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**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.

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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

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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.

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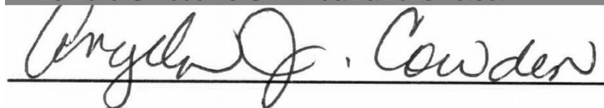

Angela Cowden, Circuit Judge

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