CASE NO. 18-7912

IN THE UNITED STATES SUPREME COURT

October 2018 Term

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ERIESE TISDALE,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

****

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

RESPONDENT'S BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

(Capital Case)

Whether the Florida Supreme Court's determination under Florida law that a defendant whose death sentence was vacated under *Hurst v. State*, may be resentenced under the revised capital sentencing statute, Chapter 2016-13, Laws of Florida, should be reviewed by this Court where the decision is based on state law and there is no conflict among state or federal courts or any unsettled constitutional question implicated by the state court decision?

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The decision of which Petitioner seeks discretionary review is reported as *Tisdale v. State*, 257 So.3d 357 (Fla. 2018) as corrected (Nov. 29, 2018).

JURISDICTION

Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257. Respondent acknowledges that §1257 sets out the scope of this Court's certiorari jurisdiction; however, this Court's jurisdiction is limited to federal constitutional issues that were properly presented to and addressed by the state court. *See also* Sup. Ct. R. 14 (g)(i) (If review of a state court judgement is sought, the Petition for Writ of Certiorari shall specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . ."). This Court has never held that this type of Sixth Amendment error is retroactive. Tisdale attempts to justify this Court's jurisdiction by relying on a Florida Supreme Court's application of state law and the state constitution in deciding that certain cases were entitled to retroactive relief and to what is arguably an expansive reading of this Court's opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Nonetheless, because of its reliance on Florida constitutional and statutory law, the Florida Supreme Court's decision in this case is based on adequate and independent state grounds. Although

it reached the correct conclusion in this case, the Florida Supreme Court's reliance on unanimous jury recommendations to find *Hurst* errors harmless does not comport with this Court's precedent – or its own.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The issues presented in this capital case involve the Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE AND FACTS

On March 27, 2013, the State indicted Eriese Alphonso Tisdale ("Tisdale"), for first degree murder of a law enforcement officer with a firearm, aggravated assault on a law enforcement officer with a firearm, possession of a firearm or ammunition by a convicted felon, and fleeing or eluding - lights and siren. The crimes occurred on February 28, 2013. The jury convicted him on all counts on October 1, 2015. After a penalty phase trial, the jury recommended death by a vote of nine to three. Three days before the scheduled sentencing hearing, this Court issued *Hurst v. Florida*, 136 S. Ct. 616 (2016) which invalidated Florida's sentencing scheme in death cases. The trial court proceeded to sentence Tisdale to death under the statute in effect at the time of the crime, which allowed a death sentence by a majority vote. The trial court specifically found only those aggravators actually found by the jury.

The Florida Supreme Court summarized the facts of the case as follows:

> 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 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.

Tisdale v. State, 257 So.3d at 358-59. That court affirmed the convictions but vacated the death sentence on the basis of the errors identified in *Hurst*.

The Florida Supreme Court's holding in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017) followed this Court's ruling in *Hurst v. Florida* in requiring the aggravating circumstances to be found by a jury beyond a

reasonable doubt before a death sentence may be imposed. The Florida court then expanded this Court's ruling, requiring in addition that "before the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death." *Hurst v. State*, 202 So.3d at 57.

The dissent observed that "[n]either the Sixth Amendment nor *Hurst v. Florida* requires a jury to determine the sufficiency of the aggravation, the weight of the aggravation relative to any mitigating circumstances, or whether a death sentence should be imposed." *Hurst v. State*, 202 So.3d at 82 (Canady, J., dissenting). [1]

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[1] In *Hurst v. Florida*, 136 S. Ct. 616 (2016), this Court's holding was clear. "Florida's sentencing scheme, which required the judge alone to find the existence of an *aggravating circumstance*" violated the Sixth Amendment's right to a jury trial. *Hurst v.Florida,* 136 S. Ct. at 624 (emphasis added). There is no *Hurst v. Florida* error, as defined by this Court, in Tisdale's case. Tisdale's contemporaneous and prior violent felony convictions satisfy the requirements of *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring*, and *Hurst v. Florida*. *See also Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting Hutton's guilt-phase jury necessarily found the existence of aggravating factors.).

REASON FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S DETERMINATION UNDER FLORIDA LAW THAT DEFENDANT WHOSE DEATH SENTENCE WAS VACATED UNDER *HURST V. STATE*, MAY BE RESENTENCED UNDER THE REVISED CAPITAL SENTENCING STATUTE, CHAPTER 2016-13, LAWS OF FLORIDA, IS BASED ON STATE LAW AND THERE IS NO CONFLICT AMONG STATE OR FEDERAL COURTS OR ANY UNSETTLED CONSTITUTIONAL QUESTION IMPLICATED BY THE STATE COURT DECISION.

Petitioner requests that this Court review the Florida Supreme Court's decision denying relief based on his argument that Florida Act Chapter 2016-13 entitled him to a life sentence since the jury recommendation was nine to three; as noted above, the Florida court vacated the death sentence due to *Hurst* error and remanded the case for a new penalty phase trial. The Florida Supreme Court's denial of relief in Petitioner's case is based on adequate and independent state grounds, is not in conflict with any other state court of last review, and is not in conflict with any federal appellate court. As will be shown, nothing about the Florida Supreme Court's decision is inconsistent with the United States Constitution. Petitioner does not provide any compelling reason for this Court to review his case. Sup. Ct. R. 10. Indeed, Petitioner cannot cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's

decision in *Tisdale v. State*, 257 So.3d 357, in which the court determined that Petitioner was not entitled to a life sentence based on a prior penalty phase recommendation that occurred under an unconstitutional state statute. Since no compelling reason for review has been offered by Petitioner, certiorari should be denied.

Tisdale argues that the trial court erred in failing to sentence him under Chapter 2016-13 which the Florida Legislature enacted on March 7, 2016 after this Court issued its opinion in *Hurst v. Florida*, 136 S. Ct. 616 (2016). He argues that statute applied to his case because it had gone into effect shortly before the court actually sentenced him even though it had not existed when the jury made its recommendation in October 2015. Under Chapter 2016-13, he would have been sentenced to life since the jury recommendation was nine to three for death, missing the new requirement that the recommendation had to have at least ten votes for death for that sentence to be imposed. He contends that the State is not entitled to seek death in any new penalty trial because he was "acquitted" of the death penalty by the jury recommendation. This Court should deny the petition because the issues raised are only matters of state law and do not involve any unsettled constitutional principle. Tisdale is not entitled to a life sentence under Chapter 2016-13.

Tisdale's argument that *Perry v. State*, 210 So.3d 630 (Fla. 2016) held that § 921.141(2)(c), Fla. Stat. (2016) applied retroactively to pending prosecutions, specifically that the requirement of ten votes for death applied to pending prosecutions; he misread the case. In *Perry*, the Florida Supreme Court determined that the Act, Chapter 2016-13, specifically the vote requirement, was unconstitutional and could not be applied to pending prosecutions. *Perry v. State*, 210 So.3d at 635. The decision rendered the statute a nullity; hence it had no application to Tisdale. Furthermore, that decision was delivered months after Tisdale was sentenced.

The Florida Supreme Court analyzed this issue solely in state law terms:

> 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, 106 S. Ct. 1749, 90 L.Ed.2d 123 (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).
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> 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).

Tisdale v. State, 257 So.3d at 360-61.

This Court does not have jurisdiction to accept this matter since, as it has long recognized, jurisdiction does not lie to review decisions from state courts which rest on adequate and independent state law grounds. *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgements of state courts that rest on adequate and independent state grounds."). This lack of jurisdiction occurs when the state court decision contains a plain statement that the decision relies on a state law basis even if the state court alternatively reached the merits. *Sochor v. Florida*, 504 U.S. at 533; *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983); *see also Harris v. Reed*, 489 U.S. 255, 264 n. 10 (1989); *Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935). This Court has repeatedly recognized that where a state court judgement rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v.*

Miller, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below); *Street v. New York*, 394 U.S. 576, 581-82 (1969).

Tisdale argues that, due to double jeopardy, Florida is precluded from seeking death in the future at a new penalty phase trial. He contends that the jury vote in his case constituted an "acquittal" of the death penalty. The Florida Supreme Court also rejected this argument. Neither the jury's 9-3 vote for death, nor the trial judge's subsequent sentencing order operated to acquit Tisdale of the death penalty. *See Poland v. Arizona*, 476 U.S. 147, 154 (1986)("At no point during petitioners' first capital sentencing hearing and appeal did either the sentencer or the reviewing court hold that the prosecution had 'failed to prove its case' that petitioners deserved the death penalty.").

This Court's precedent is clear that the Fifth Amendment's Double Jeopardy Clause does not bar the State from seeking the death penalty at a new penalty phase following the Florida Supreme Court's reversal of Tisdale's death sentence. As this Court discussed in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003), a retrial of a capital defendant does not implicate double jeopardy, stating, "[n]or, in these circumstances, does the prospect of a second capital-sentencing proceeding

implicate any of the perils against which the Double Jeopardy Clause seeks to protect." This Court rejected the defendant's double jeopardy claim because he had not been "acquitted" of the offense of "murder plus aggravating circumstance(s)." *Id.* at 112. This Court noted that the first sentencing jury deliberated and did not make any findings regarding aggravating and mitigating circumstances and thus, there was no double jeopardy bar to Pennsylvania seeking the death penalty on retrial. *Id.* at 112-13.

Tisdale's reliance on *Bullington v. Missouri*, 451 U.S. 430 (1981) is misplaced. Following penalty phase proceedings in *Bullington* the jury returned a life without parole for fifty years verdict. In contrast here, Tisdale was not "acquitted" of the death penalty as discussed by this Court in *Bullington*. The necessary jury vote for a death recommendation at the time this case was decided by the jury was by a bare majority. Further, the Florida Supreme Court has held that a non-unanimous death recommendation is not an "acquittal" of the death penalty, implicating double jeopardy. *Victorino v. State*, 241 So.3d 48, 50 (Fla. 2018).[2] The State may again seek death in a new penalty phase trial.

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[2] Petitioner's contention that the State failed to prove an essential "element" constitutes an "acquittal" of the enhancement required for a death sentence has also been negated by the Florida Supreme Court. In *Foster v. State*, 258 So.3d 1248, 1252 (Fla. 2018), the court explained:

> These statutes and the rule of procedure illustrate that the *Hurst* penalty phase findings are not elements of the capital felony of first-

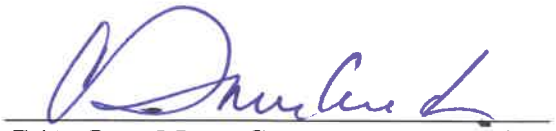
Finally, Tisdale's argument that the trial court's decision to proceed under § 921.141(3), Fla. Stat. (2015) was arbitrary and capricious is moot since a new penalty phase was ordered. It serves no basis for this Court to entertain the petition.

This Court should deny the petition.

CONCLUSION

Based upon the foregoing arguments and authorities, the petition for writ of certiorari should be denied.

Respectfully submitted,
ASHLEY MOODY
ATTORNEY GENERAL



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degree murder. Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred. Thus, Foster's jury did find all of the elements necessary to convict him of the capital felony of first-degree murder—during the guilt phase. (emphasis in original)