No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TROY VICTORINO,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

CHRISTOPHER J. ANDERSON
Counsel of Record
Law Office of Christopher J. Anderson
2217 Florida Boulevard, Suite A
Neptune Beach, Florida 32266
(904) 246-4448
chrisaab1@gmail.com

CAPITAL CASE

QUESTIONS PRESENTED

1. Does the Florida Supreme Court ruling that the automatic-resentencing-to-life provision of Florida Statutes Section 775.082(2) applies only if death is deemed unconstitutional as a form of criminal punishment violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Does the Florida Supreme Court ruling allowing defendants who received non-unanimous, unconstitutional, jury death-sentence recommendations to be re-subjected to the risk of receiving the death penalty in a new penalty phase violate the prohibitions against double jeopardy contained in the Fifth Amendment to the United States Constitution?

3. Does the Florida Supreme Court's ruling allowing defendants who received non-unanimous, unconstitutional, jury death-sentence recommendations to be re-subjected to the risk of receiving the death penalty in a new penalty phase trial violate the prohibitions against ex post facto laws contained in Article 1, Sections 9 and 10 of the United States Constitution?

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Petitioner Troy Victorino, a death-sentenced Florida prisoner, was the Appellant in the Florida Supreme Court.

Respondent State of Florida was the Appellee in the Florida Supreme Court.

DATE OF DECISION BELOW

The decision of the Florida Supreme Court sought to be reviewed is the Florida Supreme Court's March 8, 2018 decision in *Troy Victorino v. State of Florida*, Florida Supreme Court Case Number SC17-1284. A copy is included at page App. 2 of the Appendix submitted herewith. Petitioner filed a Motion for Rehearing on March 20, 2018 (App 6), which the Florida Supreme Court denied on May 3, 2018 (App. 14).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

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

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

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

> No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; . .

Article 1, Section 9 of the United States Constitution provides, in pertinent part:

No . . . ex post facto Law shall be passed.'

Article 1, Section 10 of the United States Constitution provides, in pertinent part:

No State shall . . . pass any . . . ex post facto Law . . .

STATEMENT OF THE CASE

The subject of this case is a six-victim, Deltona, Florida mass murder that occurred sometime between late evening of August 5th, 2004 and early morning of August 6th, 2004. Following the guilt-phase portion of the trial, Petitioner's jury found Petitioner (and some co-defendants) guilty of all of six first-degree murders.

The case progressed to the life-or-death "penalty phase" of trial. Petitioner's trial counsel presented substantial mitigation evidence. *See, Victorino v. State*, 23 So.3d 87 (Fla. 2009) at pages 93-94. For the murders of Michelle Nathan and Anthony Vega, the jury recommended life sentences. For the murder of Erin Berlanger, the jury recommended the death sentence by a vote of 10 to 2. (App. 80). For the murder of victim Francisco Ayo-Roman, the jury recommended the death sentence death by a vote of 10 to 2. (App 80-81). For the murder of victim Jonathan Gleason, the jury recommended the death sentence by a vote of 7 to 5. (App. 81). For the murder of victim Roberto Gonzales, the jury recommended the death sentence by a vote of 9 to 3. (App. 81) On September 21, 2006, the trial court judge sentenced Petitioner exactly as the jury had recommended for all of the murder victims. (R9, p 1531-1555). The Florida Supreme Court affirmed in all respects. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009).

Thereafter, the case progressed through all of the usual stages of capital case post-conviction proceedings. Defendant's judgment and sentences were affirmed on the first, "direct" appeal to the Florida Supreme Court. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009). Thereafter, the Florida Supreme Court affirmed the trial court's denial of Petitioner's "ineffective assistance of counsel" postconviction motion. *Victorino v. State*, 27 So. 3d 478 (Fla. 2013).

However, all such prior, postconviction proceedings are of no relevance to the present Petition. All of the issues raised in the subject Petition and its underlying, "change of law" motion for postconviction relief arose after –and as a result of—this United States Supreme Court's decision in *Hurst v. Florida*, 577 U.S. _____, 136 S. Ct. 616 (2016) (hereinafter referred to as the "*Hurst*" decision for brevity).

Following the *Hurst* decision, Petitioner filed a successive motion for postconviction relief in state court. Such motion was a "change of law" motion for postconviction relief based on *Hurst*. As the Florida Supreme Court correctly observed in *Victorino v. State*, (Florida Supreme Court Case No. SC17-1285, March 8, 2018), such successive postconviction motion asserted four claims: (1) that Petitioner's death sentences must to be vacated based on *Hurst*, (2) that Petitioner is entitled to be automatically resentenced to life on Florida Statutes Section 775.082(2), (3) that Petitioner cannot be re-subjected to the risk of receiving the death penalty because of the constitutional prohibitions of double jeopardy, (4) that Petitioner cannot be re-subjected to the risk of receiving the death penalty because of the constitutional prohibitions of ex post facto laws. (App. 2).

The trial court granted such successive postconviction motion in part and denied it in part. The trial court agreed that Petitioner's death sentences, all of which were imposed pursuant to non-unanimous jury death-sentence recommendations, violated *Hurst* had to be vacated. (App. 96). The trial court denied the Petitioner's remaining claims that he is entitled to be automatically resentenced to life under Florida Statutes Section 775.082 (2) and that the constitutional prohibitions against double jeopardy and ex post facto laws prevented the state from re-subjecting him to the risk of receiving the death penalty. (App. 96-98). The trial court ordered a new penalty phase (App. 98).

With regard to its denial of Petitioner's Florida Statutes Section 775.082, automatic-resentencing-to-life claim, the trial court explained that such automatic-resentencing-to life provision applies only if death is ruled unconstitutional as a form of criminal punishment. The trial court further explained that the United States Supreme Court's *Hurst* decision did not rule death unconstitutional as a form of criminal punishment, but rather, *Hurst* held that Florida's pre-*Hurst* legal procedure for sentencing criminal defendants to death violated the Sixth Amendment, United States Constitution, right to a jury trial. The trial court cited *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) and *Franklin v. State*, 209 So. 3d 1241 (Fla. 2016) in support of this conclusion. (App. 96-97). The Florida Supreme Court upheld such ruling on appeal. (App. P. 2).

With regard to its denial of Petitioner's claim that the prohibition against double jeopardy prevented the state from re-subjecting him to the risk of receiving

the death penalty, the trial court explained that such prohibition applies only where the jury has previously decided that death is an inappropriate penalty, so as to "acquit" the defendant of the death penalty. (App. 97-98). The trial court cited *Wright v. State*, 586 So. 2d 1024, 1032 (Fla. 1991) in support of such conclusion. (App. 97). On appeal, the Florida Supreme Court affirmed, citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003) for the proposition that a second capital-sentencing proceeding " . . . does not implicate any of the perils that the double jeopardy clause seeks to protect." (App. 2).

With regard to its denial of Petitioner's claim that the prohibitions against ex post facto laws prevent the state from re-subjecting him to the risk of receiving the death penalty, the trial court explained that the change in Florida's death-sentencing scheme after *Hurst* is "merely a procedural change and does not alter the punishment attached to first-degree murder." (App. 98). The trial court cited *State v. Perry*, 192 So. 3d 70 (Fla. 5th DCA 2016) subsequently approved of in *Perry v. State*, 210 So. 3d 630 (Fla. 2016), in support of such conclusion. (App. 98). The Florida Supreme Court, citing *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), subsequently affirmed such ruling, explaining that applying post-*Hurst* law retroactively to re-subject Petitioner to the risk of receiving the death penalty does not violate the prohibition against ex post facto laws because neither the definition of the criminal conduct at issue nor the possible penalties have been changed. (App. 3).

Petitioner appealed the trial court's denial of Petitioner's automatic-resentencing-to-life claim and double jeopardy claim and ex post facto claim to the Florida Supreme Court. The trial court has stayed the new penalty phase pending resolution of such claims. On March 8, 2018, the Florida Supreme Court issued its Opinion affirming the trial court's denial of such claims. (App. 2-12). Petitioner timely filed a motion for rehearing (App. 6-13). The Florida Supreme Court denied such rehearing motion on May 3, 2018. (App. 14).

REASONS FOR GRANTING THE WRIT

1. The Florida Supreme Court's ruling that the automatic-resentencing-to-life provision of Florida Statutes Section 775.082(2) applies only if death is deemed unconstitutional as a form of criminal punishment is contrary to the broad, inclusive language of such statutory provision and hence violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Florida Statutes Section 775.082(2), in effect at the times of the subject murder and Petitioner's death-sentencing, provides, "In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment . . ."

The death penalty could be deemed unconstitutional in any of three ways. A court could rule death to be an unconstitutional form of criminal punishment. A court could rule that the death penalty is unconstitutional because of the manner in which it is executed, *i.e.* electrocution, lethal injection. A court could rule that the

death penalty is unconstitutional because of a deficiency in the legal procedure by which the death penalty is selected over some lesser punishment.

This United States Supreme Court ruled that the death penalty imposed in Timothy Hurst's case was unconstitutional because of deficiencies in Florida's procedure for selecting the death penalty over the lesser penalty of life in prison. *Hurst v. Florida*, 577 U.S. _____, 136 S. Ct. 616 (2016). Thereafter, in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016 and *Franklin v State*, 209 So. 3d 1241 (Fla. 2016) and in the present case, the Florida Supreme Court ruled that defendants whose death sentences are vacated pursuant to *Hurst* are not entitled to be automatically resentence to life because Florida Statutes Section 775.082(2)'s automatic-resentencing-to-life provision applies only if death is ruled unconstitutional as a form of criminal punishment.

Such a narrow, state court construction of Section 775.082 (2) is contrary to its plain, broad, inclusive language. There is nothing in Florida Statutes Section 775.082(2) that suggests that automatic resentencing to life is to occur only if the punishment of death is held to be unconstitutional or only if the manner of physically executing the punishment of death is held to be unconstitutional or only if the legal procedure for selecting the penalty of death is held to be unconstitutional. On the contrary, Florida Statutes Section 775.082 (2) broadly states that once the death penalty in a capital felony is held to be unconstitutional in a Florida case, Florida death sentences are to be reduced to life sentences.

Florida's own rules of statutory construction indicate Florida Statutes Section 775.082(2) is to be broadly construed as requiring automatic resentencing to life for defendants like the present Petitioner whose death sentences have been rendered unconstitutional as a result of *Hurst*. When the text of a statute speaks clearly and without ambiguity, the judiciary's role is to simply apply it. *Gomez v. Villa. of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010). The use of the word "shall" is used in Florida Statutes Section 775.082. The use of the word "shall" in a statute is presumptively mandatory. *Grip Dev. Inc. v. Coldwell Banker Residential Real Estate, Inc.* 788 So. 2d 262, 265 (Fla. 4th DCA 2000). Furthermore the "rule of lenity" dictates that penal statutes be construed in the manner most favorable to the capital defendant. *Reino v. State*, 352 So. 2d 853, 860 (Fla. 1977).

This United States Supreme Court has, on rare occasion, held that a Florida Supreme Court interpretation distorting a Florida law beyond what a fair reading requires is a violation of due process and is remediable in this high court. *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525 (2000), *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

Florida Statutes Section 775.082(2) was clearly intended as a broad, "fail safe" commuting *all* unconstitutional death sentences to life sentences. The Florida courts' refusal to acknowledge this warrants issuance of the Writ.

2. The Florida Supreme Court's ruling allowing Petitioner, who received non-unanimous, jury death-sentence recommendations, to be re-subjected to the risk of receiving the death penalty in a new penalty phase is a violation of the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

Now that the United States Supreme Court and Florida Supreme Court have rendered their above-cited *Hurst* decisions invalidating Defendant's September 21, 2006 death sentences, the Defendant cannot again be put through another legal procedure that re-subjects him to the risk of receiving the death penalty. This is because of the prohibition against double jeopardy contained in the Fifth Amendment to the United States Constitution.

The Florida Supreme Court has consistently ruled that once a Florida judge or jury deems a defendant an inappropriate candidate for the death penalty, that Defendant cannot again be put at risk of receiving the death penalty. *Brown v. State*, 521 So.2d 110 (Fla. 1988), *Fasenmyer v. State*, 457 So.2d 1361 (Fla.1984), cert. denied, 470 U.S. 1035, 105 S.Ct. 1407, 84 L.Ed.2d 796 (1985); and *Troupe v. Rowe*, 283 So.2d 857 (Fla.1973). The Justices have concluded that the double jeopardy clause contained in the Fifth Amendment to the United States Constitution and Article I, Section 9, of the Florida Constitution prohibit a second pursuit of the death penalty once a Defendant successfully avoids it. The United States Supreme Court has also so ruled. *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984); *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981); and *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

Once a Defendant is "acquitted of the death penalty" by a trier of fact, he or she may not again be subjected to risk of the death penalty. *Preston v. State*, 607 So. 2d 404 (Fla. 1992). In *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v*

State, 202 So. 3d 40 (Fla. 2016) and *McGirth v. Jones* (Florida Supreme Court Case No. SC15-953, Jan. 27, 2017), the Florida Supreme Court clarified that anything short of a *unanimous* jury death-sentence decision is insufficient for the death penalty.

Wright v. State, 586 So. 2d 1024, 1033 (Fla. 1991) dealt with a trial judge's "override" of a jury life-sentence recommendation. The Florida Supreme Court found such judge's override of the jury's life sentence recommendation was erroneous. This Florida Supreme Court explained, "Thus, when it is determined on appeal that the trial court should have accepted the jury's recommendation of life imprisonment . . . the defendant must be deemed acquitted of the death penalty for double jeopardy purposes."

Green v. United States, 355 U.S. 184 (1957) concerned a Defendant who was charged with first-degree murder but whose jury convicted him only of the lesser included offense of second-degree murder. Green got such second-degree murder conviction overturned on appeal for lack of sufficient evidence. On retrial, the State again tried the Defendant for first-degree murder, over Defendant's "double jeopardy" objection. This time the State succeeded in getting the jury to convict the Defendant of first-degree murder. The United States Supreme Court reversed such first-degree murder conviction, explaining that the jury's refusal to convict the defendant of first-degree murder in the first trial acquitted Green of first-degree murder such that double jeopardy prevented Green from again being retried on such first-degree murder charge.

In *Fong Foo v United States*, 367 U.S. 141 (1962) a federal circuit court of appeal held that the federal district (trial) court erred in directing a verdict for the Defendant and then subsequently entering a judgment of acquittal. The United States government, over the Defendant's objection, re-tried the Defendant a second time and secured the conviction. The United States Supreme Court reversed, explaining that once a Defendant has been acquitted --rightfully or wrongfully-- double jeopardy bars retrial of such Defendant on the same charge.

As noted in the Statement of the Case above, none of the present Petitioner's jury death-sentence votes were unanimous. The Florida Supreme Court has ruled that anything short of complete jury unanimity in the entire death-sentencing process and the ultimate death-sentencing decision is insufficient for the death penalty. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *McGirth v. State*, (Fla. Sup. Ct Case No. SC15-953, Jan 26, 2017). Because all of the present Petitioner's jury death-sentence recommendation votes were non-unanimous, Petitioner was "acquitted" of the death penalty. The prohibition of double jeopardy prevents the state from re-subjecting him to the risk of receiving the death penalty. The trial court and the Florida Supreme Court erred in failing to so rule.

As also noted in the Statement of the Case above, the Florida Supreme Court cited *Sattazahn v. Pennsylvania*, 537 U.S. 101, 114 (2003) in support of the proposition that subjecting a defendant to a second capital-sentencing proceeding "does not implicate any of the perils against which the Double Jeopardy Clause

seeks to protect." (App. 2). However, the Florida Supreme court appears to have misunderstood *Sattazahn*.

Petitioner filed a motion for rehearing in the Florida Supreme Court. (App. 6-12). In it, Petitioner explained that, under the Pennsylvania death-sentencing law in *Sattazahn*, the death penalty is imposed only if the jury unanimously finds one or more aggravating circumstances which outweigh the mitigating circumstances. Pennsylvania law further provides that, in the event the sentencing jury cannot reach a unanimous life-or-death decision, the judge is to discharge the jury and sentence the Defendant to life.

Sattazahn's jurors, after 31 hours of penalty-phase deliberation, gave the judge a note explaining that they were deadlocked 9-3 for a life sentence and did not believe such deadlock would be broken. The trial judge, in accordance with Pennsylvania law, sentenced Sattazahn to life. *Sattazahn*, supra, at page 104.

On appeal, the Pennsylvania appellate court found some errors in the guilt-phase jury instructions and remanded the case back to the trial court for an entirely new trial, both guilt and penalty phases. The new-trial jury ended up unanimously voting for the death penalty.

The question in *Sattazahn* was whether the constitutional prohibition against double jeopardy precluded the State from re-seeking the death penalty where the Defendant was granted a new trial based on guilt-phase errors and where the first-trial jury had been unable to reach a unanimous death-sentence decision. The United States Supreme Court held that prohibition against double

jeopardy did not bar a new life-or-death penalty phase in such situation. The U.S. Supreme Court explained that, under Pennsylvania law, the *Sattazahn* jury was "deadlocked" and had failed to reached reach a finding as to the aggravating circumstance. Hence, the United States Supreme Court explained, the jury could not be said to have "acquitted" Sattazahn of the death penalty. The United States Supreme Court concluded that double-jeopardy protection does not prevent re-pursuit of the death penalty such a situation. *Sattazahn*, supra, at pgs. 109-110.

It is important to note that, under the Pennsylvania life-or-death sentencing procedure described in *Sattazahn*, there is no provision for non-unanimous life or death sentencing decisions by the jury. It must be either a unanimous death-sentence decision or a unanimous life-sentence decision or else the jury is deemed "hung" and the judge sentences the Defendant to life.

This United States Supreme Court explained its *Sattazahn* rationale: Under Pennsylvania law, the jury's failure to reach a unanimous life-or-death sentencing decision is treated as a "hung" jury Id p. 113 "Normally, a retrial following a hung jury does not violate the Double Jeopardy Clause." Id. p. 109. Justice Scalia, writing for the Court, further explained:

> . . . the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result –or more appropriately, that nonresult—cannot fairly be called an acquittal

> "based on findings sufficient to establish legal entitlement to the life sentence."
>
> (id. p. 110).

However, the U.S. Supreme Court distinguished its *Sattazahn* ruling from its prior ruling prohibiting the State from re-seeking the death penalty in *Bullington v. Missouri*, 451 U.S. 430 (1981) as follows:

> In *Bullington v. Missouri*, 451 U.S. 430 (1981), however, we held that the Double Jeopardy Clause *does* apply to capital-sentencing proceedings where such proceedings "have the hallmarks of the trial on guilt or innocence." *Id.*, at 439. We identified several aspects of Missouri's sentencing proceeding that resembled a trial, including the requirement that the prosecution prove certain statutorily defined facts beyond a reasonable doubt to support a sentence of death. *Id.*, at 428. Such a procedure, we explained, "explicitly requires the jury to determine whether the prosecution has "proved its case." *Id.*, at 444. Since, we concluded, a sentence of life imprisonment signifies that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence," the Double Jeopardy Clause bars a state from seeking the death penalty on retrial. *Id.*, at 445 (Quoting *State ex. Rel. Westfall v. Mason*, 594 S.W. 2d 908, 922 (Mo. 1980) (Bardgett, C.J., dissenting).
>
> (emphasis Appellant's)

In *Sattazahn*, the U.S. Supreme Court explained that it is the existence of a separate life-or-death sentencing proceeding in which the State is required to prove the additional facts justifying the death penalty rather than the subsequent imposition of a life sentence that triggers the double-jeopardy bar to a new sentencing proceeding:

> We were, however, careful to emphasize [in *Bullington v. Missouri*, 451 U.S. 430 (1981)] that it is not the mere imposition of a life sentence that raises a double jeopardy bar. We discussed *Stroud*, a case in which a defendant who had been convicted of first-degree murder and sentenced to life imprisonment obtained a reversal of his conviction and a new trial when the Solicitor General confessed error. In *Stroud*, [*Stroud v. United States*, 251 U.S. 15 (1919)], the Court unanimously held that the Double Jeopardy Clause did not bar imposition of the death penalty at the new trial. What distinguished *Bullington* from *Stroud*, we said, was the fact that in *Stroud*, "there was no separate sentencing proceeding at which the prosecution was required to prove –beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence." *Bullington*, 451 U.S., at 439. We made clear that an "acquittal" at a trial-like sentencing phase, rather than the mere imposition of a life sentence, is required to give rise to double-jeopardy protections.

In Florida, unlike Pennsylvania, the sentencing jury's failure to reach a unanimous life-or-death sentencing decision has never been treated as a "hung" jury and has never resulted in a mistrial. In addition, the Florida death-sentencing procedure in effect in 2006, when Appellant was tried, *did* have the hallmarks of a trial of guilt or innocence. Both sides presented evidence and argument and the jury deliberated and made sentence-related determinations.

The present Appellant's jurors were not "deadlocked." They completed their statutorily defined sentencing duties and successfully completed Florida's then-in-effect sentencing procedure as to all six-murder victims. Although Appellant's jurors did not issue explicit written findings as to aggravating circumstances, they were instructed to reach conclusions about aggravators and mitigators during

deliberation as steps along the way to their ultimate life-or-death sentencing votes. Every indication is that all of the jurors did as instructed.

The present Petitioner, unlike *Sattazahn*, was not granted a new guilt phase.

The United States Supreme Court has made it clear that the fact-finding function of the sentencing jury is more important than its unanimous "life" sentence vote. For example, in *Hurst v. Florida*, 136 S. Ct. 616 (2016) the Court stated, "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." In *Ball v. United States*, 163 U.S. 662 (1986) the United States Supreme Court ruled that the prohibition against double jeopardy precluded a State from correcting and re-filing a defective indictment to re-try a defendant previously acquitted by a jury of the same murder. In double-jeopardy analysis, substance prevails over form.

In the present case, every indication is that Petitioner's jurors followed the then-existing procedure and took all of the steps and made all of the findings required for their ultimate life-or-death sentencing decision. They chose to render non-unanimous votes for the death penalty, which –as a matter of law under *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State*, 202 So. 3d 40 (2016)— are effectively decisions *against* the death penalty. In this regard, the present Appellant's jurors *can* be regarded as having "acquitted" Appellant of the death penalty.

This Florida Supreme Court does not regard pre-*Hurst* jury sentencing determinations as valueless. This Court continues to uphold pre-*Hurst* jury death-

sentencing decisions where the State meets its burden of proving the *Hurst* error to be harmless beyond a reasonable doubt. *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Therefore, in fairness, it should work both ways. The fact that Petitioner's jurors completed all of their penalty-phase tasks and declined to render unanimous death-sentence recommendations for any of the six murder victims should indeed factor in double jeopardy analysis and should indeed be deemed to "acquit" Defendant of the death penalty.

The Florida Supreme Court's failure to rule that double jeopardy bars further pursuit of the death penalty warrants the issuance of the Writ.

3. The Florida Supreme Court's ruling allowing defendants who received non-unanimous, unconstitutional, jury death-sentence recommendations to be re-subjected to the risk of receiving the death penalty in a new penalty phase trial violates the prohibitions against ex post facto laws.

The Defendant argued in his underlying, post-*Hurst* motion for postconviction relief that the prohibition of ex post facto laws prevents the state from again placing Petitioner at risk of receiving the death penalty. The trial court was unpersuaded, ruling, "The application of the new capital sentencing statutes (Florida's revised, post-*Hurst* death-sentencing statutes) did not constitute an ex post facto violation because it is merely a procedural change and does not alter the punishment attached to first-degree murder." (App. 98). On appeal, the Florida Supreme Court, citing *Lyce v. Mathis*, 519 U.S. 433, 441 (1997), agreed. (App. 3). The Florida Supreme Court explained that applying Florida's new, post-*Hurst* death sentencing statutes which require the jury to unanimously find all aggravating

factors that were proven beyond a reasonable doubt, and unanimously find that sufficient aggravating factors exist to impose death, and unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death does not violate the ex post facto prohibition because it does not alter the definition of criminal conduct nor increase the penalty by which the crime of first-degree murder if punishable. (App. 5).

Petitioner argued on appeal that his status at the time of his original, September 26, 2006 sentencing was that of a person who had not received a single, unanimous jury death-sentence recommendation. Hence, Petitioner had –and has— the status of a person not eligible for the death penalty. To go back now and apply recent, post-*Hurst* law retroactively to Petitioner to render the Petitioner once again death-eligible would appear to violate the constitutional prohibitions against ex post facto laws.

In *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216 (1925) Justice Stone summarized the characteristics of an ex post facto law: "It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto."

In the present case, going forward with a new life-or-death sentencing proceeding after the above-cited Hurst rulings would deprive Defendant of the immunity from the death penalty which he now has by virtue of the same Hurst decisions and Florida Statutes Section 775.082 (described above) and also as a result of having already gone through one life-or-death sentencing proceeding without a single, unanimous jury death-sentence vote. As noted above, Florida Statutes Section 775.082 was in effect at the time of the subject murder. It provides that death sentences that are subsequently determined to be unconstitutional are to be reduced to life-without-parole sentences.

In subjecting the Defendant to the risk of the death penalty a second time under current death-sentencing law, the trial court and the Florida Supreme Court have erred and violated the prohibitions against ex post facto laws contained in Article 1, Sections 9 and 10 of the U.S. Constitution. For this reason, the Writ should issue.

CONCLUSION

This Court should grant a writ of certiorari to review the decision below.

Respectfully submitted,

/S/ Christopher J. Anderson
CHRISTOPHER J. ANDERSON
Counsel of Record
Law Office of Christopher J. Anderson
2217 Florida Boulevard, Suite A
Neptune Beach, FL 32266
(904) 246-4448
chrisaab1@gmail.com