.

No. SC16-1032

Supreme Court of Florida

November 8, 2018

Summaries:

Source: Justia

The Supreme Court vacated Defendant's death sentence and remanded this case to the trial court for a new penalty phase, holding that the error pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), was not harmless beyond a reasonable doubt. Defendant was convicted of first-degree murder of a law enforcement officer and other crimes. The jury recommended a sentence of death by a vote of nine to three on the murder charge. The trial court imposed a death sentence on the murder charge and lesser sentences on the other charges. Defendant appealed, arguing that he was entitled to a new penalty phase pursuant to *Hurst*. The Supreme Court agreed, vacated Defendant's death sentence but affirmed his convictions and sentences on all lesser charges, holding that *Hurst*-related precedent required reversal of Defendant's death sentence.

PER CURIAM.

Eriese Alphonso Tisdale was convicted of one count of first-degree murder of a law enforcement officer, one count of aggravated assault on a law enforcement officer with a firearm, one count of possession of a firearm by a convicted felon, and one count of eluding or fleeing a police officer with lights and siren. After the penalty phase, the jury recommended a sentence of death by a vote of nine to three on the murder charge and the

trial court imposed a death sentence, with lesser sentences on the other charges. This is Tisdale's direct appeal, and we have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

Page 2

Tisdale raises no issues relating to his guilt phase trial and we find the evidence sufficient to support the murder charge.¹ Accordingly, we affirm all convictions. Tisdale's only sentencing issues relate to the sentence of death, and we affirm without discussion the sentences on all lesser convictions. However, we vacate his death sentence because we cannot conclude that the *Hurst*² error in his case was harmless beyond a reasonable doubt. Accordingly, we remand his case to the trial court for a new penalty phase pursuant to *Hurst*.

FACTS

On the morning of February 28, 2013, Sergeant Gary Morales of the St. Lucie County Sheriff's Office conducted a traffic stop on a vehicle being driven by Tisdale, a convicted felon. Tisdale, the sole occupant of his vehicle, attempted to flee as Sergeant Morales radioed for backup and pursued Tisdale. Tisdale stopped in a residential neighborhood, catching the attention of multiple residents. Sergeant Morales drove slightly past Tisdale and then came to a sudden stop as well. As Sergeant Morales backed up his patrol car and opened his driver's side

Page 3

door, Tisdale rapidly exited his vehicle with a drawn handgun, rushed Sergeant Morales before Morales could leave the seat of his patrol car or access his own firearm, and fired a burst of shots into the vehicle, hitting Sergeant Morales three times and killing him. Three eye-witnesses—one police officer and two civilians—witnessed Tisdale fire the fatal shots. Tisdale then ran back toward his vehicle while aiming his gun at another police

officer who had responded to Sergeant Morales' call for backup, jumped back into his vehicle, and continued his flight. Several officers pursued Tisdale with their lights and sirens activated.

Eventually, one of the pursuing deputies rammed Tisdale's vehicle, causing it to "spin out" and ending the chase. Tisdale was arrested without further incident at the scene of the collision. Police seized Tisdale's handgun, used in the shooting, from the vehicle at the time of his arrest. A forensic biologist testified at trial that the DNA found on Tisdale's gun matched DNA samples obtained from Tisdale. The firearms examiner testified that the seven shell casings recovered from the area where Tisdale exited his vehicle and ran toward Sergeant Morales's car had been fired from Tisdale's gun. Forensic experts also linked bullets recovered from Sergeant Morales's body and vehicle to Tisdale's gun.

RELEVANT PROCEDURAL HISTORY

Tisdale's jury returned its guilty verdicts on October 1, 2015. After hearing evidence bearing on an appropriate sentence, the jury returned its penalty phase

Page 4

verdict on October 9, 2015, with nine of the twelve jurors recommending death. At the time, section 921.141(3), Florida Statutes (2015), authorized a trial judge to impose a death sentence following a death recommendation by at least seven jurors. The judge released the jurors from further service immediately after receiving the penalty phase recommendation.

The court held a *Spencer*³ hearing on November 17, 2015, and then set a final sentencing for January 15, 2016.

On January 12, 2016, three days before the scheduled sentencing, the United States

Supreme Court issued its decision in *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016), declaring "Florida's sentencing scheme" unconstitutional. The trial court postponed sentencing and eventually reset the sentencing hearing for May 9, 2016. Prior to sentencing, the Florida Legislature enacted chapter 2016-13, Laws of Florida, which became effective on March 7, 2016. The new law authorized imposition of the death penalty, but only if at least ten jurors recommended a death sentence. See § 921.141(2)-(3), Fla. Stat. (2016).

Over Tisdale's objection that death was no longer a valid legal sentence without at least ten jurors voting to recommend the death penalty, the trial court imposed a death sentence under section 921.141(3) as to the murder charge,

Page 5

finding the nonunanimous death recommendation to be harmless beyond a reasonable doubt in light of the jury's unanimous verdict on charges that would factually establish two aggravating factors: (1) the victim of the capital felony was a law enforcement officer engaged in lawful performance of his duties; and (2) a prior violent felony conviction (based on the contemporaneous conviction of aggravated assault on a law enforcement officer with a firearm). The trial court relied only on the two aggravating factors found by the jury as part of its verdict, assigning great weight to both.⁴ The portion of chapter 2016-13 authorizing

Page 6

imposition of a death sentence based upon a recommendation of ten jurors would later be declared unconstitutional in *Perry v. State*, 210 So. 3d 630, 640 (Fla. 2016) (applying *Hurst*, which held that a death sentence could not be legally imposed absent a unanimous death recommendation by the penalty phase jury).

ANALYSIS

Tisdale raises three issues on appeal: (1) whether chapter 2016-13 entitles him to a life sentence without the possibility of parole; (2) whether he is entitled to automatic commutation of his death sentence to a life sentence without the possibility of parole pursuant to section 775.082(2), Florida Statutes (2012); and (3) whether he is entitled to a new penalty phase pursuant to *Hurst*. Having found the evidence sufficient to support Tisdale's first-degree murder conviction, we

Page 7

address Tisdale's claims that he is entitled to relief pursuant to *Hurst*, as well as his alternative claims that we should remand for a life sentence.

Chapter 2016-13

Tisdale first argues that chapter 2016-13 should apply to his case and entitles him to a life sentence without the possibility of parole based upon double jeopardy principles. We reject this argument. Tisdale's jury was sworn and rendered its recommendation before the passage of chapter 2016-13. Because the recommendation supported imposition of the death penalty at the time the jury was sworn and jeopardy attached, double jeopardy principles do not bar a new penalty phase trial. *Cf. Victorino v. State*, 241 So. 3d 48, 50 (Fla. 2018) (determining that a defendant sentenced to death following nonunanimous jury recommendations "has not been acquitted of the death penalty" when the law at the time of trial would have permitted a death sentence, such that retrial is not barred by double jeopardy); *see also, Hurst v. State*, No. SC17-302, 2017 WL 1023762, at *1 (Fla. Mar. 16, 2017) (summarily rejecting as "without merit" claims based on double jeopardy grounds that the State is precluded from seeking the death penalty in *Hurst* resentencing proceedings); *Poland v.*

Arizona, 476 U.S. 147, 154-57 (1986) (holding that reimposing the death penalty on petitioners did not violate the Double Jeopardy Clause because neither the sentence nor the reviewing court held that the prosecution had not proved its case that the death penalty was not appropriate).

Page 8

Moreover, we have invalidated the provision of chapter 2016-13 on which Tisdale attempts to rely for this argument. *See Perry*, 210 So. 3d at 640; *Evans v. State*, 213 So. 3d 856, 859 (Fla. 2017) (holding that chapter 2016-13—but not the portion authorizing a 10-2 vote requirement for the jury's final recommendation—can be validly applied to pending prosecutions).

Section 775.082(2), Florida Statutes

Next, Tisdale argues that he is entitled to automatic commutation of his death sentence to a life sentence without the possibility of parole pursuant to section 775.082(2), Florida Statutes (2012). We have consistently rejected this argument in other similar cases, *see, e.g., Caylor v. State*, 218 So. 3d 416, 425 (Fla. 2017) (denying defendant's claim that section 775.082(2) mandates commutation to a life sentence and remanding for a new penalty phase pursuant to *Hurst*), and reject Tisdale's argument for the reasons explained in *Caylor. Id.*

Hurst

Finally, Tisdale argues that our *Hurst*-related precedent requires reversal of his death sentence. We agree, vacate Tisdale's death sentence, and remand for a new penalty phase pursuant to *Hurst*.

In *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016), the Supreme Court held that Florida's capital sentencing scheme was unconstitutional, because "[t]he Sixth

Amendment requires a jury, not a judge, to find each fact necessary to impose a

Page 9

sentence of death. A jury's mere recommendation is not enough." On remand, we held that *Hurst* error occurs when the jury does not unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to impose death, and that the aggravation outweighs the mitigation. *Hurst*, 202 So. 3d at 54. We further held that the jury recommendation for death must be unanimous before the court may impose a death sentence. *Id.* We also determined that *Hurst* error is capable of harmless error review. *See id.* at 67.

"New rules of law set down by this Court, or by the United States Supreme Court, apply to cases on direct review or those not otherwise finalized." *See Deviney v. State*, 213 So. 3d 794, 799 (Fla. 2017). Tisdale's case is on direct appeal, and thus his appeal is subject to *Hurst*, *see id.*, which requires reversal of the death sentence based upon the nonunanimous recommendation. *Cf. Kopsho v. State*, 209 So. 3d 568, 570 (Fla. 2017) (concluding that Kopsho's death sentence violated *Hurst* "[b]ecause Kopsho was condemned by a vote of ten to two"). And, we have consistently held that *Hurst* error is not harmless in cases where the jury's recommendation is not unanimous. *See, e.g., Hojan v. State*, 212 So. 3d 982, 1000 (Fla. 2017) (determining that *Hurst* error was not harmless because the jury did not return a unanimous recommendation for death).

Page 10

Accordingly, we vacate Tisdale's sentence of death and remand for a new penalty phase pursuant to *Hurst*.⁵

CONCLUSION

For the foregoing reasons, we affirm Tisdale's convictions, affirm the sentences on all lesser charges, vacate the death sentence imposed on the charge of first-degree murder of a law enforcement officer, and remand this case for a new penalty phase pursuant to *Hurst*.

It is so ordered.

PARIENTE, LEWIS, QUINCE, and LABARGA, JJ., concur. PARIENTE, J., concurs with an opinion. LAWSON, J., concurs specially with an opinion. CANADY, C.J., and POLSTON, J., concur as to the convictions and the noncapital sentences and dissent as to the death sentence.

ANY MOTION FOR REHEARING OR CLARIFICATION MUST BE FILED WITHIN SEVEN DAYS. A RESPONSE TO THE MOTION FOR REHEARING/CLARIFICATION MAY BE FILED WITHIN FIVE DAYS AFTER THE FILING OF THE MOTION FOR REHEARING/CLARIFICATION. NOT FINAL UNTIL THIS TIME PERIOD EXPIRES TO FILE A REHEARING/CLARIFICATION MOTION AND, IF FILED, DETERMINED.

Page 11

PARIENTE, J., concurring.

I concur with the per curiam opinion reversing Tisdale's death sentence and remanding for a new penalty phase pursuant to *Hurst*⁶ based on the jury's nonunanimous recommendation for death by a vote of nine to three. I also agree that Tisdale is not entitled to have his sentence reduced to life despite the unusual timing of the jury's recommendation for death and the trial court's sentencing in this case.⁷

I write separately to emphasize the significant mitigation in this case, in

particular the substantial early childhood adversity Tisdale experienced, including exposure to cocaine in utero, being raised by a single parent, having a father who was incarcerated, and witnessing domestic violence at home. All of these experiences are properly classified as Adverse Childhood Experiences (ACEs).⁸

Page 12

See *Jackson v. State*, 213 So. 3d 754 (Fla. 2017); *State v. Bright*, 200 So. 3d 710, 726 (Fla. 2016).

This Court has explained the ACE study, "which identifies ten factors that suggest trauma and adverse environments," stating:

The factors indicative of trauma are: (1) childhood physical abuse; (2) childhood verbal abuse; (3) childhood sexual abuse; (4) childhood physical neglect; (5) childhood emotional neglect; and (6) domestic violence in the household. The factors indicative of an adverse environment are: (7) parents who are separated or divorced; (8) growing up in a household where someone is incarcerated; (9) growing up in a household where there is someone with a serious alcohol or drug problem; and (10) growing up in a household where there is someone with serious mental illness. If a person encounters just one of those factors, then that person is considered significantly more at risk for psychological and mental problems. Furthermore, the more factors applicable, the higher the risk. For instance, an individual who has experienced five ACE factors is predicted to

live twenty years less than an individual without any ACE factor.

Bright, 200 So. 3d at 726; accord *Ellerbee v. State*, 232 So. 3d 909, 929 (Fla. 2017). "Only one-tenth of one percent (or one in one thousand people) are exposed to more than seven ACEs. . . . A high exposure to ACEs . . . is correlated to an increased risk of substance abuse, depression, domestic violence, and suicide,

Page 13

among other negative outcomes." *Ellerbee*, 232 So. 3d at 929. An increased number of ACEs affects a child's health and brain development.

In fact, recent studies performed by our own Department of Juvenile Justice show that a large percentage of our delinquent youth have high ACE scores. Mark A. Greenwald, Fla. Dep't Juv. Just., *Adverse Childhood Experiences: ACEs and Juvenile Offenders* 8, 17 (Jan. 13, 2015), [http://www.djj.state.fl.us/docs/research2/ace_studies_\(nationally_and_in_florida\)_\(1-13-15\).pdf?sfvrsn=2](http://www.djj.state.fl.us/docs/research2/ace_studies_(nationally_and_in_florida)_(1-13-15).pdf?sfvrsn=2). In addition, the Department of Juvenile Justice reports that ACEs cause long-term effects, including dissociation, homelessness, and delinquency/criminal behavior. *Id.* at 6-7.

In this case, the record makes clear that Tisdale's childhood included many ACEs. Specifically, Tisdale experienced physical abuse, emotional abuse, emotional neglect, domestic violence in the household between his mother and her boyfriend, and grew up in a household where someone was incarcerated, all of which have been proven to adversely affect a child's development. The defense alleged in its sentencing memorandum that Tisdale suffered from all of the following: hereditary predisposition to substance abuse and dependence; generational family dysfunction and distress;

prenatal cocaine exposure; raised by a single mother; ambiguous paternity; his father's absence, criminality, and imprisonment; emotional and supervisory neglect by his mother; frequent school

Page 14

changes (seven schools between kindergarten and 12th grade); residential instability (over six residences by age eight); sequential stepfather figures; corruptive male role models in his extended family; murder of his maternal first cousin; community racism; corruptive community; community violence; police profiling/harassment/violence; inconsistent school performance; marijuana dependence from age fifteen; and marginal young adult adjustment. Am. Sentencing Order, at 8-9.

Further, during the penalty phase, Dr. Burton opined that Tisdale's development was negatively affected by the absence of a father figure, racism, and the use of violence in his raising. Dr. Garbarino, a professor of psychology and developmental psychologist who evaluated Tisdale, testified during the penalty phase that Tisdale experienced more adversity than 98% of other youth.

It is clear that Tisdale's childhood was fraught with "trauma and adverse environments," all of which should be considered in determining the appropriate sentence in this case. *Bright*, 200 So. 3d at 726. While this type of mitigation does not serve as an "excuse" for committing a violent act and especially the ultimate violent act—murder—it is important that judges and juries understand its significance in shaping a defendant's development and choices when evaluating mitigation.

Accordingly, I concur in the reversal for a new penalty phase.

Page 15

LAWSON, J., concurring specially.

I fully concur in that portion of the opinion affirming Tisdale's conviction and concur specially in the reversal of Tisdale's death sentence. See *Okafor v. State*, 225 So. 3d 768, 775-76 (Fla. 2017) (Lawson, J., concurring specially).

An Appeal from the Circuit Court in and for St. Lucie County, Dan L. Vaughn, Judge - Case No. 562013CF000608AXXXXX

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for Appellee

Footnotes:

¹ Although Tisdale does not contest the sufficiency of the evidence with respect to any charge, this Court has a mandatory obligation in every capital case to ensure that the evidence is sufficient to support any murder conviction. *Dausch v. State*, 141 So. 3d 513, 517 (Fla. 2014).

² *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017).

³ *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

⁴ The trial court found the following nonstatutory mitigating circumstances and assigned the noted weight: (1) Tisdale was twenty-five years old when he committed the murder (very little weight); (2) Tisdale had a hereditary predisposition to substance abuse

and dependence (very little weight); (3) Tisdale's family history includes generational dysfunction (very little weight); (4) Tisdale was exposed to cocaine while a fetus (very little weight); (5) Tisdale was raised by a single mother (very little weight); (6) Tisdale's genetic father is unknown (very little weight); (7) Tisdale's father was absent (moderate weight); (8) Tisdale's father was incarcerated for robberies and died in prison (almost no weight); (9) Tisdale suffered physical punishment as a child by his mother's boyfriend (very little weight); (10) Tisdale's mother abused him (almost no weight); (11) Tisdale observed domestic violence in the home (little weight); (12) Tisdale frequently changed schools as a child (very little weight); (13) Tisdale experienced residential instability (slight weight); (14) Tisdale had two stepfathers (very little weight); (15) Tisdale had corruptive male role models (very little weight); (16) Tisdale's cousin was murdered (moderate weight); (17) Tisdale experienced racism growing up (almost no weight); (18) Tisdale lived in a corruptive community (very little weight); (19) Tisdale grew up in a violent community (minimal weight); (20) Tisdale experienced instances of police harassment (very little weight); (21) Tisdale had poor grades (very little weight); (22) Tisdale used marijuana regularly (very little weight); (23) Tisdale marginally adjusted as a young adult (very little weight); (24) Tisdale is a devoted, loving son (moderate weight); (25) Tisdale is a loving father (very little weight); (26) Tisdale is a giving person and is selfless (almost no weight); (27) Tisdale has a good personality (almost no weight); (28) Tisdale was a pleasant and likeable child (very little weight); (29) Tisdale graduated from high school (moderate weight); (30) Tisdale earned his associate of arts degree (moderate weight); (31) Tisdale has artistic abilities (very little weight); (32) Tisdale has a loving relationship with his family (very little weight); (33) Tisdale has matured and is remorseful (almost no weight); (34) Tisdale attended church and was spiritual (very little

weight); (35) Tisdale had a good employment record (moderate weight); (36) Tisdale has good conduct in jail (very little weight); (37) Tisdale will adjust to life in prison and will most likely not be dangerous in the future (very little weight); (38) Tisdale demonstrates high potential for rehabilitation (very little weight); (39) Tisdale would contribute positively in prison (almost no weight); (40) Tisdale has no juvenile history (moderate weight); and (41) Tisdale has no violent criminal history before February 28, 2013 (moderate weight).

⁵ Because we conclude that Tisdale is entitled to a new penalty phase pursuant to *Hurst*, we decline to address the proportionality of his death sentence. See *Bargo v. State*, 221 So. 3d 562, 570 (Fla. 2017) (holding that because defendant was entitled to *Hurst* relief, this Court need not address the proportionality of his death sentence).

⁶ *Hurst v. State (Hurst)*, 202 So. 3d 40 (Fla. 2016), cert. denied, 137 S. Ct. 2161 (2017); see *Hurst v. Florida*, 136 S. Ct. 616 (2016).

⁷ The jury's recommendation for death was before *Hurst v. Florida*, 136 S. Ct. 616, but the sentencing occurred after *Hurst v. Florida* and after the Legislature passed the first new sentencing law in light of *Hurst v. Florida*. See ch. 2016-13, Laws of Fla.

⁸ See Vincent J. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults. The Adverse Childhood Experiences (ACE) Study*, 14 Am. J. Prev. Med. 245-58 (1998). There is an "enormous body of research" on ACEs and their effect on children into their adult lives. Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 Hofstra L. Rev. 923, 927 (2008); see, e.g., Heather C. Forkey, *Children Exposed to Abuse and Neglect: The Effects of Trauma on*

the Body and Brain, 30 J. Am. Acad. Matrim. Law. 307, 310-15 (2018); *Adverse Childhood Experiences (ACEs)*, Ctrs. for Disease Control & Prevention, <https://www.cdc.gov/violenceprevention/acestudy/> (last visited Sept. 26, 2018); *see also Research, ACEs Too High*, <https://acestoohigh.com/research/> (last visited Sept. 26, 2018) (listing studies on ACEs since Dr. Felitti's 1998 study).

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ERIESE ALPHONSO TISDALE,

Appellant,

v.

Case No. SC14-1967

STATE OF FLORIDA,

Appellee.

APPELLEE'S NOTICE TO COURT AND/OR MOTION FOR CLARIFICATION

COMES NOW Appellee, State of Florida by and through undersigned counsel, pursuant to Rule 9.330 Florida Rules of Appellate Procedure and hereby seeks clarification from this Honorable Court regarding Dr. Burton, identified in Justice Pariente's concurring opinion and as grounds states:

1. On November 8, 2018, this Court issued its opinion in the above styled case.

2. Justice Pariente concurred and wrote separately to emphasize the mitigation offered. Tisdale v. State, --- So.3d --- -, case no. SC16-1032, slip op. at 11 (Fla. Nov. 8, 2018) In that discussion, Dr. Burton was identified as having offered an opinion during the penalty phase. However, a review of the Master Index (ROA vol 47 attached) reveals that Dr. Burton was not a witness during the penalty phase.

3. The State suggests that the reference to "Dr. Burton" may be erroneous and/or seeks clarification as to the witness whose

EXHIBIT 3

opinion was referenced.

WHEREFORE, based upon the foregoing, Appellee, the State of Florida, by and through undersigned counsel, requests respectfully this Court GRANT this clarification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of November 2017, I electronically filed the foregoing Motion for Rehearing with the Clerk of the Court by using the E-PORTAL FILING SYSTEM which will also send notice of electronic filing to: Jeffrey H. Garland, Esq. at jgarland@treasurecoastlawyer.com.

 /S/ Leslie T. Campbell
LESLIE T. CAMPBELL
Assistant Attorney General

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Criminal Appeals Division
West Palm Beach

IN THE CIRCUIT COURT OF THE
NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY,
FLORIDA

CASE NO.: 56-2013-CF-000608-A

STATE OF FLORIDA,

Plaintiff,

vs.

ERIESE ALPHONSO TISDALE,

Defendant.

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-----X-----

MASTER INDEX
VOLUME 47

1	<u>VOLUME INDEX</u>		
2			
3	<u>VOLUME NUMBER</u>	<u>DATE</u>	<u>PAGES</u>
4			
5	Volume 1	5/19/15	1-61
	Volume 2	6/29/15	62-236
6	Volume 3	6/29/15	237-356
	Volume 4	8/18/15	357-391
7	Volume 5	8/28/15	392-438
	Volume 6	9/08/15	439-465
8	Volume 7	9/09/15	466-493
	Volume 8	9/11/15	494-649
9	Volume 9	9/15/15	650-779
	Volume 10	9/15/15	780-904
10	Volume 11	9/15/15	905-1030
	Volume 12	9/16/15	1031-1171
11	Volume 13	9/16/15	1172-1291
	Volume 14	9/16/15	1292-1398
12	Volume 15	9/17/15	1399-1568
	Volume 16	9/17/15	1569-1756
13	Volume 17	9/18/15	1757-1921
	Volume 18	9/18/15	1922-2057
14	Volume 19	9/18/15	2058-2207
	Volume 20	9/21/15	2208-2378
15	Volume 21	9/21/15	2379-2483
	Volume 22	9/21/15	2484-2590
16	Volume 23	9/22/15	2591-2759
	Volume 24	9/22/15	2760-2866
17	Volume 25	9/22/15	2867-2976
	Volume 26	9/23/15	2977-3139
18	Volume 27	9/23/15	3140-3309
	Volume 28	9/24/15	3310-3435
19	Volume 29	9/24/15	3436-3586
	Volume 30	9/25/15	3587-3742
20	Volume 31	9/25/15	3743-3897
	Volume 32	9/28/15	3898-4040
21	Volume 33	9/28/15	4041-4187
	Volume 34	9/29/15	4188-4345
22	Volume 35	9/30/15	4346-4448
	Volume 36	10/01/15	4449-4588
23			
24			
25			

VOLUME INDEX, CONTINUED

<u>VOLUME NUMBER</u>	<u>DATE</u>	<u>PAGES</u>
Volume 37	10/01/15	4589-4742
Volume 38	10/06/15	4743-4842
Volume 39	10/06/15	4843-4952
Volume 40	10/07/15	4953-5053
Volume 41	10/07/15	5054-5222
Volume 42	10/08/15	5223-5337
Volume 43	10/08/15	5338-5466
Volume 44	10/09/15	5467-5589
Volume 45	11/17/15	5590-5656
Volume 46	04/29/16	5657-5750
Volume 47	MASTER INDEX	5751-

ESQUIRE REPORTING

STUART & FORT PIERCE, FLORIDA

1 (800) 282-8803

1	<u>PRE-TRIAL PROCEEDINGS</u>	
2		PAGE
3	Defendant's Motion to Prohibit Questioning of	6
4	Potential Jurors as to Their Willingness to	
	Render a Verdict for the Death Penalty	
5	State's Response	6
6	Defendant's Motion For Jury Instruction Delineating	10
7	All Mitigating Factors Under Florida Statute	
	921.141(6)(h)	
8	State's Response	10
9	Defendant's Rebuttal	11
10	Defendant's Motion for Notice of Aggravating	14
	Factors	
11	State's Response	15
12	Defense's Rebuttal	16
13	Defendant's Motion to Exclude Law Enforcement	17
	From the Gallery	
14	State's Response	18
15	Judge's Ruling	23
16	Defendant's Motion to Exclude the Victim Impact	26
17	Evidence and Argument Motion to Declare	
	921.141 and 921.141(7), Florida Statutes	
18	Unconstitutional	
19	State's Response	27
20	Rebuttal by Defense	29
21	Jury Questionnaire Discussion	34
22	Defendant's Motion For Individual Voir Dire	
23	And Sequestration of Potential Jurors During Voir Dire	49
24	State's Response	51
25	Judge's Ruling on State Identifying Aggravating Factors	60
	<u>DEPUTY SHERIFF MICHAEL HANSEN</u>	
	Direct Examination By Mr. Bakkedahl	67
	<u>OFFICER MATTHEW SINGER</u>	
	Direct Examination By Mr. Bakkedahl	78

1	<u>OFFICER KEITH BOHAM</u>	
2	Direct Examination By Mr. Bakkedahl	90
3	<u>DETECTIVE RONALD WENTZ</u>	
4	Direct Examination By Mr. Bakkedahl	111
	Cross-Examination By Mr. Glenn	216
	Redirect Examination By Mr. Bakkedahl	235
5	<u>DETECTIVE RONALD WENTZ</u>	
6	Direct Examination By Mr. Glenn	335
	Cross-Examination By Mr. Isenhower	341
7	Jury Questionnaire Requests by Defense	360
	State's Response	361
8	Court's Ruling	367
9	Smart Phone Request by Defense	370
	State's Response	371
10	Discussion on Voir Dire	372
11	Request by Defense for Computer Animation	
12	And Leave to take Deposition of FBI Agent	373
	State's Response	374
13	Defense's Rebuttal	383
14	Motion to Sever	396
	State's Response	397
15	Defense's Rebuttal	401
16	Motion to Compel	404
	State's Response	413
17	Defense's Rebuttal	416
	Judge's Ruling	429
18	Prospective Jurors Report To Fill Out Questionnaires	
19	Venire #1	442
20	Venire #2	450
	Venire #3	457
21	Venire #1	469
	Prospective Juror Micah Alemany Excused	480
22	Venire #2	482
	Prospective Juror James Franklin Excused	490
23	Prospective Juror Doyle Excused	492
24	Motion For Discovery of Prosecutorial Investigation	542
25	of Jurors	

1	Motion for Redactions to Defendant's Statement	547
2	Requested Redactions to Statement	557
3	Objections to Jail Calls	577
4	Defense's Motion For Continuance	585
	Judge's Ruling on Motions	644
5	Judge's Ruling on Motion For Continuance	655
6	Agreed Cause Challenges	671
7	Court's Opening Comments to Prospective Panel #1	689
	Individual Voir Dire by Counsel	713
8	Cause Challenge on Kalib Guettler	745
	Individual Voir Dire, Continued	788
9	Individual Voir Dire, Continued	908
	Group Voir Dire by Court	1039
10	Court Reads Jury Instructions	1043
	Individual Voir Dire by Counsel	1053
11	Panel #1 Individual Voir Dire by Counsel, Cont.	1175
	Ruling on Death Penalty Individual Voir Dire	1301
12	Court's Opening Comments to Prospective Panel #2	1303
13	Individual Voir Dire by Counsel	1337
	Agreed Cause Excusals	1404
14	Panel #2 Individual Voir Dire, Continued	1408
	Panel #2 Individual Voir Dire, Continued	1572
15	Cause Challenges	1748
16	Court's Opening Comments to Prospective Panel #3	1770
	Panel #3 Individual Voir Dire	1808
17	Panel #3 Individual Voir Dire, Cont.	1925
	Panel #3 Individual Voir Dire, Cont.	2061
18	Cause Excusals	2212
	Individual Voir Dire of Mr. Weiner	2223
19	Group Voir Dire of Combined Panels	2232
	Voir Dire by Mr. Bakkedahl	2258
20	Group Voir Dire with Missing Morning Session Jurors	2386
	Group Voir Dire by Mr. Bakkedahl, Cont.	2408
21	Group Voir Dire by Mr. Bakkedahl, Cont.	2487
	Voir Dire by Mr. Bakkedahl, Cont.	2596
22	Voir Dire by Ms. Celidonio	2674
	Continued Voir Dire by Ms. Celidonio	2763
23	Voir Dire by Ms. Celidonio, Cont.	2870
	Cause Excusals	2958
24		
25		

1	Individual Voir Dire	2988
	Group Voir Dire by Ms. Celidonio, Cont.	3020
2	Group Voir Dire by Mr. Glenn	3050
	Cause Excusals	3143
3	Defense's Request to have Bailiffs	
	Remove Mourning Band	3145
4	Judge's Ruling on Mourning Band Request	3147
5	Group Voir Dire by Mr. Glenn, Cont.	3149
	Group Voir Dire by Mr. Glenn, Cont.	3313
6	Voir Dire by Mr. Bakkedahl	3393
	Individual Voir Dire of Robert Barnes,	
7	Bruce Bowden and Debbie Lloyd	3400
	Individual Voir Dire of Ms. Simms by the Court	3419
8	Group Voir Dire by the Court	3423
9	Nixon v. Singletary inquiry of the	
	Defendant by Mr. Glenn	3434
10	Individual Voir Dire	3445
11	Jury Selection	3452
	Jury Selected	3477
12	Jury Selection on Alternates	3479
	Alternate Jurors Selected	3484
13	Jury Panel Seated in Jury Box	3485
	Roll Call of Jurors	3485
14	Jury Panel Sworn In	3488
15	Rule of Sequestration Invoked by Defense	3491
16	Court Reviews Preliminary Pretrial Instructions	
	With Counsel	3498
17	Motion in Limine by State	3500
18	Ruling on Video Animation	3501
19		
20	<u>GUILT PHASE</u>	
	Pretrial Preliminary Jury Instructions Given	3502
21	Opening Statement by Mr. Isenhower	3516
22	Opening Statement by Mr. Glenn	3528
23	<u>DETECTIVE RONALD WENTZ</u>	
	Direct Examination by Mr. Bakkedahl	3536
24		
25		

1	<u>DETECTIVE RONALD WENTZ</u>	
2	Direct Examination, Continued by Mr. Bakkedahl	3593
3	<u>LIEUTENANT KEVIN DIETRICH</u>	
4	Direct Examination by Mr. Bakkedahl	3619
5	<u>CASEY FEDYNIK</u>	
6	Direct Examination by Mr. Isenhower	3628
7	Cross-Examination by Mr. Glenn	3644
8	Redirect Examination by Mr. Isenhower	3651
9	<u>MICHELLE EID</u>	
10	Direct Examination by Mr. Isenhower	3653
11	Cross-Examination by Mr. Manship	3672
12	<u>JERRY PILARSKI</u>	
13	Direct Examination by Mr. Isenhower	3680
14	Cross-Examination by Mr. Glenn	3700
15	<u>ALBERT KRAJNIAK</u>	
16	Direct Examination by Mr. Isenhower	3711
17	Cross-Examination by Mr. Glenn	3735
18	Redirect Examination by Mr. Isenhower	3739
19	Recross-Examination by Mr. Glenn	3740
20	<u>DETECTIVE CLARENCE BENNETT</u>	
21	Direct Examination by Mr. Bakkedahl	3748
22	Cross-Examination by Mr. Glenn	3791
23	Redirect Examination by Mr. Bakkedahl	3804
24	<u>DETECTIVE NATHANIEL STUBLEY</u>	
25	Direct Examination by Mr. Isenhower	3807
26	Cross-Examination by Mr. Glenn	3831
27	<u>DEPUTY MARK SARVIS</u>	
28	Direct Examination by Mr. Isenhower	3834
29	Cross-Examination by Mr. Manship	3857
30	<u>LIEUTENANT KEVIN DIETRICH</u>	
31	Direct Examination by Mr. Bakkedahl	3859
32	<u>WADE TINDALL</u>	
33	Direct Examination by Mr. Isenhower	3872
34	<u>MASTER DEPUTY KEVIN LINDSTADT</u>	
35	Direct Examination by Mr. Bakkedahl	3882

1	<u>DETECTIVE RONALD WENTZ</u>	
2	Direct Examination by Mr. Bakkedahl	3891
3	<u>SERGEANT GRANT KING</u>	
4	Direct Examination by Mr. Bakkedahl	3908
5	<u>RICHARD YOUNG</u>	
6	Direct Examination by Mr. Bakkedahl	3927
7	Cross-Examination by Mr. Manship	3958
8	<u>JESSICA MALDONADO (PROFFER)</u>	
9	Proffered Examination by Mr. Bakkedahl	3967
10	Defense's Objections to Maldonado Proffer	3976
11	State's Rebuttal to Maldonado Proffer	3977
12	Defense's Rebuttal to Maldonado Proffer	3979
13	Supplemental Maldonado Proffer	3979
14	Maldonado Proffer Ruling	3980
15	<u>JESSICA MALDONADO</u>	
16	Direct Examination by Mr. Bakkedahl	3985
17	Cross-Examination by Mr. Manship	3994
18	Redirect Examination by Mr. Bakkedahl	4003
19	<u>RICHARD YOUNG</u>	
20	Direct Examination by Mr. Bakkedahl	4009
21	Defense's Objection to Mannequin	4044
22	State's Response	4044
23	Defense's Rebuttal	4047
24	Richardson Inquiry	4048
25	Richardson Findings and Ruling on Objections	4054
26	<u>RICHARD YOUNG</u>	
27	Direct Examination, Continued by Mr. Bakkedahl	4062
28	<u>MARK CHAPMAN</u>	
29	Direct Examination by Mr. Isenhower	4082
30	Cross-Examination by Mr. Manship	4110
31	<u>JULIE CASALS</u>	
32	Direct Examination by Mr. Bakkedahl	4123
33	Cross-Examination by Mr. Manship	4139
34	Redirect Examination by Mr. Bakkedahl	4140
35	<u>DR. ROGER MITTLEMAN</u>	
36	Direct Examination by Mr. Bakkedahl	4142
37	Cross-Examination by Mr. Manship	4170
38	Redirect Examination by Mr. Bakkedahl	4174

1	Defense's Objection to Mannequin	4193
	State's Response	4197
2	Ruling on Mannequin	4199
3	<u>DETECTIVE SERGEANT KYLE KING</u>	
	Direct Examination by Mr. Bakkedahl	4203
4	Cross-Examination by Mr. Manship	4275
5	Stipulation Read to Jury	4277
6	State Rests	4278
7	Judgment of Acquittal Motion	4279
	State's Response	4287
8	Ruling on Judgment of Acquittal	4291
9	<u>BERTHA HUSKEY</u>	
	Direct Examination by Mr. Manship	4295
10	Cross-Examination by Mr. Isenhower	4306
	Redirect Examination by Mr. Manship	4314
11	State's Objection to Admitting Sheriff's	
12	Office Policies and Procedures	4316
	Argument by Defense	4317
13	Argument by State	4317
	Further Argument by Defense	4322
14	Further Argument by State	4324
	Further Argument by Defense	4327
15	Charge Conference	4336
16	Argument by Defense on Policies and Procedures	4349
17	Argument by State	4352
	Further argument by the Defense	4354
18	Further argument by the State	4354
	Ruling on Policies and Procedures	4355
19	Ruling on Impeachment	4359
20	Court Inquires of Defendant Re: Testifying	4373
21	Charge Conference	4403
22	State's Exhibit No. 21 Published to the Jury	4443
23	Policies and Procedures Read to Jury	4444
24	Defense Rests	4445
25		

1	Defense Renew's Objection to Mannequin	4453
2	Ruling on Renewed Objection to Mannequin	4453
3	Renewed Judgment of Acquittal Motion	4456
3	Judgment of Acquittal Ruling	4457
4	Closing Argument by Mr. Bakkedahl	4458
5	Motion for Mistrial	4466
6	Motion for Mistrial Ruling	4466
6	Closing Argument by Mr. Glenn	4488
7	Rebuttal Closing Argument by Mr. Bakkedahl	4521
8	Motion for Mistrial	4530
9	Ruling on Motion for Mistrial	4531
10	Court Instructs Jury	4548
11	Jury Retires to Begin Deliberations	4582
12	Question by the Jury	4592
13	Audio Playback of Jerry Pilarski	4599
14	Audio Playback of Albert Krajniak	4631
14	Audio Playback of Clarence Bennett	4660
15	Verdict	4737
16	<u>PENALTY PHASE</u>	
17	<u>DR. MARK CUNNINGHAM (PROFFER)</u>	
18	Direct Examination by Ms. Celidonio	4753
18	Cross-Examination by Mr. Bakkedahl	4801
19	Redirect Examination by Ms. Celidonio	4828
19	Recross-Examination by Mr. Bakkedahl	4829
20	Further Redirect Examination by Ms. Celidonio	4829
20	Argument by the State	4832
21	Argument by the Defense	4834
21	Dr. Cunningham Ruling	4837
22	Motion in Limine by the Defense	4846
23	Motion by Defense to have In Camera and Ex Parte Proffer	4856
24	Argument by the State	4858
24	Argument by the Defense	4858
25	In Camera and Ex Parte Proffer Ruling	4861

1	<u>DR. JAMES GARBARINO (PROFFER)</u>	
	Direct Examination by Ms. Miranda	4872
2	Cross-Examination by Mr. Bakkedahl	4891
	Redirect Examination by Ms. Miranda	4922
3		
	Argument by the State	4926
4	Argument by the Defense	4940
	Rebuttal Argument by the State	4943
5	Dr. Garbarino Ruling	4945
6	Motion in Limine Ruling	4946
7	Motion for Continuance	4946
8	Motion for Continuance by the Defense	4957
9	Victim Impact Argument by Defense	4967
10	Defense Renews Motions to Exclude	4969
	Victim Impact Evidence, Motion to Delineate	
11	Mitigation, Motion to Declare 921.141(5)(J),	
12	Cold, Calculating and Premeditated Unconstitutional	
	and Motion to Allow Victim Impact Evidence Before	
	the Judge Alone	
13	Victim Impact Argument by the State	4976
14	Defense Motion in Limine Regarding Reference	4987
15	to Nonenumerated Mitigating Factors	
16	Judge's Ruling on Victim Impact Statements	4990
	Judge's Ruling on Motion for Continuance	4991
17	Judge's Ruling on Motion in Limine	4991
	Judge's Ruling on Redactions of Sheriff Mascara's	
18	Victim Impact Statement	4992
	Judge's Ruling on Redactions of Holly Morales's	
19	Victim Impact Statement	4995
	Judge's Ruling on Redactions of Mr. And Mrs. Morales's	
20	Victim Impact Statement	4995
	Judge's Ruling on Redactions of Jeff Whelan's	
21	Victim Impact Statement	4995
22	Penalty Phase Jury Instructions	5002
	Opening Statement by Mr. Isenhower	5003
23		
	<u>SHERIFF KEN MASCARA (VICTIM IMPACT)</u>	
24	Direct Examination by Mr. Isenhower	5008
25		

1	<u>JEFF WHELAN (VICTIM IMPACT)</u>	5017
2	Direct Examination by Mr. Isenhower	
3	<u>CANDY MORALES (VICTIM IMPACT)</u>	5025
4	Direct Examination by Mr. Isenhower	
5	<u>HOLLY MORALES (VICTIM IMPACT)</u>	5028
6	Direct Examination by Mr. Isenhower	
7	Opening Statement by Ms. Miranda	5035
8	<u>DR. JAMES GARBARINO</u>	
9	Direct Examination by Ms. Miranda	5042
10	Direct Examination, Continued by Ms. Miranda	5060
11	Cross-Examination by Mr. Bakkedahl	5073
12	<u>DR. JAMES GARBARINO (PROFFER)</u>	
13	Direct Examination by Mr. Bakkedahl	5107
14	Cross-Examination by Ms. Miranda	5110
15	Redirect Examination by Mr. Bakkedahl	5111
16	Recross-Examination by Ms. Miranda	5121
17	Judge's Ruling on Proffer of Dr. Garbarino	5122
18	<u>DR. JAMES GARBARINO</u>	
19	Cross-Examination, Continued by Mr. Bakkedahl	5123
20	Redirect Examination by Ms. Miranda	5134
21	Recross-Examination by Mr. Bakkedahl	5146
22	Further Redirect Examination by Ms. Miranda	5147
23	<u>HOLLY BEER</u>	
24	Direct Examination by Ms. Miranda	5148
25	Cross-Examination by Mr. Isenhower	5152
26	<u>VANESSA TYREE</u>	
27	Direct Examination by Ms. Celidonio	5153
28	<u>MARY ANN BROWN</u>	
29	Direct Examination by Ms. Miranda	5183
30	Cross-Examination by Mr. Isenhower	5192
31	Redirect Examination by Ms. Miranda	5193
32	<u>AHMAAD CARSON</u>	
33	Direct Examination by Ms. Celidonio	5196
34	Cross-Examination by Mr. Isenhower	5218
35	<u>DAVID REIDY</u>	
36	Direct Examination by Ms. Miranda	5236
37	Cross-Examination by Mr. Isenhower	5239
38	Redirect Examination by Ms. Miranda	5240

1	<u>ALICE HUDSON</u>	
	Direct Examination by Ms. Miranda	5242
2	Cross-Examination by Mr. Isenhower	5246
	Redirect Examination by Ms. Miranda	5249
3	<u>RONALD D. MCANDREW</u>	
4	Direct Examination by Ms. Celidonio	5252
	Cross-Examination by Mr. Bakkedahl	5278
5	Redirect Examination by Ms. Celidonio	5302
6	<u>DR. MARK CUNNINGHAM</u>	
	Direct Examination by Ms. Celidonio	5316
7	Direct Examination, Cont. by Ms. Celidonio	5343
	Cross-Examination by Mr. Bakkedahl	5402
8	<u>NORETTA JENKINS</u>	
9	Direct Examination by Ms. Celidonio	5414
	Cross-Examination by Mr. Isenhower	5440
10	<u>CHARMAINE TISDALE</u>	
11	Direct Examination by Ms. Miranda	5446
12	Defense Rests	5451
13	Closing Argument by Mr. Bakkedahl	5473
	Closing Argument by Ms. Celidonio	5519
14	Jury Charged	5561
15	Jury Retires to Deliberate	5576
	Verdict	5582
16	Jury Polled	5583
	Jury Released	5586
17	Court's Adjudication	5588
18	<u>SPENCER HEARING</u>	
19	<u>CHARMAINE TISDALE</u>	
20	Direct Examination by Mr. Bakkedahl	5599
	Cross-Examination by Ms. Miranda	5639
21	<u>SENTENCING</u>	
22	Vanessa Tyree Addresses the Court	5662
23	Charmaine Tisdale Addresses the Court	5664
	Defendant Addresses the Court	5669
24	Comment to the Court by Ms. Celidonio	5673
	Comment to the Court by Mr. Bakkedahl	5680
25	Rebuttal Comment by Ms. Miranda	5691
	Sentence Announced by the Court	5695

EXHIBITS
(SHOWN IN ORDER AS MARKED DURING PROCEEDINGS)

SUPPRESSION HEARING

1		
2		
3	State's No. 1	98
	State's No. 2	115
4	State's No. 3	118
	State's No. 4	121
5	State's No. 9	129
	State's No. 10	129
6	State's No. 5	132
	State's No. 6	133
7	State's No. 7	204
	State's No. 8	210

WILLIAMS RULE AND SUPPRESSION HEARING

8		
9	Defendant's No. 1	341

JURY QUESTIONNAIRES

10		
11	Court's No. 1 for ID	481

JURY SELECTION

12		
13	Defendant's Composite No. 1	3015

TRIAL PROCEEDINGS

14		
15	Court's No. 2 for ID	3495
16	State's No. 21 for ID	3497
	State's No. 1	3561
17	State's Nos. 2, 3, 6-9, 13-20 State's Nos. 4 & 5	3577
	State's No. 12	3577
18	State's No. 8	3584
	State's Nos. 10 & 11	3609
19	State's No. 22	3669
	State's No. 23	3782
20	State's No. 24	3790
	State's No. 25	3823
21	State's No. 35	3846
	State's No. 26	3854
22	State's No. 27	3893
	State's No. 29	3913
23	State's No. 28	3914
	State's No. 30	3916
24	State's No. 32	3917
	State's No. 33	3919
25	State's No. 34	3920
	State's No. 31	3923

1	State's Nos. 36-45 & State's Nos. 47-48	3936
	State's No. 53	3937
2	State's No. 54	3949
	State's No. 49	3951
3	State's No. 52	3954
	State's No. 50	3955
4	State's No. 51	3956
	State's Nos. 55, 59, 60, 61, 63, 72-79, 81, 82 & 84	4011
5	State's Nos. 85-89	4018
	State's No. 56	4026
6	State's No. 57	4027
	State's No. 62	4030
7	State's No. 58	4032
	State's Nos. 65-71	4036
8	State's No. 80	4071
	State's No. 83	4073
9	State's No. 90	4075
	State's Nos. 91-100 & 126	4153
10	Court's No. 2 for ID	4193
	Court's No. 3 for ID	4199
11	Court's No. 4 for ID	4199
	States Nos. 101-118 & 120-125	4240
12	States No. 64	4241
	States No. 119	4260
13	Defendant's No. 2 for ID	4369
	Defendant's No. 3 for ID	4369
14	State's No. 21	4366
	Defendant's No. 4 for ID	4748
15	Court's No. 6 for ID	4992
	Court's No. 10 for ID	4996
16	Court's No. 11 for ID	4996
	State's No. 128	5015
17	Defendant's Nos. 6 - 14	5179
	Defendant's No. 15	5191
18	Defendant's Nos. 17 & 18	5215
	Defendant's Nos. 16, 19 & 20	5218
19	Defendant's No. 25	5264
	Court's No. 14 for ID	5401
20	Defendant's No. 21	5440
	Defendant's No. 26	5449
21	Defendant's No. 27	5594
	Defendant's No. 28	5595
22	Defendant's No. 29	5596
	State's No. 129	5597
23	State's No. 130	5598
24		
25		