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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR NASSAU COUNTY, FLORIDA

STATE OF FLORIDA, CASE NO.: 452021CF000725AXXX

vs. DIVISION: CR B

PATRICK MCDOWELL /

STATE'S RESPONSE AND OBJECTION TO 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 AS APPLIED TO PATRICK MCDOWELL AND APPLICABLE IN HIS CASE

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A. Relevant procedural history of the case

This matter comes before the Court on Defendant Patrick McDowell's motion to declare Florida's amended capital sentencing scheme, which dispenses with the jury unanimity requirement and replaces it with an 8-4 vote, unconstitutional. McDowell argues that the amended statute is violative of the *ex post facto* clause as applied to his case. McDowell entered an open plea of guilty to the charges on March 10, 2023. The court accepted the plea and passed the case until September for a penalty phase. A jury has not yet been impaneled and sworn to try the penalty phase. After the plea, the Florida Legislature passed a new death penalty law in section 921.141(2)(c), Florida Statutes, known as the "8-4 Law," which changed the number of votes required for the jury to recommend a death sentence from 12 to 8. Governor DeSantis signed the law on April 20, 2023, noting that it is to "take effect upon becoming a law." The Defendant's Motion was filed on May 30, 2023. However, during the plea, the court engaged McDowell in a colloquy about the potential law change and its applicability to his penalty phase.

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B. Legal Argument

Claim I: Because the requirement for jury unanimity is substantive, the *ex post facto* clause bars this Court from conducting the penalty phase under this new statutory scheme.

(i) The Defendant's allegations

The Defendant argues that the right to a unanimous verdict has been characterized as substantive. (Motion, 2). The Defendant further argues that in the context of the death penalty, Florida's Supreme Court thinks that an alteration of the life-or-death vote that is needed to impose a death sentence is a substantive change in the law. (Motion, 2). Legislature notes that both pre-*Hurst* and post-*Hurst*, the Florida Supreme Court strongly suggested that the Legislature should fix the problem of whether to adopt unanimity (*Steele*) or to dispense with unanimity (*Poole*). (Motion, 3). *See State v. Steele*, 921 So.2d 538, 548 (Fla. 2005) and *State v. Poole*, 292 So.3d 694, 714 (Fla. 2020). The Defendant reasoned that since the Court understands under separation of powers, matters of substantive law are for the Legislature, while matters of procedure are for the Court, this provides a clear indication that the Court considers unanimity or non-unanimity to be substantive, not procedural. (Motion, 3). The Defendant further reasoned that otherwise, the Court could have, and would have, adopted, or repealed the unanimity requirement itself, instead of urging the Legislature to do it. (Motion, 3).

(ii) The case law cited by the Defendant is not applicable.

The defense cites four cases in his Motion to support his argument that because the requirement of jury unanimity is substantive, the *ex post facto* clause bars the trial court from conducting the penalty phase under the new statutory scheme. (Motion, 2). However, each of the four cases the Defendant cited relates to the verdict in the ***guilt phase*** of a trial. In *People v.*

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McGhee, 964 N.E.2d 715, 720 (Ill. 2012), the court held that a defendant has a substantive right to a unanimous verdict; however, the court ruled that the polling of a jury is merely a procedural device that helps ensure the jury's verdict was unanimous. *Id.* at 723. In *State v. Watson*, 407 SW3d 180, 184 (Mo. Ct. App. 2013), the court held that criminal defendants have the right to a unanimous jury verdict. In *State v. Shomo*, 609 A.2d 394, 400 (N.J. 1992), the court reversed the conviction because there was the possibility that the defendant was convicted and sentenced on a less-than-unanimous verdict. Lastly, in *Commonwealth of the Northern Mariana Islands v. Ramangmau*, 1995WL92140, 4 (Supreme Court of the N. Mar. Is., 1995), the case dealt with a purportedly unanimous verdict, but polling revealed that the jurors' decision may not have been unanimous. Therefore, this Honorable Court should not find the Defendant's case law persuasive.

(iii) The amendment to the statute creating the "8-4" law.

Section 921.141(2)(c) of the Florida Statutes 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. If fewer than eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment without the possibility of parole." §921.141(2)(c), *Fla. Stat.* Statutory amendments are either substantive, which are usually applied prospectively unless clear legislative intent to the contrary, or procedural, which are applied retroactively to pending proceedings. *Webb v. Webb*, 765 So.2d 220, 221 (Fla. 2nd DCA 2000). In the context of criminal cases, "substantive law is that which declares what acts are crimes and prescribes the punishment therefor, while procedural law is that which provides or regulates the steps by which one who violates a criminal

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statute is punished." *Love v. State*, 286 So.3d 177, 185 (Fla. 2019), *citing State v. Garcia*, 229 So.2d 236, 238 (Fla. 1969). A change in the law from requiring a unanimous jury to recommend death to an 8-4 jury is not substantive because it regulates the process by which a judge will impose the substantive sentence. Thus, this Honorable Court must use the new law at the Defendant's penalty phase.

(iv) Substantive versus procedural

The issue of substantive versus procedural has been previously addressed in an identical situation by the United States Supreme Court, interpreting procedural changes to Florida's death penalty statute. In *Dobbert v. Florida*, 97 S.Ct. 2290 (1977), an appeal from the Florida Supreme Court, the United States Supreme Court reviewed an *ex post facto* claim of a defendant related to Florida's death penalty statute. After the commission of the crime, but before the trial, Florida amended section 921.141 and removed the presumption of a death penalty absent a recommendation of the jury for mercy. *Id*. at 2299. The new procedure required a separate sentencing hearing, presentation of mitigating circumstances, an advisory opinion of the jury, and a final determination by the trial judge. The defendant argued that the change in the sentencing procedure deprived him of his right to have the jury determine what penalty should be imposed. *Id*. at 2297-2298. The Court held that the change in the law was procedural. *Id*. at 2298. The Court reasoned that even though a change in the law may work to the disadvantage of a defendant, a procedural change is not *ex post facto*. *Id*., *citing Hopt v. Utah*, 4 S.Ct. 202 (1884) and *Thompson v. Missouri*, 18 S.Ct. 922 (1898). Specifically, the *Dobbert* Court stated that "[T]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in

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the quantum of punishment attached to the crime." Thus, the Court's rationale was that for a law to be *ex post facto*, it must be more onerous than the prior law. *Id*.

(v) Prospective application of the statute's amendment

The baseline event is the date of the crime when a new substantive statute, or an amended substantive statute, is at issue. However, due to *ex post facto* concerns, the date of the crime is not the proper baseline event with a new procedural statute, or an amended procedural statute, is at issue. Instead, it is the date of the affected proceeding that is the critical date when a procedural statute or procedural amendment is involved. *Love v. State,* 286 So.3d 177, 177 (Fla. 2019). In *Love*, the Florida Supreme Court held that an amendment to the stand-your-ground statute, section 776.032(4), Florida Statutes, would apply to all immunity hearings conducted after the effective date of the amendment. The Florida Supreme Court explained that, if the amended statute was applied to upcoming hearings, it was not being applied retroactively. The *Love* Court discussed and relied on *Landgraf* including the footnote. *Id*. at 187, citing *Landgraf*, 511 U.S. at 275, n. 29). The Florida Supreme Court specifically noted that the application of a new procedural statute to a "pending case is not a retroactive application." *Id*. at 189. The Florida Supreme Court explained that whether a statute is being applied retroactively or prospectively turns on "the posture of the case, not the date of the events giving rise to the case." *Id*. at 187; *see also Bailey v. State*, 333 So.3d 761 (Fla. 3d DCA 2022), wherein the appellate court, relying on *Love*, affirmed the trial court's refusal to conduct a second immunity hearing applying the amended statute. Thus, it is the law in effect on the date of that stage of the trial that controls when applying procedural statutes and procedural amendments. *Landgraf v. USI Film Products*, 511 U.S. 244, 255-264 & n. 29 (1994).

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In the case sub judice, the relevant event for retroactivity analysis of the amendments to Florida's death penalty statute is the date of the penalty phase. In McDowell's case, his penalty phase will begin well after the effective date of the amendment to Florida's death penalty statute. Therefore, this is a prospective application of the amended statute because the amendment to Florida's death penalty statute governs the jury's recommendation of a death sentence at the future penalty phase. The procedural amendments are not being applied retroactively; they are being applied prospectively only. Thus, because the new death penalty statute in McDowell's case is not being retroactively applied, the amended death penalty statute is properly being applied prospectively under the reasoning of the United States Supreme Court in *Landraf*.

(vi) Conclusion as to the allegations in Claim I

The new death penalty statute was enacted April 23, 2023. McDowell's penalty phase proceeding has not yet begun. Thus, in the instant case, the amended death penalty statute is being applied ***prospectively***, not retroactively, because the penalty phase will occur in the future in front a jury that has yet to be determined or selected. The mere application of a new procedural statute in a pending case is not a retroactive application when it is applied in the future. *Love v. State*, 286 So.3d 177, 188-189 (Fla. 2019). Accordingly, under the reasoning of both the United States Supreme Court's decision in *Landgraf*, and the Florida Supreme Court's decision in *Love*, Florida's amended death penalty statue is properly being applied prospectively to a future penalty phase rather than retroactively. Therefore, this Honorable Court should deny the Defendant's claims in Section I of this Motion.

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<u>Claim II: The *ex post facto* analysis in *Dobbert* has been superseded, and the crucial considerations now are "substantial risk" (of a harsher sentence) and "punitive intent."</u>

(i) <u>The Defendant's allegations in Claim II</u>

In Claim II of his Motion, the Defendant argues that the conceptual framework used in *Dobbert* has been superseded by, and is no longer controlling, based upon *Collins v. Youngblood*, 497 U.S. 37 (1990). (Motion, 4). The Defendant argues that the ex *post facto* clause was "intended to secure substantial personal rights against arbitrary and oppressive legislative actions." (Motion, 4). The Defendant further argues that *Collins* made plain that "simply labeling a law "procedural," …does not thereby immunize it from scrutiny under the ex *post facto* clause." (Motion, 4-5). The Defendant opines that the critical question to be answered when determining whether an amended sentencing law violates the ex *post facto* clause is whether the change in law creates a "sufficient" or "significant" risk of increasing the punishment for a given crime. (Motion, 5). The Defendant further opines that the fact that the new law does not increase the maximum sentence, and that the judge retains discretion to impose a lesser sentence, does not obviate the ex post facto violation. (Motion, 5).

(ii) The case law cited by the Defendant is not applicable.

The Defendant cites several cases that allegedly support is position that the ex post facto analysis in *Dobbert v. Florida*, 432 U.S. 282 (1977) has been superseded by "substantial risk" and "punitive intent." (Motion, 5). Of note, Dobbert, which was a case that originated in Duval County, is still good law. *Id*. In *Dobbert*, the Court held that the changes in the death penalty statute between the time of the murder and the trial, which related to the jury's advisory opinion being reviewed by the judge, are procedural and thus, not a violation of the *ex post facto* clause.

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Id. at 283. However, the cases cited by the Defendant are not applicable because they can be distinguished. For example, the Defendant cites *Peugh v. United States*, 569 U.S. 530 (2013), wherein the United States Supreme Court held that the ex post facto clause forbids the government from subjecting defendants to an increased advisory sentencing range by altering the substantive formula used to calculate the applicable sentencing range. (Motion, 5). However, *Peugh* involved an ***increase*** in punishment for a crime that was committed before a change in the law. *Id.* In McDowell's case, the punishment, life or death, has not been altered by the amended statute. Thus, *Peugh* is factually distinguishable from the instant case.

Furthermore, the Defendant cites *Collins v. Youngblood*, 497 U.S. 37, 50-51 (1990), to support his allegation that the *ex post facto* clause analysis in *Dobbert* has been superseded by considerations of "substantial risk" and "punitive intent." (Motion, 5). However, the *Collins* opinion does not support his argument. In *Collins*, the defendant argued he was entitled to a new trial because his conviction and sentence was void because it provided for both a fine and imprisonment, which was not allowed by law at the time of his sentence. *Id.* at 37. An appellate court reversed the conviction relying on *Thompson v. Utah*, 170 U.S. 343 (1898), which held that retroactive procedural statutes violate the *ex post facto* clause unless they leave untouched the substantial protections with which existing law surrounds the accused, such as the right to a new trial. *Id.* The *Collins* Court held that the defendant was wrong when he argued that the *ex post facto* clause was not limited to three categories: 1) a statute that punishes as a crime an act previously committed, which was innocent when done; 2) a statute that makes more burdensome the punishment for a crime, after its commission; or 3) a statute that deprives one charged with a crime of any defense available according to the law at the time when the act was committed. *Id.*

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at 38. The *Collins* Court reasoned that the "substantial protection" discussion in *Beazell v. Ohio*, 269 U.S. 167 (1925) imported confusion into the Court's interpretation and should not be used to adopt undefined enlargement of the *ex post facto* clause. *Id*. Specifically, the *Collins* court held that it has ***not*** broadened the categories the *ex post facto* clause applies to include if retroactive legislation deprives an accused of 'substantial protection' under the law existing at the time of the crime. *Id*. (Emphasis added). In the case sub judice, the new statute, applied retroactively, does not run afoul of any of the three ex post facto concerns. Instead, the new death penalty statute merely alters the process to determine whether the death penalty will be imposed. Otherwise, it makes no change to the punishment attached to first-degree murder. Thus, the statutory amendment at issue is procedural and does not violate ex post facto principles.

Lastly, and of note, though McDowell relied on the *Collins* opinion to support his argument, the *Collins* Court held that it would not violate the e*x post facto* clause if a defendant was originally entitled to a jury of twelve, but ultimately received a jury of eight. *Id*. at 50-52. The Court reasoned that the right to a jury trial as provided by the Sixth Amendment is obviously a "substantial" one, but it is not a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the e*x post facto* clause. *Id*. (overruling *Thompson v. Utah*, supra, to the extent it rested on the e*x post facto* clause and not the Sixth Amendment).

(iii) The Fifth District Court has ruled that the amendment is procedural.

On May 11, 2023, the Fifth District Court of Appeal has already directed trial courts to apply the court iteration of the statute. *See* 5D23-1569. Specifically, the appellate court ordered that the State of Florida's emergency petition for writ of certiorari was granted, and the trial court was

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directed to apply the current version of section 921.141, Florida Statutes. In *Victorino*, jury selection began on April 10, 2023, and was on going on April 20, 2023, when the Governor signed into law an amended version of section 921.141, Florida Statutes providing that if at least eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a death sentence. *State v. Victorino*, 372 So.3d 772, 775-776 (Fla. 5th DCA 2023). The State moved to apply the amended statute to the case, but the trial court denied the motion, concluding that because jury selection had already commenced, using the amended statute would violate the defendant's due process rights. *Id*. at 776. The State sought certiorari relief before the Fifth District, which directed the trial court to apply the current version of the statute. *Id*. The court reasoned that a procedural change, even one that works to a defendant's disadvantage, is not an *ex post facto* law because it does not alter substantive personal rights, such as the definition of a crime or an increase in a sentence by which a crime is punishable. *Id*. at 777-778. The court further reasoned that a law is procedural when it alters how a criminal case is adjudicated instead of addressing the substantive criminal law. *Id*. at 778. Thus, the court held that the amendment to section 921.141 is a quintessentially procedural change that has no substantive effect because it simply altered the methods employed in determining whether the death penalty is to be imposed but does not change the quantum of punishment attached to the crime. *Id*. This Honorable Court is bound by the decisions of the Fifth District Court of Appeal. *See Pardo v. State*, 596 So.2d 665, 666 (Fla. 1992), which held that the decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court. Thus, this Honorable Court should deny the claims in Section II.

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<u>Claim III: Patrick McDowell's case has progressed past the trial phase; thus, the new law cannot be applied to his penalty phase.</u>

(i) The Defendant's allegations in Claim III

In Claim III of his Motion, the Defendant argues that the United States Supreme Court has held that jeopardy attaches in a jury case when the jury is impaneled and sworn, and in a non-jury trial when the trial judge begins to hear evidence. (Motion, 11). The Defendant further argues that jeopardy attaches to an unconditional guilty plea when the plea is or should have been accepted. (Motion, 11). The Defendant reasons that it is of no consequence that his penalty phase has yet to begin because the penalty phase is not a separate guilt determination but is a continuation of the same proceeding. (Motion, 11).

(ii) Double jeopardy has not attached because a jury has not been impaneled or sworn.

The commencement of a trial occurs at different times depending upon the purpose. For speedy trial purposes, rule 3.191(c) of the Florida Rules of Criminal Procedure states that trial commences when the jury panel is sworn for voir dire examination. *McDermott v. State*, 383 So.2d 712, 714 (Fla. 2nd DCA 1980), *citing Moore v. State*, 368 So.2d 1291 (Fla. 1979). For purposes of double jeopardy, jeopardy attaches when the jury is impaneled and sworn. *Knight v. State*, 211 So.3d 1, 11 (Fla. 2016). Of note, in *Victorino*, supra, the Fifth District held that it is irrelevant that the current version of section 921.141 became law after jury selection had started. *Victorino*, supra, at 778. The court reasoned that criminal jeopardy is attached to a case when a jury, not a group of prospective jurors, is sworn in. *Id.*, *citing Knight v. State*, 211 So.3d 1, 11 (Fla. 2016). The court further reasoned that because the trial court did not swear the selected jury until after the current version of section 921.141 because law, the fact jury selection had already

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bean did not insulate the proceedings from an amendment to a procedural law that took effect before the jury was sworn and heard any evidence. *Id*.

In the instant case, voir dire has not yet begun. Thus, a jury has not been impaneled and sworn. Like the defendant in *Victorino*, the Defendant in the case sub judice is attempting to make an argument of detrimental reliance. However, like the defendant in *Victorino*, the statutory amendment took no one, including the Defendant, by surprise. *Victorino* at 777-778. In fact, the record shows that the court engaged the Defendant in a colloquy prior to acceptance of his plea that discussed the likelihood that the statute would be amended prior to his penalty phase. Thus, the Defendant should be estopped from arguing that the amended statute is barred by double jeopardy concerns. Accordingly, because double jeopardy has not attached in the instant case, and because the Defendant has no right to the application of any procedure other than the one in effect at the time the penalty phase is held, this Honorable Court should deny the Defendant's claims in section III.

C. **Conclusion**

If this issue were to be raised on direct appeal, it would require affirmance. *See*, *e.g.*, *Dobbert v. Florida*, 432 U.S. 282 (1977); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Love v. State*, 286 So.3d 177 (Fla. 2019), and *State v. Victornio*, 372 So.3d 772 (Fla. 5th DCA 2023). Because the changes contained in the now current version of §921.141, *Fla. Stat.*, are ameliorative and procedural in nature, the mere application of a new procedural statute in a pending case is not a retroactive application simply because the new law altered the method employed in determining whether the death penalty was to be imposed when there was not an increase in the quantum of punishment attached to the crime or sentence for first-degree murder.

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Dobbert at 2298. It is the law in effect on the date of that stage of the trial that controls when applying procedural statutes and amendments. *Landgraf* at 255-264 & n. 29. The amended death penalty statute is being applied prospectively, rather than retrospectively, because it is being applied to a future sentencing that has not yet begun; and the date of the affected proceeding is the critical date when a procedural statute or amendment is involved. *Love* at 187. Finally, as the Fifth District Court of Appeal held in *Victorino*, it is irrelevant that the current version of section 921.141 because law after jury selection had started. Accordingly, in the case sub judice, the new law, which simply changes the method utilized in determining whether the death penalty is to be imposed, rather than the penalty for first-degree murder, must be applied to McDowell's penalty phase, which has not yet started.

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WHEREFORE, the State requests this Honorable Court enter an order denying the Defendant's Motion and rule that the 2023 version of section 921.141, utilizing the non-unanimous death penalty sentencing law, is the law that governs the Defendant's penalty phase.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the State's Response and Objection has been e-served to the Defendant's attorney, Alan Chipperfield, and a courtesy copy provided to the court, on this 21th day of February 2024.

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