CASE NO. 18-5434

IN THE SUPREME COURT OF THE UNITED STATES

TROY VICTORINO

Petitioner,

v.

STATE OF FLORIDA

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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QUESTION PRESENTED

[Capital Case]

Whether this Court should exercise its certiorari jurisdiction to review the Florida Supreme Court's ruling that *Hurst* does not require death sentences imposed in violation of *Hurst* to be commuted to life, where the decision is based on adequate independent state grounds and the issue presents no conflict between the decisions of other state courts of last resort or federal courts of appeal, does not conflict with this Court's precedent, and does not otherwise raise an important federal question?

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CITATION TO OPINION BELOW

The decision of the Florida Supreme Court is reported at *Victorino v. State*, 241 So. 3d 48 (Fla. 2018) (Pet. App. A-2), *reh'g denied*, 2018 WL 2069254 (Fla. May 3, 2018) (Pet. App A-14).

STATEMENT OF JURISDICTION

The judgment of the Florida Supreme Court was entered on March 8, 2018. (Pet. App. A-2). Petitioner asserts that this Court's jurisdiction is based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

FACTS AND PROCEDURAL BACKGROUND

On August 27, 2004, Troy Victorino was charged in a fourteen-count superseding indictment that included six counts of first-degree murder in the deaths of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo–Roman. *Victorino v. State*, 23 So. 3d 87, 91 (Fla. 2009). The evidence presented at trial established that the August 6, 2004, murders were the culmination of events that began several days before. On Friday,

July 30, Erin Belanger contacted police concerning suspicious activity at her grandmother's vacant house on Providence Boulevard in Deltona. Without the owner's permission, Victorino and codefendant Hunter had recently moved into the home with their belongings. On Saturday, Belanger again contacted police; this time she reported that several items were missing from her grandmother's house. Late Saturday night, Victorino appeared at Belanger's own residence on Telford Lane. He demanded the return of his belongings, which he believed Belanger had taken from the Providence Boulevard residence. Shortly after leaving Belanger's residence early on the morning of Sunday, August 1, Victorino contacted law enforcement to report the theft of his belongings from the Providence Boulevard residence. The responding officer advised Victorino that he had to provide a list of the stolen property. This angered Victorino, and he said, "I'll take care of this myself."

On Thursday, August 5, codefendants Graham, Salas, and Cannon met with Victorino and Hunter at their residence. There, Victorino outlined the following plan to obtain his belongings from Belanger. Victorino said that he had seen a movie named Wonderland in which a group carrying lead pipes ran into a home and beat the occupants to death. Victorino stated that he would do the same thing at the Telford Lane residence. He asked Graham, Salas, and Cannon if they "were down for it" and said to Hunter, "I know you're down for it" because Hunter had belongings stolen as well. All agreed with Victorino's plan. Victorino described the

layout of the Telford Lane residence and who would go where. Victorino said that he particularly wanted to "kill Flaco," and told the group, "You got to beat the bitches bad." Graham described Victorino as "calm, cool-headed." codefendant Hunter asked if they should wear masks; Victorino responded, "No, because we're not gonna leave any evidence. We're gonna kill them all."

On the morning of Friday, August 6, a coworker of two of the victims discovered the six bodies at the Belanger residence and called 911. Officers responding to the 911 call arrived to find the six victims in various rooms. The victims had been beaten to death with baseball bats and had sustained cuts to their throats, most of which were inflicted postmortem. Belanger also sustained postmortem lacerations through her vagina up to the abdominal cavity of her body, which were consistent with having been inflicted by a baseball bat. The medical examiner determined that most of the victims had defensive wounds. The front door had been kicked in with such force that it broke the deadbolt lock and left a footwear impression on the door. Footwear impressions were also recovered from two playing cards, a bed sheet, and a pay stub. All of these impressions were linked to Victorino's Lugz boots. Furthermore, DNA testing linked bloodstains on Victorino's Lugz boots to several of the victims.

On July 25, 2006, Victorino was convicted of six counts of first-degree murder (Counts II–VII); one count of abuse of a dead human body (Count VIII); one count

of armed burglary of a dwelling (Count XIII); one count of conspiracy (to commit aggravated battery, murder, armed burglary of a dwelling, and tampering with physical evidence) (Count I); and one count of cruelty to an animal (Count XIV). *Id.* at 91-3. The jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo–Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three). *Id.*

The trial court followed the jury's recommendation by imposing four death sentences. *Id.* The trial court found the following five aggravating factors applicable to each of the four murders and accorded them the weight indicated: (1) the defendant had a prior felony conviction and was on probation at the time of the murders (moderate weight); (2) the defendant had other capital felony convictions (very substantial weight); (3) the defendant committed the murders in the course of a burglary (moderate weight); (4) the murders were especially heinous, atrocious, or cruel (HAC) (very substantial weight); and (5) the murders were cold, calculated, and premeditated (CCP) (great weight). In addition, the court found a sixth aggravator in the murders of Gleason and Gonzalez—that the murders were committed to avoid arrest (substantial weight). The trial court found no statutory mitigation but did find several nonstatutory mitigating factors. The trial court determined that the aggravating factors far outweighed the mitigating circumstances

and, in accord with the jury's recommendation, sentenced Victorino to death for each of the four murders. *Victorino*, 23 So. 3d at 94-95 (footnotes omitted). The convictions and death sentences were affirmed on direct appeal. *Id.* at 108. Victorino's case became final on direct appeal on March 1, 2010, when the petition for writ of certiorari would have been due to this Court.

Victorino filed an amended motion for postconviction relief on August 1, 2011, asserting 17 claims. *Victorino v. State*, 127 So. 3d 478, 485 (Fla. 2013). One of the claims alleged that the trial court erred in failing to find that his death sentences were illegal under *Ring v. Arizona*, 536 U.S. 584 (2002). *Victorino*, 127 So. 3d at 485. An evidentiary hearing was held and the postconviction court issued an amended order on February 17, 2012, denying relief. The Florida Supreme Court affirmed the denial on October 10, 2013, and denied Victorino's petition for writ of habeas corpus. *Id.* at 503.

On December 28, 2016, Victorino filed a successive postconviction motion based upon *Hurst v. Florida*, 136 S. Ct. 616 (2016) and *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The trial court granted in part and denied in part the successive motion. The trial court ruled that *Hurst* applied to Victorino's case because it became final after *Ring*, and that the *Hurst* error was not harmless beyond a reasonable doubt because the jury recommendations for the death penalty were not unanimous. The trial court denied Victorino's argument that he was entitled to be resentenced to life

in prison, as well as his arguments regarding double jeopardy and *ex post facto* laws. On June 14, 2017, the trial court vacated Victorino's death sentences and ordered that new penalty phase proceedings be held. On July 11, 2017, Victorino filed a notice of appeal in the Florida Supreme Court, challenging the denial of several claims[1] raised in his successive postconviction motion. On March 8, 2018, the Florida Supreme Court issued its Opinion affirming the trial court's denial of such claims. *Victorino v. State*, 241 So. 3d 48, 49–50 (Fla. 2018), *reh'g denied*, 2018 WL 2069254 (Fla. May 3, 2018).

On July 30, 2018, Victorino filed a Petition for Writ of Certiorari to this Court.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW SHOULD BE DENIED BECAUSE THE FLORIDA SUPREME COURT'S RULING ON THE APPLICATION OF *HURST* RELIES ON STATE LAW TO PROVIDE THAT SECTION 775.082(2), FLORIDA STATUTES DOES NOT REQUIRE DEATH SENTENCES IMPOSED IN VIOLATION OF *HURST V. FLORIDA* TO BE COMMUTED TO LIFE, AND THE COURT'S RULING DOES NOT VIOLATE THE FIFTH AMENDMENT'S DOUBLE JEOPARDY CLAUSE OR THE PROHIBITION AGAINST EX POST FACTO LAWS AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR INVOLVE AN IMPORTANT, UNSETTLED QUESTION OF FEDERAL LAW.

Victorino requests that this Court review the Florida Supreme Court's post-

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[1] Issue I-Florida Statutes Section 775.082(2) requires a life sentence without parole; Issue II-Double Jeopardy claim; and Issue III- Prohibition against *ex post facto* laws contained in Article 1, Sections 9 and 10 of the United States Constitution and in Article 1, Section 10, of the Florida Constitution. (Pet. App. A-16).

Hurst decision vacating his four death sentences and remanding for a new penalty phase. Victorino claims that the State should not be allowed to seek the death penalty at the new penalty phase as it would be a violation of the Fifth Amendment's Double Jeopardy Clause as well as a violation of Ex Post Facto laws. Victorino fails to establish why a *Hurst* error entitles him to a life sentence, when neither Hurst nor any other defendant seeking relief pursuant to *Hurst* has been afforded one. There is no basis to grant certiorari on this issue.

Citing to the Fifth and Fourteenth Amendments does not automatically convert Victorino's claims to due process violations. *Cuyuhoga River Power Co. v. Northern Ohio Traction & Light Co.*, 252 U.S. 388, 397 (1920) (explaining that a federal question must exist "not in mere form but in substance, and not in mere assertion, but in essence and effect."). As will be shown, nothing about the Florida Supreme Court's decision is inconsistent with the United States Constitution. Victorino's claims do not otherwise involve an unsettled, important federal question or a federal question with ramifications beyond the case presented, and cases that do not present a decisional split or unresolved federal question do not merit certiorari review. *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182, 184 n.3 (1987). Victorino does not provide any "compelling" reason for this Court to review his case, nor can he cite to any decision from this or any appellate court that conflicts with the Florida Supreme Court's denial of Victorino's automatic

resentencing to life claim. Victorino's petition is no more than an attempt to have this Court review his case as he disagrees with the Florida Supreme Court's holding. Nothing presented in the petition justifies the exercise of this Court's certiorari jurisdiction.

1. Florida Statutes Section 775.082 Does Not Entitle Victorino To A Commutation Of His Sentence Of Death.

This Court's review of the Florida Supreme Court's interpretation of Florida law is not warranted. The Florida Supreme Court's interpretation of §775.082 (2) is not violative of federal law or this Court's precedent. This Court has repeatedly recognized that where a state court judgment 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. Muller*, 296 U.S. 207, 210 (1935); *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *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). If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010); *Long*, 463 U.S. at 1041.

Victorino's case became final on direct appeal on March 1, 2010, when the petition for writ of certiorari would have been due to this Court. After filing a successive postconviction motion based upon *Hurst v. Florida*, and *Hurst v. State,* the trial court ruled that *Hurst* applied to Victorino's case because it became final after *Ring*, and that the *Hurst* error was not harmless beyond a reasonable doubt because the jury recommendations for the death penalty were not unanimous. The trial court vacated Victorino's death sentences and ordered that new penalty phase proceedings be held.

Irrespective of the court's decision, Victorino asserts that he is entitled to a life sentence pursuant to section 775.082(2), Florida Statutes, which provides:

> (2) 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 as provided in subsection (1). No sentence of death shall be reduced as a result of a determination that a method of execution is held to be unconstitutional under the State Constitution or the Constitution of the United States.

However, this section only applies if capital punishment as a penalty is declared unconstitutional, and that clearly has not happened. *Perry v. State*, 210 So. 3d 630, 633 (Fla. 2016) (explaining that *Hurst v. State* did not declare the death penalty unconstitutional); and *Hurst*, 202 So. 3d at 65 (*Hurst v. Florida* was decided on Sixth Amendment grounds and "nothing in that decision suggests a broad

indictment of the imposition of the death penalty generally[...]the death penalty still remains the ultimate punishment in Florida.").

Contrary to Victorino's arguments, he is not entitled to be resentenced to life in prison in accordance with Florida Statutes, section 775.082(2), or based upon the *Hurst* ruling. Neither this Court nor the Florida Supreme Court declared Florida's death penalty statute to be unconstitutional post-*Hurst*. As the Florida Supreme Court has distinctly explained, the statute "does not mandate automatic commutation to life sentences after the decision in *Hurst v. Florida*." *Hurst*, 202 So. 3d at 65. Moreover, the Florida Supreme Court has consistently rejected similar claims to life sentences. *See Johnson v. State*, 205 So. 3d 1285, 1289 (Fla. 2016) (rejecting Johnson's argument that his case should be remanded to the trial court for imposition of a life sentence); *Franklin v. State*, 209 So. 3d 1241, 1248 (Fla. 2016) (refusing to remand Franklin's case to the trial court for imposition of a life sentence); and *Hurst v. State*, 202 So. 3d 40, 65 (Fla. 2016) (rejecting Hurst's claim that section 775.082(2) of Florida Statues entitles him to a life sentence because that section is only imposed if capital punishment as a penalty is declared unconstitutional).

Likewise, this Court did not eliminate capital sentencing as an option in Florida. Rather, this Court ruled in *Hurst* that Florida's sentencing scheme, not the statute itself, was unconstitutional. Any argument to the contrary goes beyond the holding in *Hurst*. The new rule announced in *Hurst v. Florida*, and expanded in

Hurst v. State, allocated the authority regarding capital sentencing decisions from the judge to the jury. This Court's ruling was a narrow one: "Florida's sentencing scheme, which required the judge alone to **find the existence of an aggravating circumstance**, is . . . unconstitutional." *Hurst v. Florida*, 136 S. Ct. at 624 (emphasis added). However, *Hurst,* like *Ring*, was a procedural change, not a substantive one. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) ("*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review.").

This Court noted that under Florida Statutes, section 775.082 (1) the jury played an advisory role in the sentencing of capital defendants in Florida, with the trial court being the fact finder as to whether or not aggravating circumstances existed to impose a death sentence. *Hurst*, 136 S. Ct. at 622. This Court ruled that the state's sentencing scheme violated the Sixth Amendment, which this Court stated "required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding." *Id.* at 624. However, this Court did not declare that Florida's death penalty was unconstitutional. It simply ruled that the procedure for imposition of such sentence was unconstitutional. Moreover, the fact that this Court remanded for a determination of harmless error shows that Florida's death penalty has not been held unconstitutional. Otherwise, this Court would have directed that Hurst's death sentence be vacated.

Furthermore, the Florida Supreme Court has soundly rejected the view that section 775.082 applies post-*Hurst*. It is a "'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't of Treasury,* 489 U.S. 803, 809 (1989)). "To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute." *Bautista v. State*, 863 So. 2d 1180, 1185-86 (Fla. 2003) (citing *State v. Anderson*, 764 So. 2d 848, 849 (Fla. 3d DCA 2000) (citing *McKibben v. Mallory*, 293 So. 2d 48, 52 (Fla.1974)). The first step is to examine the plain language of the statute. In deciding that all death-sentenced defendants are not entitled to a commutation of their death sentences to life, the Florida Supreme Court found as follows:

> When section 775.082(2) is viewed in the context of this State's response to the plurality opinion in *Furman*, and in light of the fact that *Furman* was based on Eighth and Fourteenth Amendment principles, we conclude that the statute does not mandate automatic commutation to life sentences after the decision in *Hurst v. Florida*. *Hurst v. Florida* was decided on Sixth Amendment grounds and nothing in that decision suggests a broad indictment of the imposition of the death penalty generally. *Ring* was also decided on Sixth Amendment grounds, and that decision did not require the state court to vacate all death sentences and enter sentences of life and did not address the range of conduct that a state may criminalize. After *Hurst v. Florida*, the death penalty still remains the ultimate punishment in Florida, although the Supreme Court has now required that all the critical findings necessary for imposition of the death penalty be transferred to the jury.

There is no indication in the *Hurst v. Florida* decision that the Supreme Court intended or even anticipated that all death sentences in Florida would be commuted to life, or that death as a penalty is categorically prohibited. Moreover, the text of section 775.082(2) refers to the occasion that "the death penalty" is held to be unconstitutional to determine when, and if, automatic sentences of life must be imposed. This provision is intended to provide a "fail safe" sentencing option in the event that "the death penalty"—as a penalty—is declared categorically unconstitutional.[21]

[FN21]. Our construction of section 775.082(2) is supported by historical records concerning this legislation at the time it was being considered by the Legislature. For example, in a September 13, 1971, letter from then-Attorney General Robert L. Shevin to Senator David McClain, who introduced Senate Bill 153 which enacted the statutory language at issue, the Attorney General stated, "I have read with interest your prefiled bill to amend the State's death penalty statute to provide life imprisonment if the Supreme Court of the United States bans the death penalty." (Available at Fla. Dep't of State, Div. of Archives, Tallahassee, Fla., Series 19, Box 458). Within those same records appears a report titled "Subject: SB 153 by McCLAIN declaring that persons sentenced to death shall, if the death penalty is ruled unconstitutional, be sentenced to life imprisonment." In that memorandum, it is also stated, "The death penalty is currently being considered by the Supreme Court. If it is declared unconstitutional, some disposition will need to be made of persons who are currently under a death sentence." Id. The memorandum further states, "Assuming that capital punishment is held unconstitutional, life imprisonment would still be a constitutional means of punishment." *Id.*

The Supreme Court in *Hurst v. Florida* focused its decision on that portion of the capital sentencing process requiring a judge rather than a jury to make all the findings critical to the imposition of the death penalty. The Court did not declare the death penalty unconstitutional.

Accordingly, we hold that section 775.082(2) does not require commutation to life under the holding of *Hurst v. Florida*, which did not invalidate death as a penalty, but invalidated only that portion of the

> process which had allowed the necessary factfinding to be made by the judge rather than the jury in order to impose a sentence of death.

Hurst v. State, 202 So. 3d 40, 65–66 (Fla. 2016). *See also Perry*, 210 So. 3d at 633 (explaining that *Hurst v. State* did not declare the death penalty unconstitutional).

Finally, Victorino seeks to avail himself of the rule of construction, also referred to as the rule of lenity. But the rule of lenity does not help him here. The Florida Supreme Court has stated "the rule of lenity is a canon of last resort." *Kasischke v. State,* 991 So. 2d 803, 814 (Fla. 2008) (citing *U.S. v. Shabani*, 513 U.S. 10, 17 (1994) ("The rule of lenity, however, applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."). This Court only looks to the rule of lenity if, after examining all other canons of statutory construction, the legislative intent is still ambiguous. Here, no such egregious ambiguity exists. Accordingly, neither a plain reading of section 775.082 (2) nor the rule of lenity supports Victorino's argument.

The Separation of Powers Clause of the constitution does not allow the courts to rewrite statutes. *See State v. C.M.*, 154 So. 3d 1177, 1180 (Fla. 4th DCA 2015) (internal citation and quotation marks omitted) ("The courts are not at liberty to add words to statutes that were not placed there by the Legislature. To do so, would be an abrogation of legislative power."). "It is a fundamental principle of statutory construction that where a statute is plain and unambiguous there is no occasion for judicial interpretation." *Golf Channel v. Jenkins*, 752 So. 2d 561, 564 (Fla. 2000)

(alteration in the original) (quoting *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454 (Fla. 1992)). Certiorari review should be denied.

2. There Is No Underlying Constitutional Error

Certiorari is unwarranted in this case because there was no underlying constitutional error warranting resentencing in this case. The Florida Supreme Court's vast expansion of the holding in *Hurst v. Florida* was not required or even suggested by this Court's holding. For example, *Hurst v. Florida* requires the jury to find one aggravating circumstance existed, not that every aggravating circumstance must be found to exist, before rendering a defendant eligible for the death penalty. Likewise, *Hurst v. Florida* did not establish a new Sixth Amendment right to have a jury determine whether mitigating circumstances exist and determine whether mitigation is sufficiently substantial to warrant leniency.[2] Additionally, *Hurst v. Florida* did not hold that there is a constitutional right to jury sentencing.

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[2]*See SeeSeKansas v. Carr*, 136 S.Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a question is "mostly a question of mercy"). *See also State v. Mason*, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found.").

Since the Florida Supreme Court's holding in *Hurst v. State* was a product of state law, and does not present a federal question, this Petition should be denied.

In contrast to the defendant in *Hurst*, here, Petitioner was found guilty of multiple counts of first degree murder, which satisfied the contemporaneous violent felony aggravator under Florida law. *See Jenkins v. Hutton*, 137 S.Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty). Petitioner also possessed a prior violent felony conviction. Consequently, Petitioner entered the penalty phase eligible for a death sentence. *See Alleyne v. United States*, 570 U.S. 99, 111 n.1 (2013) (citing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)) (prior convictions are "a narrow exception" to the Sixth Amendment requirement that defendants have a right to have a jury find facts which expose a defendant to a greater punishment). Based on these two factors in Petitioner's case, there was no *Hurst v. Florida* error.

The error complained of in the instant petition is the violation of the expanded sentencing requirements created in *Hurst v. State*, not the federal constitutional requirements set forth in *Hurst v. Florida*. Thus, any violation of that state holding in Petitioner's case would not be reviewed under federal law. No question of federal law has been presented for this Court's review.

Aside from failing to present any federal constitutional error, this case is also inappropriate for certiorari review because this Court would first have to decide the predicate question of retroactivity. Petitioner's case was final in 2010, well before this Court decided *Hurst*. *Hurst* is only applicable to Petitioner through a more expansive state law test for retroactivity, providing retroactive application to the date this Court decided *Ring* in 2002. As *Ring*, and by extension *Hurst*, has been held not to be retroactive under federal law, Florida has implemented a test which provides relief to a broader class of individuals in applying *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980) instead of *Teague* for determining the retroactivity of *Hurst*. See *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"). Federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive at all under *Teague*. See *Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review"), cert. denied, 138 S. Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively). Consequently, this Court would first have to find *Hurst* retroactive under federal law, overruling *Schriro v. Summerlin*, before reaching the underlying question of harmlessness. Certiorari should be

denied.

3. The Prohibition Against Double Jeopardy Does Not Apply.

Victorino argues that because his death sentence was vacated as a result of the *Hurst* decisions, the Florida and United States Constitutions prohibit him from being subjected to the death penalty again because of double jeopardy. Victorino was never "acquitted" of capital murder. Victorino confuses a remand for retrial or resentencing with an acquittal in his argument pertaining to double jeopardy.

This Court's precedent is clear that the Fifth Amendment's Double Jeopardy Clause would not bar the State from seeking the death penalty at a new penalty phase following the Florida Supreme Court's reversal of Victorino's previous four death sentences. 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." (internal quotations omitted). 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.

Similarly, in this case, Victorino was never "acquitted" of capital murder and the jury was not asked, nor did they make, any findings regarding the existence of aggravating or mitigating circumstances. Rather, the jury simply returned a recommendation that Victorino receive the death penalty on four counts of first degree murder. Based on this Court's *Hurst* decision, as well as the Florida Supreme Court's interpretation of *Hurst* on remand, the Florida Supreme Court ruled that the *Hurst* error in Victorino's case was not harmless and reversed for a new penalty phase. Since the jury never acquitted Victorino of capital murder and the death penalty, the Fifth Amendment Double Jeopardy Clause does not prohibit the State from again seeking the death penalty at the new penalty phase.

Victorino's argument that 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," has no relevance here. Victorino has not been found an inappropriate candidate for the death penalty. The fact that he was convicted of six counts of first degree murder in a case in which the State is seeking the death penalty makes him eligible for the death penalty. None of the cases cited by Victorino prove otherwise.

In addition, each of Victorino's cases are distinguishable. In *Brown v. State*, 521 So. 2d 110 (Fla. 1988), the trial court erroneously ruled that *Enmund v. State*, 458 U.S. 782 (1982) barred the imposition of the death penalty in the case. *Brown*,

521 So. 2d at 111-112. No such ruling has taken place in the instant case. In *Fasenmyer v. State*, 457 So. 2d 1361 (Fla. 1984), which did not involve the death penalty, the trial court increased the severity of the defendant's sentence following a successful appeal. *Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973), also a non-death penalty case, involved a prosecutor trying to increase a defendant's sentence after the defendant had been sentenced and jeopardy attached. Because Victorino was previously sentenced to death, which is the most severe punishment any defendant can receive, a new penalty phase would not increase the severity of his sentence. Thus, *Fasenmyer* and *Troupe* do not apply here. *Wright v. State,* 586 So. 2d 1024 (Fla. 1994), involved a trial judge's override of a jury's recommendation for a life sentence. In contrast, Victorino's trial court followed the jury's recommendation by imposing four death sentences. As a result, *Wright* is not applicable. Petitioner identifies no conflict in authority, let alone a conflict that warrants this Court's review. The ruling below did not conflict with any relevant decision of this Court, federal circuit courts of appeal, or the highest court of a state on an important legal principle, nor did it decide an unsettled question of federal law.

3. Ex Post Facto Considerations Do Not Apply.

Florida's revised capital sentencing scheme, which requires the jury to unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that sufficient aggravating factors exist to

impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death before the trial judge may consider imposing a sentence of death, *see* § 921.141(2), Fla. Stat. (2017), neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable. *Victorino v. State*, 241 So. 3d 48 (Fla. 2018). The range of conduct punished by death in Florida remains the same. Nevertheless, Victorino argues that to apply the recent, post-*Hurst* case law retroactively to make the defendant death-eligible would violate the constitutional prohibitions against ex post facto laws.

Generally, under the Florida Constitution, the legislature is empowered to enact substantive law while the Florida Supreme Court has the authority to enact procedural law. *See Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000). For a criminal law to be ex post facto it must be retrospective, that is, it must apply to events that occurred before its enactment; and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. *Lynce v. Mathis*, 519 U.S. 433, 441 (1997). In *Dobbert v. Florida*, 432 U.S. 282, 292 (1977), this Court held that ex post facto prohibitions reach only those legislative enactments that affect substantive criminal law. This Court summarized the categories of laws constituting substantive changes to criminal law:

> [A]ny 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.

Beazell v. Ohio, 269 U.S. 167, 169–70 (1925).

This Court did not rule Florida's death penalty to be unconstitutional, but simply mandated that imposition of the sentence be supported by jury fact-finding. In response, Florida adopted **new procedural requirements** that, among other things, mandated that all factual findings necessary to impose death be found by a unanimous jury. The Florida Supreme Court's interpretation of *Hurst v. Florida* in *Hurst v. State* greatly expanded that procedural rule. Nevertheless, it remained a procedural rule and not a "definition" of Florida's death penalty statute.

In *Dobbert v. Florida*, this Court ruled that even a procedural change that may work to the disadvantage of the defendant is not ex post facto. *Dobbert v. Florida*, 432 U. S. 282, 293 (1977). The defendant there committed first degree murders in 1971 and 1972. The procedures used in Florida's then-existing capital sentencing statute were found unconstitutional in June of 1972, and the revised capital sentencing statute was enacted in late 1972, after the commission of Dobbert's last murder. Not only were ex post facto challenges to the application of the revised statute to Dobbert rejected by this Court, but the Court emphasized the "operative fact" of the existence of the prior death penalty statute at the time of the offenses served to warn Dobbert of the penalty that could be imposed. *Dobbert*, 432 U.S. at

298. The existence of the statutory sentence of death at the time of the commission of the offense served as an indication of the controlling legislative intent, i.e., that the Florida Legislature intended that a sentence of death be a viable option in that case. Significantly, the *Dobbert* Court expressly concluded that the revised procedures implemented by the Florida Legislature did not violate the rule forbidding application of ex post facto laws, as the changes effected were merely a matter of procedure.

Thus, a legislative act affecting changes in criminal procedure, including procedural changes that disadvantage a defendant, generally does not violate the ex post facto clause. *Carmell v. Texas*, 529 U.S. 513, 543–44 (2000) (recognizing no one has vested right in mode of procedure); *Collins v. Youngblood*, 497 U.S. 37, 45 (1990) ("[Procedural] refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.").

A new penalty phase proceeding does nothing to criminalize behavior that was not criminalized when Victorino was originally tried, and ex post facto laws simply do not apply. Victorino fails to articulate any law that would be erroneously applied retrospectively or even any aggravating circumstance that the State would be seeking in a new penalty phase proceeding that was not sought in his original proceeding. Victorino was granted no "immunity" from the death penalty and is not a member of any protected class for which the death penalty cannot be sought. There

is no "increased risk of increasing the measure of punishment attached to the covered crimes" in resentencing a capital defendant who has an original sentence of death vacated and is resentenced under *Hurst,* which imposes additional requirements that are far more beneficial to capital defendants.

Capital punishment is constitutional in Florida and the State has a legal basis to seek the death penalty. The Florida Supreme Court recently and explicitly stated that this Court's holding in *Hurst v. Florida*, 136 S. Ct. 616 (Fla. 2016) "did not declare the death penalty unconstitutional." *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). The Florida Supreme Court's application of *Hurst* is in accord with the precedent of this Court. Furthermore, Victorino cannot show that the Florida Supreme Court's opinion decided an important question of federal law in a manner that conflicts with a decision of this Court. See Sup. Ct. R. 10. In sum, Victorino does not identify any direct conflict with this Court or other courts, nor does he offer any unresolved, pressing federal question. He challenges only the application of this Court's well-established principles to the Florida Supreme Court's decision. As Victorino does not demonstrate any compelling reasons for this Court to exercise its certiorari jurisdiction under Rule 10, this Court should deny the petition.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

Respectfully submitted,

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