IN THE SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner, **CASE NO.:**
L.T. NO.: 20CF008641

v.

BELONI PETIT-FRERE,

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

COMES NOW, the State of Florida, by and through undersigned counsel, pursuant to Florida Rules of Appellate Procedure 9.030(b)(2) and (3) and 9.100(e), and Article V Section 4(b)(3) of the Florida Constitution, and hereby respectfully petitions this Court for Writ of Certiorari directing the Honorable Kevin Abdoney of the Tenth Judicial Circuit to implement the current statutory death penalty sentencing procedures of Section 921.141 of the Florida Statutes (2023) which was signed into law on April 20, 2023.

In *State v. Victorino*, 5D23-1569, 2023 WL 6174344 (Fla. 5th DCA Sept. 22, 2023), the Fifth District recently held that the amended death-penalty statute, which allows a jury to recommend death by a supermajority vote of 8-4, applies to pending cases. As

that court acknowledged, the new law is a procedural change that does not alter the range of permissible penalties and does not implicate the *Ex Post Facto* Clause. That conclusion is amply supported by binding Supreme Court precedent. The Fifth District therefore issued a writ of certiorari quashing a trial court order declining to apply the new law to that pending case. This Court should reach the same result here.

Nature of Relief Sought

The nature of the relief sought is an Order of the Court preventing the trial court from proceeding on the outdated version of section 921.141 and directing the lower court to utilize the current statutory death penalty sentencing procedures of section 921.141 of the Florida Statutes (2023).

Basis For Invoking Jurisdiction

The Florida Constitution grants district courts of appeal broad constitutional power to issue extraordinary writs. Art. V, § 4(b)(3), Fla. Const. Specifically, this Court's certiorari jurisdiction may be invoked pursuant to Florida Rule of Appellate Procedure 9.030(b)(2), Article 5, § 3(b)(8), as well as Article 5, section 4(b)(3) of the Florida Constitution.

For a district court to grant a writ of certiorari, the petitioner must "demonstrate that the contested order constitutes '(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case, (3) that cannot be corrected on post judgment appeal.'" *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 454 (Fla. 2012) (quoting *Reeves v. Fleetwood Homes of Fla., Inc.*, 889 So. 2d 812, 822 (Fla. 2004)).

Courts consider in tandem whether the contested order would cause the petitioner material injury and whether the petitioner has an adequate remedy on appeal, referring to the combined question as whether the petitioner would suffer "irreparable harm." *See Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 351 (Fla. 2012) (explaining that the threshold inquiry is whether there exists "a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm").

Here the trial court departed from the essential requirements of the law by denying the State's request to apply the current statutory death penalty sentencing procedures of Section 921.141 of the Florida Statutes (2023), to Respondent's upcoming trial. The

judiciary is obligated to uphold the constitutionality of legislative enactments and fashion instructions consistent with the law. The State of Florida will be irreparably harmed because the State has no basis to challenge this ruling on appeal. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112–13 (2003) (observing the double jeopardy bar may preclude a penalty phase retrial under certain circumstances). Because the court is applying an outdated law and stricter standard that requires a unanimous jury recommendation for a sentence of death, the State may have no recourse if a life sentence is imposed. *State v. Garcia*, 350 So. 3d 322, 326 (Fla. 2022).

The State is irreparably harmed, and a writ of certiorari is necessary.

Facts and Procedural History

On Wednesday October 14, 2020 at approximately 3:16 pm, Winter Haven Police Department patrol officers responded to the Rose Motel located at 815 6th Street Northwest, Winter Haven, Polk

County, Florida 33881 in reference to a well-being check.[1] Officer Grantham responded to the scene.

Once inside the hotel room, Officer Grantham observed a black male lying face up on the bed. Officer Grantham then observed an unclothed white female lying on the floor inside the adjoined bathroom of the motel room. The female subject was also deceased. The white female was positively identified as Leslee Umpleby the black male as Timothy Anderson.

It was later determined via autopsy that Anderson had been stabbed approximately eight times, and that Umpleby had also been stabbed approximately seven times, most prominently one to the neck and one to the head.

During the investigation, it was learned that Leslee was romantically involved with Beloni Petit-Frere, and that this relationship was described as violent. It was also documented that

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[1] During the investigation detectives were able to obtain video from the Rose Motel for the evening of October 13, 2020. In the surveillance video it shows a subject wearing dark clothes leaving the vicinity of the crime scene at approximately 11:13 p.m.

the suspect became aware Umpleby was involved in a new and intimate relationship with Timothy Anderson on October 10, 2020.

A search warrant was sought and obtained for the known residence of Petit-Frere. During the execution of the search warrant multiple articles consisting of clothing, footwear, knives, DNA swabbings from various locations, photographs and a light blue hand towel with possible blood were collected and submitted to the Florida Department of Law Enforcement's Tampa labs. Photographs of the light blue towel collected during the search were later shown and identified by witness Dawn Swartz to be the towel she saw Petit-Frere in possession of during the late evening hours of October 13, 2020.

Based on the investigation, physical evidence, DNA findings, and witness statements, it was determined that Petit-Frere unlawfully entered the victims' motel room with the intent to commit murder and did kill Leslee Umpleby and Timothy Anderson by repeatedly stabbing them to death. (Exh. A, App. at 9-10).

On November 19, 2020, Petit-Frere was indicted on seven felony counts, among them, two counts of first-degree murder. (Exh. B, App. at 19-24).

On December 4, 2020, the State of Florida timely filed its Notice of Intent to Seek Death Penalty and Disclosure of Aggravating Factors: 1) the defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person; 2) the capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, burglary and kidnapping; 3)the capital felony was especially heinous, atrocious or cruel; and 4) the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (Exh. C, App. at 25-26).

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." On April 20, 2023, the Governor signed Senate Bill 450. The amendments to Florida's death penalty statutes now allow for a jury recommendation of a death sentence by a vote of eight to four jurors rather than requiring a unanimous jury vote for a death recommendation, as the

prior version of the statute required. § 921.141, Fla. Stat. (2022) (capital felonies), and § 921.142, Fla. Stat. (2022) (drug trafficking). The amendments became effective immediately.

Section 921.141(2)(c) of Florida's death penalty statute now provides:

> (c) If 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. (2023). And section 921.141(3)(a)2 of the amended statute now provides:

> (a) If the jury has recommended a sentence of:
> …
>
> 2. Death, and at least eight jurors recommend a sentence of death, the court, after considering each aggravating factor found by the jury and all mitigating circumstances, may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury. The court may impose a sentence of death only if the jury unanimously finds at least one aggravating factor beyond a reasonable doubt.

§ 921.141(3)(a)2, Fla. Stat. (2023). The death penalty statute was also amended to require a written order from the sentencing judge for

either a death sentence or a life sentence which must include "the reasons for not accepting the jury's recommended sentence, if applicable." § 921.141(4), Fla. Stat. (2023).

On July 14, 2023, the State filed a Motion to Utilize New Statutory Death Penalty Sentencing Procedures of § 921.141, Fla. Stat (2023). (Exh. D, App. at 27-34). On September 5, 2023, the Defendant filed a 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. (Exh. E, App. at 34-38).

On September 8, 2023, the trial court held a hearing on the above motions to address the issue of whether retroactive application would constitute an ex post facto law. (Exh. F, App at 39-79). The State's primary argument was that the changes to section 921.141 were procedural in nature and should apply when sentencing takes place.[2] The State also argued that the changes did not offend *ex post*

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[2] In *Love v. State*, 286 So. 3d 177, 190 (Fla. 2019), 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 Court explained the distinction between substantive law and procedural law. Substantive law is that which declares what acts are crimes and prescribes the punishment for

facto principles because they did not increase the punishment for first degree murder, citing to *Dobbert v. Florida*, 432 U.S. 282 (1977).

The Defendant argued that the application of the amendment in this case would be retrospective and not prospective as the relevant date for purposes of retroactivity is the date of the offense. The Defendant also focused on the allegedly punitive nature of the amendment.

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those crimes, while procedural law provides or regulates the steps by which one who violates a criminal statute is punished. *Id.* at 185 (quoting *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969)). The Court concluded that the amendment at issue was procedural rather than substantive, observing that historically, amendments to statutes regarding the burden of proof have been viewed as procedural. *Id.* at 186. The Court explained that, if the amended statute was applied to upcoming hearings, it was *not* being applied retroactively. The Court, in *Love*, discussed and relied on *Landgraf* including the footnote. *Id.* at 187 (citing *Landgraf*, 511 U.S. at 275, n.29). The Court noted that application of a new procedural statute to a "pending case is not a retroactive application." *Id.* at 189. The 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 19, 2022) (affirming the trial court's refusal to conduct a second immunity hearing applying the amended statute, relying on *Love*).

While the trial court agreed with the State that application of the new death penalty scheme to this case would be considered, in the context of section 775.022, "prospective", the trial court found that application of the new death penalty scheme, even if permitted by section 775.022, was constitutionally infirm pursuant to the *Ex Post Facto* Clause which forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment.

By order dated September 18, 2023, the trial court denied the State's Motion to Utilize New Statutory Death Penalty Sentencing Procedures of § 921.141, Fla. Stat (2023)[3] holding that 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. (Exh. G, App at 80-107).

ARGUMENT

THE TRIAL COURT'S DECISION TO PROCEED ON THE OUTDATED VERSION OF SECTION 921.141 DEPARTS FROM THE ESSENTIAL REQUIREMENTS OF LAW

[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, was denied. (Exh. G, App at 91).

RESULTING IN MATERIAL INJURY TO THE PETITIONER THAT CANNOT BE REMEDIED BY APPEAL.

Trial courts have the "responsibility to determine and properly instruct the jury on the prevailing law." Standard Jury Instructions in Crim. Cases (95-1), 657 So. 2d 1152, 1153 (Fla. 1995); *Allen v. State*, 324 So. 3d 920, 928 (Fla. 2021). To fulfill this responsibility, "[t]he standard jury instructions appearing on The Florida Bar's website may be used by trial judges in instructing the jury in every trial to the extent that the instructions are applicable," but if the court "determines that an applicable standard jury instruction is erroneous or inadequate ... the judge shall modify the standard instruction or give such other instruction as the trial judge determines to be necessary to instruct the jury accurately and sufficiently on the circumstances of the case." Fla. R. Gen. Prac. & Jud. Admin. 2.580.8; *Allen v. State*, 324 So. 3d 920, 928 (Fla. 2021).

The responsibility to ensure that the jury is properly instructed ultimately rests with the trial court, not counsel. The court has a duty to assure that the jury is instructed on the correct law to be applied to the case. While the standard jury instructions may be presumed to be correct, final responsibility for correctly instructing

the jury remains with the trial court. *Silva v. State*, 259 So. 3d 278, 282 (Fla. 3rd DCA 2018). "In that regard, a trial judge in a criminal case is not constrained to give only those instructions that are contained in the Florida Standard Jury Instructions." The "[j]ury instructions must relate to issues concerning evidence received at trial," and "the court should not give instructions which are confusing, contradictory, or misleading." *Hegele v. State*, 276 So. 3d 807, 810 (Fla. 4th DCA 2019). The trial court's decision to proceed on the outdated version of section 921.141 departs from the essential requirements of the law and supports the granting of the writ of certiorari.

I. The *Ex Post Facto* Analysis in *Dobbert* is applicable to this case.

On September 22, 2023, the Fifth District Court of Appeal issued its opinion in *State v. Victorino*, 5D23-1569, 2023 WL 6174344, (Fla. 5th DCA Sept. 22, 2023), (Exh. H, App. at 108-123), which granted the State's petition allowing the amended statute to be applied at the upcoming trials. Relying on *Dobbert*, the court held that the amendment to section 921.141 was a procedural change with no **substantive** effect. Agreeing with the State, the *Victorino*

court found that since the change to section 921.141 "neither alters the definition of criminal conduct nor increases the penalty by which the crime of first-degree murder is punishable[,] ... it does not constitute an ex post facto law. *Id.*

Article I, § 10, of the Constitution prohibits the States from passing any "*ex post facto* Law." The Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 41,43 (1990). At times, the Court has suggested that the application of the *Ex Post Facto* Clause depends on whether a challenged law is substantive or procedural, and that a procedural change[4] cannot be *ex post facto*. More recently, however, the Court has rejected a rigid distinction between substance and procedure and instead focused on whether a law falls within the four categories identified in *Calder v. Bull*, 3 U.S. 386, 390 (1798).

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[4] It is logical to assume 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.

In *Collins v. Youngblood*, the Court held that by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. However, a procedural change may constitute an *ex post facto* violation only if it **"affect[s] matters of substance**." *Collins v. Youngblood*, 497 U.S. 37, 45 (1990) (emphasis added). As the *Victorino* court acknowledged, the amendment to section 921.141 is a quintessentially procedural change that has no substantive effect. *State v. Victorino*, No. 5D23-1569, 2023 WL 6174344, at *3 (Fla. 5th DCA Sept. 22, 2023). "The new statute simply alter[s] the methods employed in determining whether the death penalty [is] to be imposed; there [is] no change in the quantum of punishment attached to the crime." *See Dobbert*, 432 U.S. at 293–94, 97 S.Ct. 2290.

Indeed, in two cases, the Supreme Court has held that laws addressing the structure and function of the jury fall outside *Calder*'s categories. The first, *Collins v. Youngblood*, held that the *Ex Post Facto* Clause did not bar a statute reducing the number of jurors required for a conviction. 497 U.S. 37, 47, 50–52 (1990). The question in *Youngblood* involved the application of a Texas statute, enacted after the date of the defendant's crime, that allowed a judge to "reform" a

jury verdict by striking from the verdict an improperly assessed fine. *Id.* at 39. Pre-amendment, the jury's erroneous verdict would have necessitated a new trial. *Id.* The Supreme Court held that this new statute properly applied to the defendant's case because it fell outside *Calder*'s categories. *Id.*

But the critical point is this: In reaching that result, the Court felt it necessary to recede from *Thompson v. Utah*, 170 U.S. 343 (1898). In *Thompson*, the Court had held that a Utah law "reducing the size of juries in criminal cases from 12 persons to 8" was an impermissible *ex post facto* law. *Youngblood*, 497 U.S. at 47, 50–52 (citing *Thompson*, 170 U.S. at 352). In hindsight, the Court announced in *Youngblood*, that decision was incorrect. *Id.* Though recognizing that the number of jurors is in a sense a "'substantial' [right]," the Court in *Youngblood* held that "it is not a right that has anything to do with the definition of crimes, defenses, or punishment, which is the concern of the *Ex Post Facto* Clause." *Id.* at 51. Put another way, the requisite number of jurors—like a Texas judge's power to reform a verdict—went to "remedies and modes of procedure[,] which do not affect matters of substance." *Id.* at 46. The

Court therefore "overrule[d]" *Thompson* "[t]o sthe extent [it] rested on the *Ex Post Facto* Clause." *Id.* at 51–52.[5]

As subsequent courts have understood, *Youngblood*'s explanation for overruling *Thompson* leaves no doubt that laws, like Florida's, which merely alter the number of jurors required for a particular result fall outside the "concern" of the *Ex Post Facto* Clause. *See State v. Cohen*, 604 A.2d 846, 854 (Del. 1992) (understanding *Youngblood* to bar a nearly identical challenge to Delaware's amended death-penalty statute); *cf. United States v. Joyner*, 201 F.3d 61, 80 (2d Cir. 2000) (holding that a statutory change eliminating the jury's role in sentencing was not *ex post facto* under *Youngblood*).

In the second case, *Dobbert v. Florida*, 432 U.S. 282 (1977), the United States Supreme Court held that applying a newer version of a death penalty statute did not violate *ex post facto* or equal protection.

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[5] The jury's recommendation of death is not an element of the offense and thus is not covered by the Sixth Amendment right to a jury. *See State v. Poole*, 297 So. 3d 487, 503 (Fla. 2020); *infra* 25. *Youngblood* therefore applies with even greater force here because the number of jurors is not even a "'substantial' [right]" in the recommendation context.

Dobbert murdered his young daughter in December of 1971 and then he murdered his young son sometime in early 1972. *Id.* at 284-84, 288. He was convicted of first-degree murder for the murder of his daughter and sentenced to death. At the time of the murder in 1971, Florida's death penalty statute provided that a person convicted of a capital felony was to be punished by death unless the verdict included a recommendation of mercy by a majority of the jury. *Id.* at 288. There was a presumption that a death sentence was the appropriate penalty under the version of the death penalty statute in effect on the date of the murder. After the murder, in June of 1972, the United States Supreme Court struck down capital punishment as violating the Eighth Amendment in *Furman v. Georgia*, 408 U.S. 238 (1972). In response to *Furman*, many states, including Florida, enacted new death penalty statutes. Many of these new death penalty statutes, including Florida's, were based on the Model Penal Code's death penalty scheme which included detailed aggravating and mitigating factors. Dobbert was sentenced to death using the amended death penalty statute.

Dobbert raised an *ex post facto* and an equal protection challenge to Florida's amended death penalty statute being applied

to him. *Dobbert*, 432 U.S. at 287. Dobbert argued that Florida had no valid death penalty statute in effect on the date of the murder because that statute violated *Furman*. Dobbert also argued he had a "substantial right" to have the jury alone determine the penalty instead of having the jury make a recommendation but the judge making the ultimate decision, as provided for in the amended statute. *Id*. at 292.

The *Dobbert* Court concluded that the amendments to Florida's death penalty statute were procedural and ameliorative, in the sense that the changes to the statute benefitted the defendant, and therefore there was no *ex post facto* violation. *Dobbert*, 432 U.S. at 292. The Court concluded that Florida's amended death penalty statute was both procedural and ameliorative. *Id*. at 294. In a footnote, the majority explained that these holdings were "independent bases for our decision" and that, even if the change was not ameliorative, there would still be no *ex post facto* violation from applying a new procedural statute. *Id*. at 292, n.6 (citing *Beazell v. Ohio*, 269 U.S. 167 (1925)). The *Dobbert* majority explained that even when the amendments to a statute, compared to the older version of the statute, "work to the disadvantage of a defendant, a procedural

change is not *ex post facto*." *Id.* at 293 (citing *Hopt v. Utah*, 110 U.S. 574 (1884), and *Thompson v. Missouri*, 171 U.S. 380 (1898)).

The Court concluded the amendments were clearly procedural because they merely "altered the methods employed in determining whether the death penalty was to be imposed and there was no change in the quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293-94. The crime, the punishment, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the amendments. *Id.* at 294.

There was no notice concern in applying the amended statute because the punishment under the older version of the death penalty statute, in effect on the date Dobbert committed the murder, included the possibility of a death sentence and that was equally true of the newer version of the death penalty statute. *Dobbert*, 432 U.S. at 297 (noting the statute on the books at the time he committed the murder provided fair warning how seriously Florida treated "the act of murder"). The Court reasoned that the prior version of the death penalty statute served to warn him of the penalty if he was convicted of first-degree murder and such notice was "sufficient compliance with the *ex post facto* provision of the United States Constitution." *Id.*

at 298. The Court's basic reasoning was that there was a death penalty in Florida when he committed the murder and, following the amendment to the death penalty statute in the wake of *Furman*, there was still a death penalty in Florida. The punishment under the older version of the death penalty statute included the possibility of a death sentence and the newer version of the statute did too. His being sentenced to death was a possibility at the time he committed the crime. The penalty had not changed, and he had notice that his conduct was a serious crime, and that death was a possible sentence for murder in Florida. So, there was no notice problem with applying the newer amended version of Florida's death penalty statute to him.

Here, as in *Dobbert*, there is no *ex post facto* violation from applying the amended death penalty statute to Petit-Frere at the upcoming resentencing because the amendments are procedural. Here, as in *Dobbert*, Petit-Frere had notice that his sentence could be a death sentence from the statute as it existed at the time of his murder in 2021.

At the time Petit-Frere committed the murders, he had statutory notice that his conduct of murdering someone was criminal, and he also had statutory notice that first-degree murder was punishable by

the death penalty in Florida from the 2021 version of the death penalty statute. *Ex post facto* is, at its core, a due process notice issue. *Lankford v. Idaho*, 500 U.S. 110 (1991). Because Petit-Frere had notice of death as a possible punishment at all relevant times, there is no *ex post facto* issue. *Dobbert* is controlling.[6]

Likewise, 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. *California Dep't of Corr. v. Morales*, 514 U.S. 499, 505 (1995). The legislation at issue here effects no change in the definition of Respondent's crime. The punishment for first-degree murder in Florida was a life-without parole sentence or a death sentence before the recent amendments

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[6] When two lines of Supreme Court cases are in tension, a lower court should follow the case that is closest factual and legally. Any tension between *Youngblood* and *Dobbert*, on the one hand, and *Peugh*, on the other, should be resolved in favor of following *Youngblood* and *Dobbert*. If a precedent of the Supreme Court has direct application in a case yet appears to rest on reasons rejected in some other line of decisions, the lower courts "should follow the case which directly controls." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

and the punishment for first-degree murder in Florida is still a life-without parole sentence or a death sentence after the recent amendments. The updated changes do not "change[] the legal consequences of acts completed before [their] effective date," *Miller v. Florida*, 482 U.S. 423, 430 (1987) (citation omitted), and they do not "increase[] the penalty by which a crime is punishable," *California Dep't of Corr. v. Morales*, 514 U.S. 499, 506 n.3 (1995).

II. Two different aspects of the capital decision making process: the eligibility decision and the selection decision.

The trial court's reliance on *Peugh v. U.S.*, 569 U.S. 530 (2013) and *Miller v. Florida,* 482 U.S. 423 (1987) is misguided.[7] Rather, as *Victorino* established, *Dobbert* is controlling.

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[7] In its Order, the court acknowledges the difference:

> 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

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.[8] *Id.* at 534. But there are clear factual and legal distinctions between *Peugh* and this case.

"[T]he *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." *Peugh v. United States*, 569 U.S. 530, 550 (2013), citing *Morales*, 514 U.S., at 505.

> that of 8. That does not, however, render *Miller* and *Peugh* inapposite. Indeed, as this Court ultimately concludes, they are decisive by analogy.

(Exh. G, App. at 84).

[8] When Peugh committed his crime, the recommended sentence was 30 to 37 months. When he was sentenced, it was 70 to 87 months. *Peugh v. United States*, 569 U.S. 530, 545 (2013).

Section 775.082(1), Florida Statutes, states that the punishment for a capital felony is life imprisonment unless "the procedure set forth in § 921.141 results in findings by the court that such person shall be punished by death." The required trial court findings are set forth in section 921.141(3), Florida Statutes, which is titled "Findings in Support of Sentence of Death."

Section 921.141(3) requires two findings. One is an eligibility finding, the other a selection finding. The eligibility finding is in section 921.141(3)(a): "[t]hat sufficient aggravating circumstances exist as enumerated in subsection (5)." It is the finding of an aggravating circumstance that exposes the defendant to a death sentence. *State v. Poole*, 297 So. 3d 487, 503 (Fla. 2020). That eligibility finding remains unchanged. [9]

The selection finding, which is the amendment in question, is in section 921.141(3)(b): "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." *State v.*

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[9] Contrary to the trial court's order, the procedure by which a defendant becomes ***eligible*** for the death penalty has not changed. (Exh. G, App. at 81).

Poole, 297 So. 3d 487, 502 (Fla. 2020). By contrast, the selection decision involves determining "whether a defendant eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972, 114 S.Ct. 2630. The section 921.141(3)(b) selection finding is not a "fact." The ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy. *Kansas v. Carr,* ── U.S. ──, 136 S. Ct. 633, 642, (2016); *State v. Poole,* 297 So. 3d 487, 503 (Fla. 2020).

The change in the law does not create a significantly greater risk that Petit-Frere will receive a more onerous sentence. Under precedent, the relevant inquiry for determining whether a law "inflicts a greater punishment," is whether the "retroactive application of the change in [the] law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Garner v. Jones,* 529 U.S. 244, 250 (2000) (quoting *California Dept. of Corrections v. Morales,* 514 U.S. 499, 509 (1995)). The amended statute does not "expose" the defendant to the death penalty by increasing the legally authorized range of punishment. It is the finding of an aggravating circumstance, which remains unaffected by the changes in the statute, that exposes the defendant to a death sentence. The

statutory "range" in effect at the time of Respondent's offense will remain in effect at his sentencing.

III. **Legal changes that alter the likelihood of a particular sentence do not implicate traditional *ex post facto* concerns.**

An individual contemplating the commission of a given offense knows he may be sentenced anywhere within the legally prescribed range. Petit-Frere faces the same risk that he will receive the death penalty as he did under the law in effect at the time of the alleged offenses. Once the jury unanimously finds an aggravator, Petit-Frere becomes part of the narrow class eligible for death. There is no higher sentence. What has changed is not that he will receive a higher sentence of death, but rather that he will receive the sentence he has already been found eligible for. He may *hope* to receive a lenient sentence, and he may even have good reasons for expecting leniency. But he does not have any guarantees. Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes. *Peugh,* at 563 (J. Thomas, dissenting).

The role of section 921.141(3)(b) selection finding is to give the defendant an **opportunity for mercy** if it is justified by the relevant

mitigating circumstances and by the facts surrounding his crime. *State v. Poole,* 297 So. 3d 487, 503 (Fla. 2020). Legal changes that alter the *likelihood* of a particular sentence within the legally prescribed range do not deprive people of notice and fair warning implicating the *Ex Post Facto* Clause. More fundamentally, the "sufficient risk" test, like the "disadvantage the defendant" test, wrongly focuses on the particular sentence that the defendant *might* receive, rather than on the punishment "annexed to the crime." *Peugh,* at 560 (J. Thomas, dissenting) A defendant has no constitutionally protected expectation under the Due Process Clause of receiving any particular sentence within the range authorized by statute. The *ex post facto* clause's purposes - to provide adequate notice to defendants and to prevent legislative action that disfavors particular persons - are not implicated by the current changes to the death penalty statute.

Accordingly, the State requests that this Court issue a constitutional writ barring the lower court from proceeding on the outdated version of section 921.141 and directing the lower court to utilize the new statutory death penalty sentencing procedures of Section 921.141 of the Florida Statutes (2023).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished on October 13th, 2023, by e-portal to: J. Jervis Wise, Esq., Brunvand and Wise, P.A. 615 turner Street, Clearwater, FL 33756, **jervis@acquitter.com**; Bonde Johnson, Assistant State Attorney, Office of the State Attorney, 10th Judicial Circuit, 255 N. Broadway Ave., Bartow, FL 33830, **bjohnson@sao10.com**; Honorable Jon Kevin Abdoney, Circuit Judge, P.O. Box 9000, Bartow, FL 33831-9000, **kabdoney@jud10.flcourts.org**.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this PETITION is 14-point Bookman Old Style, and word count is less than 13,000 words in compliance with Fla. R. App. P. 9.045(e) and 9.100(g).

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