IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-1032

ERIESE ALPHONSO TISDALE

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

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ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, Eriese Alphonso Tisdale, was the defendant at trial and will be referred to as the "Defendant" or "Tisdale". Appellee, the State of Florida, the prosecution below, will be referred to as the "State." References to the record on appeal will be by the symbol "ROA" followed by the appropriate volume:page number(s), to the transcripts will be by the symbol "T" followed by the appropriate volume:page number(s), to any supplemental record or transcripts will be by the symbols "SR" followed by the appropriate volume:page number(s), and to Tisdale's initial brief will be by the symbol "IB".

STATEMENT OF THE CASE AND FACTS

On March 27, 2013 the State indicted Eriese Alphonso Tisdale on the following counts: 1 - first degree murder of a law enforcement officer with a firearm; 2 - aggravated assault on a law enforcement officer with a firearm; 3 - possession of a firearm or ammunition by a convicted felon; and 4 - fleeing or eluding - lights and siren. (ROA 1:41-42). Tisdale filed both a Williams Rule and suppression of his statement motions which were heard on May 19 and June 29, 2015. (ROA 5:1505-50, T 2:67-212, 3:240-332). The court denied the motions in a written order on August 26, 2015. (ROA 3:833-48). The jury trial began on September 8, 2015 and the jury convicted Tisdale on all counts on October 1,

2015. (ROA 5:1225-27, T 37:4737). The penalty phase trial began on October 7, 2015 and concluded on October 9, 2015 with a jury recommendation of death by a vote of nine to three. (T 40, 44:5582-83). The trial court held a hearing pursuant to Spencer v. State, 133 So.2d 729 (Fla. 1961) on November 17, 2015. (T 45). After hearing from additional witnesses, the court sentenced, under the statute existing at the time of the jury recommendation, Tisdale to death on April 29, 2016, finding two aggravating factors, giving both great weight, and forty non-statutory mitigators, giving thirty-two of them either very little or no weight; the court gave the other eight moderate weight. (T 46:5695-5748, ROA 7:1903-29).

On February 28, 2013, Tisdale, who was living with his pregnant girlfriend, Jessica Maldonado, on Mura Drive, left shortly before 9:30 A.M. to get her some orange juice. (T 32:3985-4002). He was a convicted felon and had a suspended driver's license. (T 30:3609-10, 34:4277-78). He was driving her red Toyota Corolla and was stopped on that street at the corner of King Orange for a traffic violation by Sergeant Morales. After stopping, Tisdale sped off, turning north on Naylor. Morales radioed for assistance and followed. Det. Bennett raced to assist and a witness pointed the direction the two cars went. (T 29:3577-80, 31:3748-73, 30:3653-79).

Tisdale stopped suddenly partway down Naylor, directly next to Jerry Pilarski and Albert Krajniak, who were completing some yard work. They saw Morales's sheriff car speeding after it with its lights on, but no sirens. Morales's car slid past the Toyota as it stopped. Pilarski saw Morales try to back his car up and get out of the car at the same time. Krajniak saw Morales kick open his door. Both saw Tisdale jump out of the red car with a gun in his hand and run toward Morales while firing shots at him. Bennett heard the shots as he was turning the corner of King Orange and Naylor and broadcast for additional assistance. All three witnesses saw Tisdale run to the open driver's door and fire seven shots at Morales as he neared. Tisdale was right next to the open car compartment, almost in the car, when he fired the final shots. (T30:3679-91, 3711-31, 32:4009-36, 4036).

Tisdale then ran back toward his car, aiming his gun at Bennett as the detective stopped his car. Bennett thought he was going to shoot him as well so he exited and fired at Tisdale who was still trying to aim. Bennett fired five shots at Tisdale who ducked and fell. (T 30:3692-3709, 32: 4009-36). Tisdale managed to get up and in the car, speeding off.

Tisdale tried to evade the three other sheriff cars which were chasing him. (T 31:3807-20, 3834-3852, 3859-70). Detective Stubley rammed Tisdale's car three

times but Tisdale refused to stop. Stubley then performed a PIT maneuver which caused Tisdale's car to spin, hit another car, and come to a halt. The deputies managed to take Tisdale into custody without further incident. Tisdale's gun, a Glock model 30, .45 caliber, was found on the floor of the front passenger seat. (T 31:3807-25, 3821-25, 32:3851). The gun had Tisdale's DNA on it. (T 33:4138).

Meanwhile, Bennett and Krajniak both ran to Morales who was slumped to the right in the driver's seat. He was completely inside his car with only his left foot hanging out. His gun was still holstered. There were no signs of life. (T 31:3872-78). Morales had suffered three gunshot wounds: one to his left arm; one to his left neck; and one to his head, just above his left ear. The shot to the head killed him immediately. He had also been shot in the chest but his protective vest had prevented the bullet from reaching his body. (T 33:4142-74). The bullets retrieved from Morales's body, his vest, and the sheriff's car all came from Tisdale's gun. (T 33:4082-4122). Detective Sergeant King of the Indian River Sheriff's Department reconstructed the crime and hypothesized that Morales was first shot in the arm, then in the throat, and finally in the head. (T 34:4203-77).

SUMMARY OF THE ARGUMENT

Point 1 - The 2016 amendments to the death penalty statutes requiring ten votes for death did not apply to Tisdale because the penalty phase jury trial and

recommendation took place under the old statute. Further, this Court invalidated that statute thereby rendering it a nullity.

Point 2 - Tisdale is not entitled to a life sentence under §775.082(2), Florida Statutes (2012) because the death penalty was not declared unconstitutional in Florida by Hurst v. Florida, 136 S.Ct. 161 (2016).

Point 3 - Any Hurst error in Tisdale's penalty phase trial was harmless because the jury convicted him of the aggravators of capital murder of a law enforcement officer and assault with a gun on a law enforcement officer during the guilt phase of the trial.

Point 4 - There was sufficient evidence to convict Tisdale on all four charged counts.

ARGUMENT

POINT 1

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. (Restated)

Tisdale argues that the trial court erred in not sentencing him under the Act Chapter 2016-13 which the Legislature enacted on March 7, 2016 after the Supreme Court issued its opinion in Hurst v. Florida, 136 S.Ct. 161 (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 "acquited" of the death penalty by the jury recommendation. Tisdale is mistaken and he is not entitled to a life sentence under Chapter 2016-13.

Tisdale argues 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 (IB 21); he misread the case. In Perry, this Court determined that the Act, chapter 2016-13, specifically the vote requirement, was unconstitutional and could not be applied to pending prosecutions. Perry, 210 So. 3d at 635. The decision rendered the statute a nullity; hence it has no application to Tisdale. Furthermore, that decision was delivered months after Tisdale was sentenced.

Tisdale also argues that, due to double jeopardy, the State is precluded from seeking death in the future if this Court orders a new penalty phase trial because of

Hurst error. He contends that the jury vote in his case constituted an acquittal of the death penalty. This Court has previously rejected this argument.

> As the United States Supreme Court discussed in Sattazahn v. Pennsylvania, 537 U.S. 101, 114, 123 S.Ct. 732, 154 L.Ed.2d 588 (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' " (citation omitted).

Victorino v. State, 2018 WL 1193382, at *2 (Fla. Mar. 8, 2018), reh'g denied, 2018 WL 2069254 (Fla. May 3, 2018). Tisdale's reliance on Bullington v. Missouri, 451 U.S. 430 (1981) does not assist him because here the trial court, the actual sentencer in Florida, did indeed find the necessary facts to support the death penalty so Tisdale was not "acquited" as discussed by the Supreme Court. The State may again seek death if a new penalty phase trial is ordered.

Finally, Tisdale argues that the trial court's decision to proceed under § 921.141(3), Fla. Stat. (2015) was arbitrary and capricious. While this may become moot if relief is granted under Point 3, the State submits that the trial court correctly applied that statute since the penalty phase trial and jury recommendation happened in October 2015, before the Supreme Court issued Hurst and before the new statute was enacted. The jury was instructed under the 2015 law so it was

appropriate that the sentencing statute remain the same when the actual sentence was decided.

POINT 2

§775.082(2) DOES NOT MANDATE A LIFE SENTENCE FOR TISDALE. (Restated)

Tisdale next argues that he should be sentenced to life without the possibility of parole as provided by §775.082(2), Florida Statutes (2012) because there was no constitutional death penalty procedure in place at the time of his trial and sentencing. Under the plain language of that provision, it is only applicable when the death penalty itself is declared unconstitutional. Here, as is evident from the fact that the Court has rejected the assertion that the type of error that occurs in Apprendi-based claims is a structural error, the error found here was merely a procedural error in the manner in which the decision to impose the death penalty was made. In fact, as the Supreme Court itself has recognized, this type of change in law does not even "alter the range of conduct [] subjected to the death penalty." Schriro v. Summerlin, 542 U.S. 348, 353 (2004). Instead, it merely requires a procedural change regarding the identity of the fact finder regarding those facts necessary to make a defendant eligible for the death penalty. Id. at 353-54. Given these circumstances, Hurst did not hold that the death penalty was unconstitutional;

it merely found a flaw in the manner in which the decision to impose the death penalty was made. Thus, by its own terms, §775.082(2), Fla. Stat. does not apply.

This Court has repeatedly rejected this argument. Hurst v. State, 202 So. 3d 40, 63–66 (Fla. 2016); Franklin v. State, 209 So. 3d 1241, 1248 (Fla. 2016); Caylor v. State, 218 So. 3d 416, 425 (Fla. 2017); Middleton v. State, 220 So. 3d 1152, 1184 (Fla. 2017). Tisdale is not entitled to a life sentence.

POINT 3

ANY ERROR UNDER THE HURST DECISIONS WAS HARMLESS. (Restated)

Tisdale's last argument is that he is entitled to a new penalty phase trial under the rulings of Hurst v. Florida, 136 S.Ct. 616 (2016), and Hurst v. State, 202 So.3d 40 (Fla. 2016) since his jury returned a nine to three recommendation for death. Hurst v. Florida invalidated the portion of the Florida death penalty sentencing scheme where the court, rather than the jury, found the aggravators necessary to impose a death sentence. In Hurst v. State this Court applied and extended that decision, mandating that the jury must unanimously find the existence of the aggravators, that they are sufficient to impose the death penalty, and that they outweigh the mitigating circumstances. This Court then held that a reviewing court must conduct a harmless error analysis with the burden on the State.

In Mosley v. State, 209 So.3d 1248 (Fla. 2016), this Court found that the Hurst decisions were retroactive to cases which were not final before April 24, 2002. In Mosley, this Court adopted the harmless error test outlined in Hurst v. State, which was on direct appeal after resentencing. Using the direct appeal harmless error standard, the Court placed the burden on the State to prove that the Hurst error did not affect the sentence. Mosley, 209 So. 3d at 1283. A proper harmless error analysis looks at whether the record demonstrates beyond a reasonable doubt that a rational jury would have recommended death had it been properly instructed in accordance with Hurst v. State. Id. at 1284 (explaining that "it must be clear beyond a reasonable doubt that a rational jury would have unanimously found all facts necessary to impose death and that death was the appropriate sentence."); see also Galindez v. State, 955 So. 2d 517, 523 (Fla. 2007) (explaining that the harmless error analysis for an Apprendi violation is whether the record demonstrates beyond a reasonable doubt that a rational jury would have found penetration when there was a failure to have the jury make the victim injury finding regarding penetration). Tisdale's case falls within that period and, thus, is eligible for relief under the Hurst decisions if the State cannot prove the error harmless.

Rather than speculating as to what the jury in this case would have done, the case should be viewed from an objective standpoint to assess what a rational jury would have done based on information contained in the record. See Davis v. State, 207 So.3d 142, 174 (Fla. 2017) ("[I]t must be clear beyond a reasonable doubt that a rational jury would have unanimously found that there were sufficient aggravating factors that outweighed the mitigating circumstances."); Mosley, 209 So. 3d at 1284 (referencing the "rational jury" standard).

When following the rational-jury standard, it should not matter whether the jury in this case unanimously recommended death. Instead, this Court should evaluate whether a rational jury would have done so. The inquiry becomes one based on an objective measurement of reasonableness rather than on what exactly the jury did or did not do in this case. In Tisdale's case, the State maintains that any error under Hurst was harmless. The sentencing court carefully and specifically only considered the two aggravating circumstances which the jury had unanimously convicted Tisdale on during the guilt phase. The two were the contemporaneous violent felony on an assault on a law enforcement officer using a gun and the murder of a law enforcement officer. Any properly instructed rational jury would have unanimously found these two aggravating circumstances. The unanimous jury verdicts convicting Tisdale of these two crimes satisfies the

requirement set forth in Hurst v. State. The existence of these two aggravators were and would be sufficient to sentence Tisdale to death, so any Hurst error was harmless beyond a reasonable doubt. Since the error was harmless, the State submits that the sentence is also proportional. See Holland v. State, 773 So.2d 1065 (Fla. 2000); Griffin v. State, 639 So.2d 966 (Fla. 1994); Gonzalez v. State, 786 So.2d 559 (Fla. 2001).

POINT 4

THERE WAS SUFFICIENT EVIDENCE TO CONVICT TISDALE.

Although not raised as an issue by Tisdale, the State submits that there was sufficient evidence to convict him of all four counts. It was undisputed at trial that Tisdale was a convicted felon and had a suspended license. (T 30:3609-10). Casey Fedynil and Michelle Eid, civilian witnesses, observed Tisdale fleeing Morales's law enforcement vehicle which had its overhead lights on. Eid saw Bennett also chasing Tisdale with both his lights and sirens on. (T 30:3628-79). The recorded radio call also established that Morales had pulled Tisdale over and that Tisdale fled. (T 29: 3577-80).

Pilarski, Krajniak, and Bennett all saw Tisdale stop his car and run over to Morales's car with a gun. All saw Tisdale fire numerous shots at Morales and saw Morales afterward showing no signs of life. Krajniak saw Tisdale run back to his

car with his attention and gun trained down the road toward Bennett. Bennett testified that Tisdale pointed the gun at him and tried to aim it. Bennett testified that Tisdale fled in his car after Bennett shot at him. (T 30:3679-3732, 31:3748-3806).

Several officers testified to chasing Tisdale who refused to stop until he was forced to do so when Stubley rammed him repeatedly and then forced his car to spin out. (T 31:3807-70). Once Tisdale was arrested, a gun was found in his car. The gun had his DNA on it. (T 33:4123-40). The bullets recovered from Morales and his car all came from the gun found in Tisdale's car. (T 33:4082-4122). Morales was killed by three gunshot wounds to his arm, neck, and head. (T 33:4142-74). There was sufficient evidence for the jury to convict on all four counts: first degree murder of a law enforcement officer; aggravated assault on a law enforcement officer with a gun; possession of a gun by a convicted felon; and eluding or fleeing a law enforcement officers who had the car lights and sirens on.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Defendant's convictions and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished electronically to Jeffrey H. Garland, Esq., at jgarland@treasurecoastlawyer.com on June 4, 2018.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 14 point Times New Roman type, a font that is not spaced proportionately on June 4, 2018.

/s/ Lisa-Marie Lerner____
LISA-MARIE LERNER