IN THE SUPREME COURT OF FLORIDA

LEONARD P. GONZALEZ, JR.,

Petitioner,

vs. CASE NO: SC23-0740

STATE OF FLORIDA

Respondent.

_____/

APPENDIX TO BRIEF OF AMICUS CURIAE HOWARD L. "REX" DIMMIG, II, PUBLIC DEFENDER FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

CASE NO.: 53-2021-CF-006615-A000-XX
DIVISION: F9

STATE OF FLORIDA,

Plaintiff,

vs.

BRYAN JAMES RILEY,

Defendant.
_____/

ORDER DENYING STATE'S MOTION TO UTILIZE NEW STATUTORY DEATH PENALTY SENTENCING PROCEDURES OF § 921.141, FLA. STAT (2023), ORDER GRANTING IN PART DEFENDANT'S MOTION TO DECLARE FLORIDA'S NEW CAPITAL SENTENCING SCHEME, DISPENSING WITH THE JURY UNANIMITY REQUIREMENT AND REPLACING IT WITH AN 8-4 VOTE, VIOLATIVE OF THE EX POST FACTO CLAUSE, AND ORDER DENYING DEFENDANT'S MOTION TO PRECLUDE APPLICATION OF THE MOST RECENT AMENDMENTS TO F.S. 921.141 IN THIS CASE AS SUCH APPLICATION WOULD VIOLATE F.S. 775.022

THIS CAUSE came to be heard on June 15, 2023, for hearing on the State's Motion to Utilize New Statutory Death Penalty Sentencing Procedures of § 921.141, Fla. Stat (2023), filed June 1, 2023; the Defendant's Motion to Declare Florida's New Capital Sentencing Scheme, Dispensing with the Jury Unanimity Requirement and Replacing It with an 8-4 Vote, Violative of the Ex Post Facto Clause, filed June 8, 2023; and the Defendant's Motion to Preclude Application of the Most Recent Amendments to F.S. 921.141 in This Case as Such Application Would Violate F.S. 775.022, filed June 8, 2023. Present were counsel for the State of Florida, Lauren Mikaela Perry, Esquire; counsel for the Defendant, Jane A. McNeill, Esquire; and the Defendant, Bryan James Riley. The Court has considered the aforementioned motions, the Defendant's Notice of Filing Amended Appendix A in Support of Defendant's Motion to

Declare Florida's New Capital Sentencing Scheme, Dispensing with the Jury Unanimity Requirement and Replacing in [sic] with an 8-4 Vote, Violative of the Ex Post Facto Clause, filed June 13, 2023, the arguments of and authorities cited by the parties, and applicable law. The Court enters its Order herein.

A. *EX POST FACTO* ANALYSIS

On September 21, 2021, the Defendant was indicted on, among other charges, four counts of first degree murder for acts alleged to have been committed on September 5, 2021. On September 24, 2021, the State of Florida filed its Notice of Intent to Seek Death Penalty and Disclosure of Aggravating Factors. At the time of the alleged murders, section 921.141, Florida Statutes, provided that in the absence of a waiver of the right to a sentencing proceeding by a jury, "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death." Effective April 20, 2023, Florida law now provides that "[i]f at least eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death." The Defendant claims that application in this case of the 2023 amendments to section 921.141 is violative of the *Ex Post Facto* Clauses of the United States and Florida Constitutions.

The State's primary argument is that the changes to section 921.141 do not offend *ex post facto* principles because they do not increase the punishment for first degree murder, but merely change the procedure by which a defendant becomes eligible for the death penalty. The State relies heavily on *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), in support of its position that a *procedural* change in the law that may work to the disadvantage of a

defendant, but does not increase the "quantum of punishment" for a covered crime, does not violate the *Ex Post Facto* Clause.[1]

The Defendant directs the Court's attention to *Collins v. Youngblood* in which it was announced that "simply labelling a law 'procedural' . . . does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones." 497 U.S. 37, 46, 110 S.Ct. 2715, 2721, 111 L.Ed.2d 39 (1990). Rather, in the context of criminal punishments, the question is "whether a given change in law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Peugh v. U.S.*, 569 U.S. 530, 539, 133 S.Ct. 2072, 2082, 186 L.Ed.2d 84 (2013) (citations and punctuation omitted). Moreover, it is not necessary that a law increase the maximum penalty for a covered crime in order to violate the *Ex Post Facto* Clause. *Peugh*, 569 U.S. at 539.

In *Peugh*, the Supreme Court addressed whether application of a change to the federal sentencing guidelines to a defendant whose crimes were committed prior to the amendments violated the *Ex Post Facto* Clause. In that case, based upon legislated increases in the points associated with various circumstances attending the defendant's crimes, the amended federal guidelines reflected a minimum advisory sentence which was 33 months higher than the high-end of the guidelines in effect at the time the Defendant committed his crimes. *Id.* at 534. The government's position in *Peugh* was that because the federal guidelines are advisory only and because the judge retained discretion to deviate downward, *ex post facto* principles were not implicated. *Id.* at 539.

[1] The State's Motion suggests that *Dobbert* is directly on point with the circumstances of this case and that the procedural changes present in *Dobbert* are analogous to those in the legislation at issue. The State argues that, as in *Dobbert*, because the maximum punishment has not changed, *Dobbert* mandates a finding in this case that there is no *ex post facto* violation. However, *Dobbert* presented unusual circumstances not present in this case. Most importantly, as determined by the Court, the changes to the death penalty scheme at issue were "on the whole ameliorative" and designed to "provid[e] capital defendants with more, rather than less, judicial protection." 432 U.S. at 292, 295. Further, the force of *Dobbert* is weakened by the Court's retreat from the "procedural" versus "substantive" litmus test. *See Collins*, 4 U.S. 37.

In its analysis, the Court referred to its decision in *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) (abrogated in part on other grounds *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)), in which it found the application to the defendant of amended sentencing guidelines enacted after his crimes were committed which provided for a higher sentencing range than that indicated under preexisting guidelines to be an *ex post facto* violation. *Peugh*, 569 U.S at 540. Although Florida's sentencing law gave discretion to the sentencing judge to depart downward from the guidelines, the judge would be required to provide in writing clear and convincing reasons for the departure and the sentence was automatically reviewable on appeal. *Miller*, 482 U.S. 426. On the other hand, a sentence within guidelines required no such written justification and was unreviewable. *Id.* In Miller's case, the unassailable guideline sentence he received under the new guidelines would have, under preexisting guidelines, required written justification and triggered the right to appellate review. *Id.* at 432-33. The Court determined that the "high hurdle" to the exercise of discretion under Florida's sentencing law rendered the new guidelines a violation of the *Ex Post Facto* Clause in that the increase in the sentencing range created a "significant risk" of a higher sentence. *Peugh*, 569 U.S. at 541 (citing *Miller*, 482 U.S. at 435).

In applying the principles of *Miller*, the *Peugh* Court recognized that the hurdles in imposing a departure sentence under the federal guidelines were not as high as those present under the Florida scheme reviewed in *Miller*. *Peugh*, 569 U.S. at 543. Unlike Florida law, the federal sentencing scheme provided for appellate review of a guideline sentence in which the appellate court was not required to presume its reasonableness. *Id.* Additionally, while the sentencing judge would be required to provide written reasons for a departure, the federal system did not require "an exacting across-the-board" requirement that the departure be supported by

"clear and convincing reasons." *Id.* Rather, the federal scheme required a departure sentence be supported by "an explanation adequate to the extent of the departure." *Peugh*, 569 U.S. at 543 (citation omitted). Despite the "gentler checks" on a judge's discretion to impose departure sentences in the federal system as compared to the Florida system, the Court concluded that those checks nevertheless "cabin the exercise of that discretion" and that "[c]ommon sense indicates that in general, this system will steer district courts to more within-Guidelines sentences." *Id.* Given its conclusion that the federal sentencing guidelines are intended to be the "lodestone of sentencing," establishing the starting point from which all sentencing decisions must be made, retroactive increase in the range indicated creates "a sufficient risk of a higher sentence to constitute an *ex post facto* violation." *Id.* at 544.

Of course the present case does not involve precisely the same issues identified in *Peugh*. The "guidelines" applicable to imposition of the death penalty in Florida are, to be sure, of a different nature than the points-based and range-based guidelines at issue in *Miller* and *Peugh*. Indeed, as the State points out, there is no "range" at all. Rather, there are simply two sentencing options – life without the possibility of parole or death. Further, the Court recognizes that any increased risk associated with receiving the death penalty is not a product of the Defendant's conduct but, rather, a product of the retreat from the requirement of a unanimous 12-member jury to that of 8. That does not, however, render *Miller* and *Peugh* inapposite. Indeed, as this Court ultimately concludes, they are decisive by analogy.

Under Florida's death penalty sentencing scheme, it is clear that a life sentence without the possibility of parole is the default sentence for first degree murder. This is so because the State faces no "hurdles" to obtaining such a sentence save securing a conviction on the underlying charge. On the other hand, several conditions must be met before the ultimate

sentence of death may be obtained. First, the State must file a proper notice of its intent to seek the death penalty listing the aggravating factors it intends to rely upon. § 782.04(1)(b), Fla. Stat.; Fla. R. Crim. P. 3.181. Second, the State must file its notice of intent within 45 days of arraignment, or otherwise establish good cause and, perhaps, good cause based upon excusable neglect in not doing so. *State v. Chantiloupe*, 248 So. 3d 1191 (Fla. 4th DCA 2018); Fla. R. Crim. P. 3.050. Third, after obtaining a conviction, the State must present evidence, including evidence related to any aggravating factors listed in its notice. § 921.141(1), Fla. Stat. Fourth, the sentencing jury must find that the State has proved beyond a reasonable doubt the existence of at least one aggravating factor. *Id.* Fifth, the jury must determine that sufficient aggravating factors exist; that aggravating factors exist which outweigh mitigating circumstances found to exist; and, that based thereon, the defendant should be sentenced to death. *Id.* Sixth, upon a recommendation of death, the sentencing judge must find that there are sufficient aggravating factors found to exist to warrant the death penalty and that the aggravating factors outweigh the mitigating factors. § 921.141(4), Fla. Stat. Seventh, the sentencing judge must enter a written order addressing the aggravating factors found to exist, the mitigating circumstances reasonably established by the evidence, and its reasoning as to whether there a sufficient aggravating factors to warrant the death penalty and whether the aggravating factors outweigh the mitigating circumstances. Eighth, a sentence of death must survive appellate scrutiny. In the absence of any one of these preconditions, there is no other sentence a defendant may suffer except life in prison without the possibility of parole.

The checks on the imposition of the death penalty in Florida bear semblance to the checks which must be overcome under a sentencing scheme that requires justification for an *upward* departure from a guideline sentence. Here, the guideline, so to speak, is life in prison.

Much like a sentence within guidelines upon conviction for a non-capital felony in Florida, a sentence of life in prison upon conviction for first degree murder committed at the time of the alleged offenses in this case required no formal justification or satisfaction of any substantive or procedural burden. Thus, while the Defendant in this case would have known for certain that he would at least serve the rest of his life behind bars, he would have also understood the circumstances under which the harsher sentence of death may be imposed. What has changed in the interim are those very circumstances. In essence, one of the highest hurdles to imposition of the death penalty has been lowered substantially. It takes no empirical evidence, but only a reasonable measure of practical wisdom, to agree that the prospect of persuading 8 members, as compared to every last member, of a 12-member jury to return a death recommendation is significantly (if not substantially) more likely. Similar to the reduction of the burden in this case, the removal of a check against the higher sentence imposed in *Miller* was integral to Court's analysis. Not only did the Court focus on the burdens placed upon the sentencing judge when imposing a downward departure sentence, it observed that the ultimate sentence imposed upon Miller would have previously required a concomitant burden upon the trial judge to provide a written order justifying the sentence with clear and convincing reasons which order would then be reviewable on appeal. *Miller*, 482 U.S. at 432-33.

The State avoids the effect of the institution of the 8-4 vote on the significant risk analysis and focuses on the procedural checks that remain in place in Florida's new death penalty scheme, arguing that such checks operate against a finding of significant risk. The State specifically points to the fact that the law still requires an independent review by the trial judge at a separate hearing, a written sentencing order, and appellate review. Despite the Court's observation that the same identified protections were in place under the prior statute and that, as

such, they do not contribute to offsetting the new balance created by the amendments, the Court nevertheless conducted a careful review of the new law to ensure that those checks indeed remain. In confirming the survival of these checks, the Court discovered additional amendments important to the analysis.

Of special note, the current version of section 921.141 requires a written order by the sentencing judge regardless of whether the sentence is for life or death. The new law provides, "In each case in which the court imposes a sentence *of life imprisonment* or death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order . . .." § 921.141(4) (emphasis added). Further, "The court must include in its written order the reasons for not accepting the jury's recommended sentence if applicable." Such requirements were not present under the prior version of section 921.141 at the time of the offenses in this case. Under the prior version, the sentencing judge could override a jury's recommendation for death without having to explain himself and such decision would be unreviewable. Of course, the responsible sentencing judge under prior law would presumably engage in the same thoughtful analysis with respect to the balance of aggravation and mitigation and the appropriateness of the death penalty, and would assuredly afford the jury's recommendation the weight it is entitled to under the law. By the same token, the judge would not be burdened with the task of reducing to writing its reasons for overriding the jury's recommendation. This burden would be especially weighty under the circumstance in which the judge agrees that the aggravating factors outweigh the mitigating circumstances but disagrees that the Defendant should be put to death. Such a grant of mercy, even in the face of a factual balance that would otherwise legally support the death penalty, unquestionably results in a lawful sentence. *See Smith v. State*, 866 So. 2d 51, 67 (Fla. 2004). However, the reasons for granting mercy – an act which by its nature is not necessitated

by virtue of any formulaic analysis those trained in the law are accustomed to – would likely be difficult to express in words.

In short, the 2023 amendments to section 921.141 have moved the goalposts. In the same stroke of the pen, the Legislature has reduced friction on the path toward death while increasing it on that toward life. As a result, the risk to a defendant confronted with the possibility of being executed that he will actually meet such an end is greater now than before. Shouldering the defendant with such increased risk not present at the time he allegedly committed his crimes substantially implicates *ex post facto* concerns.

Instead of addressing the undeniable easing of burdens attending its pursuit of the death penalty under the new legislation, the State returns to its primary argument – that there is no *ex post facto* violation because the Defendant is not facing any higher sentence than he was under the old sentencing scheme. The State sidesteps well-established Supreme Court precedent instructing "that one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Dobbert*, 432 U.S. at 300. *See also Peugh*, 569 U.S. at 539; *Miller*, 482 U.S. at 432; *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). The Court has "never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause." *Peugh*, 569 U.S. at 539.

Of course, "mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause." *Id.* (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 509, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). On the other hand, the test necessarily involves some probalistic

inquiry. Under the circumstances present in *Miller* and *Peugh*, there was certainly *some degree of risk* under the more favorable sentencing laws applicable to each defendant that the same higher sentences would have been imposed. Miller and Peugh *could have*, under preexisting guidelines, received the sentences ultimately handed down under the new sentencing schemes *if* the judges had complied with applicable laws governing imposition of upward departures.

As such, the test announced in *Miller* and *Peugh* is properly understood as one which measures relative risk. In other words, given that the Supreme Court has never required a defendant to establish that he would not have received the sentence complained of under preexisting law or to demonstrate that the law has increased the maximum permissible sentence, the test may be recast as follows – whether the change in the law creates a significantly greater risk that a defendant receives a more onerous sentence. Such recasting is consistent with the Supreme Court's admonition that in the "formulation of what constitutes an '*ex post facto* Law,' [its] cases 'have not attempted to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law.'" *Peugh*, 569 U.S. at 538-39 (quoting *Dobbert*, 432 U.S. at 292)). It is further consistent with the basic principles underlying the Court's *ex post facto* jurisprudence.

> The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p.282 (C. Rossiter ed. 1961) (J. Madison). The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. See *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); see also *post*, at 2094 – 2095. Even where these concerns are not directly implicated, however, the Clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell* [*v. Texas*], 529 U.S. [513,] 533, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

Id. at 544.

After careful consideration of the foregoing, the Court concludes that under Florida's new death penalty scheme, the defendant faces a significantly greater risk that he will receive the death penalty than under the law in effect at the time of the alleged offenses. The Court therefore concludes that application of the 2023 amendments to section 921.141 in this case would constitute a violation of the *Ex Post Facto* Clauses of the United States and Florida Constitutions.

B. ANALYSIS UNDER SECTION 775.022, FLORIDA STATUTES

The Defendant's additionally seeks to avoid application of the 2023 amendments to section 921.141 to his case under section 775.022, Florida Statutes. Specifically, the Defendant claims that section 775.022 prohibits application in his case of the amendments because the Legislature did not expressly provide for retroactive application. The State counters that application of the new death penalty legislation in this case would not constitute retroactive application because the sentencing event has not yet occurred, relying on *Pappas v. State*, 346 So. 3d 1200 (Fla. 1st DCA 2022) and *Robinson v. State*, 315 So. 3d 1266 (Fla. 5th DCA 2021). Section 775.022 addresses the effect of a reenactment or amendment to a criminal statute upon a *prior* event. Specifically, the statute directs that, unless expressly stated otherwise, a reenactment or amendment will not affect the prior operation of a statute or a prosecution or enforcement brought under the statute; a violation of the statute based upon acts occurring before the effective date, or a previously imposed penalty, forfeiture or punishment. As the State points out, there has been no sentencing event in this case. In short, application of the new death penalty scheme to this case would be considered, *in the context of section 775.022,* "prospective." However, as previously found, application of the new death penalty scheme, even if permitted by section 775.022, is constitutionally infirm pursuant to the *Ex Post Facto* Clause.

Based upon the foregoing, it is **ORDERED** as follows:

1. The State's Motion to Utilize New Statutory Death Penalty Sentencing Procedures of § 921.141, Fla. Stat (2023), filed June 1, 2023 is **DENIED**.
2. The Defendant's Motion to Declare Florida's New Capital Sentencing Scheme, Dispensing with the Jury Unanimity Requirement and Replacing It with an 8-4 Vote, Violative of the Ex Post Facto Clause, filed June 8, 2023, is **GRANTED IN PART** to the extent that application to the Defendant of the 2023 amendments to section 921.141 Florida Statutes violates the *Ex Post Facto* Clause.
3. The Defendant's Motion to Preclude Application of the Most Recent Amendments to F.S. 921.141 in This Case as Such Application Would Violate F.S. 775.022, filed June 8, 2023, is **DENIED**.

ORDERED in Polk County, Florida on Wednesday, July 12, 2023.

53-2021-CF-006615-A000-XX 07/12/2023 03:03:51 PM

Kevin Abdoney, Circuit Judge
53-2021-CF-006615-A000-XX 07/12/2023 03:03:51 PM

Copies:

Lauren M. Perry, Esquire (for the State of Florida)
Jane Allie McNeill, Esquire (for the Defendant)

APPENDIX B

IN THE CIRCUIT COURT FOR THE TENTH JUDICIAL CIRCUIT
IN AND FOR HIGHLANDS COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

v. CASE NO.: 28-2019-CF-000113-CFAM

ZEPHEN XAVER,

Defendant.
_____/

ORDER DENYING DEFENDANT'S
MOTION TO DECLARE FLORIDA'S NEW SENTENCING SCHEME, DISPENSING WITH THE JURY UNANIMITY REQUIREMENT AND REPLACING IT WITH AN 8-4 VOTE, VIOLATIVE OF THE EX POST FACTO CLAUSE AS APPLIED TO DEFENDANT
AND
GRANTING STATE'S
MOTION REQUESTING COURT ORDER THAT THE NEWLY ENACTED FLORIDA STATUTE 921.141 WILL BE UTILIZED AT THE PENALTY PHASE TRIAL OF THIS CASE

THIS MATTER is before the Court upon Defendant's *Motion to Declare Florida's New Sentencing Scheme, Dispensing with the Jury Unanimity Requirement and Replacing it with an 8-4 Vote, Violative of the Ex Post Facto Clause as Applied to Zephen Xaver* (Motion) filed through counsel on May 24, 2023. A hearing on the Motion was held on June 8, 2023. The day before the hearing, the State filed a *Motion Requesting Court Order That the Newly Enacted Florida Statute 921.141 Will Be Utilized at the Penalty Phase Trial of This Case Scheduled for January of 2024* (State's Motion). The day after the hearing, the defense filed a *Notice of Supplemental Authority and Notice of Correction in Regards to the June 8, 2023, Ex Post Facto Motion Hearing*. Based on the above referenced filings, arguments of the parties at the hearing, case record, and applicable law, the Court finds as follows:

Defendant is charged with five counts of first-degree murder, during which the victims' deaths resulted from Defendant's having discharged a firearm, in violation of §§ 782.04 and 775.087, Fla. Stat. The offense date for all five counts was "on or about" January 23, 2019. On February 8, 2019, the State filed a *Notice of Intent to Seek [the] Death Penalty* pursuant to §§

921.141(1) and 782.04(1)(b). The Notice included three aggravating factors: (1) Defendant's prior record includes another capital felony or a felony involving the use or threat of violence; (2) the capital felony was "especially heinous, atrocious or cruel;" and (3) the capital felony was a "cold, calculated and premeditated" homicide without "any pretense of moral or legal justification."

The Motion refers to the recent change to § 921.141(2)(c), Fla. Stat. Effective April 20, 2023, for defendants who do not waive the right to a sentencing proceeding before a jury, the jury must recommend to the Court a death sentence "if at least eight jurors determine that the defendant should be sentenced to death." The prior version of the subsection required a unanimous jury determination for that recommendation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Case law, and the parties' arguments, indicate that application of a law or change in a law, to a particular defendant violates constitutional *Ex Post Facto* protections if the new or amended law is substantive, rather than procedural, in nature. Both parties claim support for their position in *Collins v. Youngblood*, 497 U.S. 37 (1990). *Collins*, like many opinions dealing with the *ex post facto* issue, cited the venerable precedent case of *Calder v. Bull*, 3 U.S. 386 (1798). *Calder* listed four categories of prohibited *Ex Post Facto* laws, the third of which is most relevant to the motions presently before this Court:

(1) Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action;

(2) Every law that aggravates a crime, or makes it greater than it was, when committed;

(3) Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and

(4) Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 U.S. at 390 (emphasis added).

Collins stated that "our best knowledge of the original understanding of the *Ex Post Facto* clause [is that] Legislatures may not retroactively alter the definition of crimes or increase

the punishment for criminal acts." *Collins*, 497 U.S. at 43. Also, "[s]everal of our cases have described as 'procedural' those changes which, even though they work to the disadvantage of the accused, do not violate the *Ex Post Facto* clause." (Citations omitted.) Those cases did not "explicitly define...'procedural' [but] it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Id.* at 45. *Collins* reviewed several post-*Calder* precedents before holding that the law at issue in its case did not violate the *Ex Post Facto* clause:

> [it] does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive anyone charged with crime of any defense available according to law at the time when the act was committed.

Id. at 52.

Defense counsel emphasizes other language in *Collins* to support its claim that Florida's recent shift to an 8-4 jury vote for a death penalty recommendation violates the *Ex Post Facto* clause. That language is: "...simply labeling a law 'procedural'...does not immunize it from scrutiny under the *Ex Post Facto* clause." *Collins* at 46. The Motion claims that this language renders several precedent cases dealing with this issue "obsolete."

Defense counsel further claims *Peugh v. United States*, 569 U.S. 530 (2013), supports its position that the April 20, 2023, change is substantive. *Peugh* concerned a change in the Federal Sentencing Guidelines between 1998, the year Mr. Peugh committed five counts of bank fraud, and 2009, when he was sentenced for those crimes. The newer guidelines increased his sentencing range from 30-37 months' prison to 70-87 months. Defendant was sentenced to 70 months, and saw his *Ex Post Facto* claim twice rejected on appeal before the United States Supreme Court reversed and remanded. The guidelines change was found to fall within *Calder's* third category of *Ex Post Facto* violations ("[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.") *Peugh*, 569 U.S. at 532-533 (quoting *Calder*, 3 U.S. at 390), and at 550. Defense counsel emphasizes the majority's statement that

> Our ex post facto cases...have focused on whether a change in the law creates a 'significant risk' of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely.

Peugh, 569 U.S. at 550. Elsewhere, the opinion noted:

> On the one hand, we have never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause...On the other hand, we have made it clear that mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause. The touchstone of this Court's inquiry is whether a given change in law presents a **sufficient risk of increasing the measure of punishment attached to the covered crimes**. The question [of] when a change in law creates such a risk is "a matter of degree"; the test cannot be reduced to a "single formula."

Id. at 539 (emphasis added; internal citations omitted).

The defense and State disagree as to the application of the above-highlighted "sufficient risk of increasing the measure of punishment attached to the covered crimes," to this case. The defense argues the change in law created "a substantial risk that [Defendant] is more likely" to receive a death sentence because fewer jurors are now needed to determine that the death penalty is appropriate. The State has consistently argued that the change to § 921.141(2)(c) has not increased "the measure of punishment attached" to Defendant's crimes because his maximum penalty has always been death. Rather, the State contends the change affected the procedure by which the death penalty may be implemented.

As *Collins* noted, not every change in law that disadvantages a defendant violates the *Ex Post Facto* clause. It appears to this Court that *Peugh* entailed a "significant" risk of greater punishment from the newer guidelines, despite the trial judge's discretion to impose a downward departure sentence that could fall within the older guidelines range: "In the usual sentencing, ... the judge will use the Guidelines range as the starting point...and impose a sentence within the range." *Peugh*, 569 U.S. at 542 (additional citations omitted). Also, "the law permits the court to disregard the Guidelines only where it is 'reasonable'...to do so." *Id.* at 541-542 (quoting *Pepper v. United States*, 562 U.S. 476, 508 (2011)). In Defendant's case, the change in the law has increased his chances of receiving the maximum sentence he already faced; however, it has not "change[d] the punishment, [or] "inflict[ed] a greater punishment, than the law annexed to the crime, when committed." *See Calder*, as quoted earlier in this order.

The Court also finds relevant the State's observation that the United States Supreme Court has never required a unanimous jury to implement the death penalty. The Florida Supreme Court was reversed in *Hurst v. Florida*, 577 U.S. 92 (2016), only because Florida's sentencing scheme required the judge, and not the jury, to determine whether sufficient aggravators justified the death penalty. This violated the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Hurst v. Florida*, 577 U.S. at 97, 102-103. Upon remand, the Florida Supreme Court added the requirement that the jury's recommendation of death must be unanimous. *Hurst v. State*, 202 So. 3d 40, 57 (Fla. 2016). This was unprompted by the United States Supreme Court, which noted without criticism that Mr. Hurst's jury previously recommended death by a vote of 7 to 5. *Hurst v. Florida*, 577 U.S. at 96. As the parties in this case acknowledge, *State v. Poole*, 297 So. 3d 487, 504 (Fla. 2020), receded from *Hurst*'s unanimity requirement. Although, as the defense has noted, Florida currently has the lowest threshold jury vote for death in the United States, it remains more favorable to death penalty defendants than when *Hurst v. Florida* was decided.

It is **ORDERED AND ADJUDGED** that:

1. Defendant's Motion is **DENIED**.
2. The State's Motion is **GRANTED**.

ORDERED in Highlands County, Florida on Monday, June 26, 2023.

28-2019-CF-000113-CFAM 06/26/2023 10:30:41 AM

Angela Cowden, Circuit Judge
28-2019-CF-000113-CFAM 06/26/2023 10:30:41 AM

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CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to the Office of the Attorney General at CrimappTPA@myfloridalegal.com, Chief Deputy Solicitor General Jeffrey Paul Desousa, at Jeffrey.desousa@my floridalegal.com and jenna.hodges@my floridalegal.com, Charmaine Millsaps, Senior Assistant Attorney General, at Charmaine.Millsaps @myfloridalegal.com, and CapApp@my floridalegal.com, Scott Browne, Chief Assistant Attorney General, at Scott.Browne @myfloridalegal.com, Ira Still at ira@istilldefendliberty.com, and Joseph Chambrot at joseph@chambrotlaw.com, on this _7th___ day of August, 2023.

Respectfully submitted,

/s/ Steven L. Bolotin

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