Filing # 175571898 E-Filed 06/18/2023 02:54:55 PM

IN THE SUPREME COURT OF FLORIDA

JASON LOONEY,

Petitioner,

v.

Case No.: _____
L.T. No. 1997-CF-215

STATE OF FLORIDA,

Respondent.
_____/

PETITION FOR WRIT OF PROHIBITION

COMES NOW the Petitioner, Jason Looney, through undersigned court-appointed counsel, and files this original petition for writ of prohibition pursuant to Fla. R. App. P. 9.100.

NATURE OF RELIEF SOUGHT

Petitioner seeks a writ of prohibition directed to the Honorable J. Layne Smith, Circuit Judge of the Second Judicial Circuit of Florida, directing that § 921.141, *Florida Statutes,* as amended by Chapter 2023-23, *Laws of Florida,* not be applied to the pending prosecution of Mr. Looney in Wakulla County, which is currently set for jury trial beginning on June 19, 2023.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUES PRESENTED

I. Applying the recent amendment to § 921.141 retroactively to pending prosecutions would violate § 775.022, *Fla. Stat.*

II. Applying the recent amendment to § 921.141 to pending prosecutions would take away a vested procedural right and violate the Ex Post Facto Clause of the U.S. Constitution

JURISDICTION

This Court has original jurisdiction to issue a writ of prohibition to courts pursuit to Article V, Section 3(b)(7) of the Florida Constitution and Fla. R. App. P. 9.030(a)(3).

STANDARD OF REVIEW

The issue of whether a statute applies to cases that were pending at the time the statute went into effect presents a pure question of law that the Supreme Court reviews de novo on petition for writ of prohibition. *Love v. State,* 286 So. 3d 177 (Fla. 2019).

STATEMENT OF THE CASE AND FACTS

1. Petitioner was convicted of first-degree murder in Wakulla County Case No. 1997-CF-215 and sentenced to death. The judgment and

sentence were affirmed on direct appeal. *Looney v. State,* 803 So. 2d 656 (Fla. 2001).

2. In 2016, the Defendant filed a motion for postconviction relief under Fla. R. Crim. P. 3.851 to vacate his death sentence based on the denial of the Sixth Amendment right to trial by jury and a unanimous verdict as stated in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016).

3. By order dated October 12, 2017, the Wakulla County Circuit Court granted the motion for postconviction relief, vacated Mr. Looney's death sentence and ordered a retrial of the penalty phase.

4. In Chapter 2017-1, *Laws of Florida,* the Legislature subsequently amended § 921.141, *Florida Statutes,* to codify the right to a unanimous jury recommendation of death in capital sentencing proceedings. The statute read as follows:

> If 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. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

§ 921.141(2)(c), *Fla. Stat.* (2019).

5. This Court subsequently receded from *Hurst* in *State v. Poole,* 297 So. 3d 487 (Fla. 2020). However, the statutory right to a unanimous penalty phase jury remained in place.

6. The case is now set for a retrial of the penalty phase beginning on June 19, 2023 before the Honorable J. Layne Smith, Circuit Judge in Wakulla County, Florida.

7. On April 23, 2023, the Governor of Florida signed into law Chapter 2023-23, *Laws of Florida,* which amended § 921.141, *Florida Statutes,* and eliminated the defendant's statutory right to a unanimous jury recommendation of death before being eligible for the death penalty. Under the statute as amended, a defendant is eligible for the death penalty if eight or more jurors out of twelve vote to recommend death:

> 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.

8. The State immediately filed a motion to apply the statutory amendment at the upcoming trial, and Petitioner filed a response objecting on Ex Post Facto and other grounds.

9. By order dated May 23, 2023, the trial court granted the State's motion and ordered that the amended statute would be applied at trial.

10. On June 16, 2023, Petitioner filed a renewed motion to prohibit application of the new statute based on § 775.022, *Florida Statutes.* The court entered an order denying the motion the same day.

11. This petition follows.

ARGUMENT

I. APPLYING THE AMENDMENT TO § 921.141 RETROACTIVELY TO PENDING PROSECUTIONS ABSENT AN EXPRESS STATEMENT OF LEGISLATIVE INTENT IN THE ACT WOULD VIOLATE § 775.022

Petitioner's original death sentence was vacated under *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), because he was denied his right to trial by unanimous jury. Now on the eve of trial, the State is attempting to deprive Petitioner of his right to a unanimous jury at the retrial by applying a new rule of law retroactively to a pending prosecution. For the reasons that follow, this is prohibited by Florida law.

Article X, Section 9 of the Florida Constitution was amended following the 2018 November election to read: "Repeal of a criminal statute shall not affect prosecution for any crime committed before such repeal." Prior to the amendment, this section also contained language prohibiting the Legislature from "making an amendment to a criminal statute applicable to

pending prosecutions…." *Jimenez v. Jones,* 261 So. 3d 502, 503-504 (Fla. 2018). After the amendment, this Court acknowledged that "there will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences." *Id* at 504.

However, removal of the constitutional prohibition on retroactive application of an amended criminal statute does not mean that every such amendment applies retroactively. *See Jimenez, supra,* (stating that "nothing in our constitution does or will require the Legislature to [apply amendments retroactively.]" Following the constitutional amendment, the Legislature enacted § 775.022, *Florida Statutes,* to provide a standard for retroactivity as follows:

> (2) As used in this section, the term "criminal statute" means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.
>
> (3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:
>
> (a) The prior operation of the statute or a prosecution or enforcement thereunder.

> (b) A violation of the statute based on any act or omission occurring before the effective date of the act.
>
> (c) A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.
>
> (4) If a penalty, forfeiture, or punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty, forfeiture, or punishment, if not already imposed, must be imposed according to the statute as amended.
>
> (5) This section may not be construed to limit the retroactive effect of any defense to a criminal statute enacted or amended by the Legislature in a criminal case that has not yet resulted in the imposition of a judgment or sentence by the trial court or an appellate decision affirming a judgment or sentence of the trial court.

§ 775.022(3), (4), (5) *Fla. Stat.* (2022).

The plain language of the statute establishes clear rules for when an amended criminal statute applies to pending cases or is prospective only, and offers more protection to defendants than the Ex Post Facto Clause. First, the statute applies to amended criminal statutes regardless of whether they are substantive or procedural in nature. Thus, the distinction used to defeat Ex Post Facto claims is not dispositive and does not support retroactive application of the new law.

Second, there is a general presumption against retroactivity unless one of three exceptions is met, and the rule of non-retroactivity applies to both final cases and pending prosecutions. § 775.022(3)(a); *see also Jimenez,* 261 So. 3d at 504 (noting that in context of Article X, the term "retroactively" refers to use in pending prosecutions). This also differs from how retroactivity and prospectivity are defined in an Ex Post Facto analysis. *See also* § 775.022(5) (permitting "retroactive effect" of new defense to cases that have not yet resulted in imposition of a judgment or sentence).

The three exceptions in the statute to the general rule against retroactive application are (1) an express statement of legislative intent in the act to apply the amendment retroactively, § 775.022(3), (2) the amendment reduces the penalty for a crime, § 775.022(4), *see e.g. Dean v. State,* 303 So. 3d 257 (Fla. 5th DCA 2020) (holding that defendant was entitled to benefit of statutory amendment that increased monetary threshold for felony theft, making her crime a misdemeanor), and (3) the amendment creates a new defense to a crime, § 775.022(5). None of these exceptions are present in this case.

First, Chapter 2023-23 is not expressly retroactive. The act provides for the following effective date: "This act will take effect upon becoming a law." This is identical to the effective date language used in previous

amendments to § 921.141 in Ch. 2016-13 and Ch. 2017-1, *Laws of Florida,* which this Court construed in *Jimenez* not to be an attempt to apply those laws retroactively. *See Jimenez,* 261 So. 3d at 504 (stating that "the Legislature did not attempt to apply chapters 2016-13[1] and 2017-1 retroactively"). Therefore, the effective date language in Ch. 2023-23 is not an express provision of retroactivity that would trigger the exception in § 775.022(3).

This is consistent with the Court's interpretation of similar language in civil statutes. For example, in *Florida Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc.,* 67 So. 3d 187 (Fla. 2011), this Court addressed the question of whether Ch. 2005-111, *Laws of Florida,* which amended statutory insurance regulations, applied retroactively. The act included specific effective dates for some provisions and a general statement that "unless otherwise specified, the act shall take effect upon becoming a law." *Id* at 196 n.8. This Court held that the effective date language was not a "clearly expressed legislative intent" to apply any part of the act retroactively. *Id* at 196.

[1] Ironically, Ch. 2016-13 created a defendant's right to a notice of aggravating factors in capital sentencing proceedings, which the trial court ruled does not apply to this pending prosecution.

The exception in § 775.022(4) also does not apply, as the amendment does not reduce the penalty for the Defendant's offense. Unlike an Ex Post Facto analysis, where the Defendant must show that the amendment increases the penalty to trigger the constitutional protection, under § 775.022(4) the amendment is not retroactive unless it is shown to reduce the penalty for the crime.

Therefore, even if Ch. 2023-23 is deemed not to change the punishment for first-degree murder at all, it does not qualify for retroactive application under subparagraph (4). *Compare Dean,* 303 So. 3d 257 (Fla. 5th DCA 2020) (applying retroactively a new rule that reduced theft of property valued between $300 and $749 from a felony to a misdemeanor).

The exception in subsection (5) also does not apply. Chapter 2023-23 does not create any new defense to the death penalty. To the contrary, it makes defending against the death penalty much more difficult for defendants. Neither the constitutional amendment to Article X, Section 9 nor the 2019 enactment of § 775.022 was intended to permit retroactive application of such a law.

To construe this new statute otherwise to conform with existing Ex Post Facto standards or judicially-created rules for retroactivity ignores the plain language of the statute and renders it meaningless surplussage, both

of which run contrary to the rules of statutory construction. *See Stoletz v. State,* 875 So. 2d 572 (Fla. 2004) (the plain meaning of statutory language is the first consideration in statutory construction); *Polite v. State,* 973 So. 2d 1107, 1113 (Fla. 2007) (statutes are not to be construed in a manner that renders words superfluous).

Under the plain language of § 775.022 and this Court's analysis of Article X, Section 9 in *Jimenez*, the amendment to § 921.141 in Ch. 2023-23 that eliminates the right to a unanimous jury recommendation of death in capital sentencing proceedings does not apply to Petitioner's pending prosecution. To permit the trial to go forward with the trial court's ruling intact would deprive Petitioner of the relief he was granted in 2017 and constitute a fundamental denial of due process.

II. APPLYING THE AMENDMENT TO § 921.141 TO PENDING PROSECUTIONS BASED ON PRIOR CONDUCT DEPRIVES PETITIONER OF A VESTED PROCEDURAL RIGHT AND VIOLATES THE EX POST FACTO CLAUSE OF THE U.S. CONSTITUTION

Article I, Section 9 of the U.S. Constitution provides that "[n]o bill of Attainder or ex post facto law shall be passed." A substantive change in the criminal law violates the Ex Post Facto Clause if it is applied retroactively, whereas purely procedural or remedial statutes can be applied to pending cases in some circumstances without violating the clause. *Smiley v. State,* 966 So. 2d 330 (Fla. 2007).

However, an amendment that takes away a vested procedural right cannot be applied retroactively:

> Remedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

Id at 334; *see also Wike v. State,* 648 So. 2d 683 (Fla. 1994) (reversing death sentence where trial court deprived defendant of vested procedural right to make final closing argument). The Legislature has the power to take away by statute what was given by statute, but not in such a way that will disturb rights already vested under the former law. *Bradford v. Shine,* 13 Fla. 393 (Fla. 1869); *see also Spencer v. McBride,* 14 Fla. 403

(Fla. 1874) (stating that no statute is to be construed in a manner that will take away a vested right previously acquired under the former version of the statute).

The right to a unanimous jury recommendation of death was added to § 921.141 by Ch. 2017-1, *Laws of Florida.* This was remedial legislation passed in response to the decisions in *Hurst v. State,* 202 So. 3d 40. The amendment placed an additional burden on the State and made it statistically less probable that a death sentence would be imposed in any penalty phase proceeding. This was not done in furtherance of an existing right, as the right to a unanimous verdict in capital sentencing proceedings did not exist prior to *Hurst.* Rather, it created a new and vested procedural right.

By contrast, the amendment to § 921.141 in Ch. 2023-23 was passed as a knee-jerk reaction to State failing to obtain a death sentence for Nicholas Cruz in the Parkland school shooting case and in response to political pressure from the executive. The purpose of the amendment wasn't just to change the manner in which capital proceedings are conducted, but to make it easier for the State to impose a death sentence and harder for the accused to defend against it. That is a substantive change that will directly increase the likelihood of a death sentence.

The Ex Post Facto Clause was designed to protect criminal defendants with pending cases from just this sort of punitive legislation:

> The legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in *Weaver v. Graham,* 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed 2d 17 (1981), the Ex Post Facto Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."

Landgraf v. USI Film Products, 511 U.S. 244, 266, 114 S. Ct. 1483 (1994).

The recent amendment to § 921.141 is both retributive in purpose and more onerous in its effect, taking away the very right to a unanimous jury that was conferred when the prior death sentence was vacated under *Hurst.* In *State v. Jackson,* 306 So. 3d 936 (Fla. 2020), this Court ruled that defendants who obtained postconviction relief under *Hurst* could not have that relief summarily taken away by a subsequent change in the decisional law. The Ex Post Facto Clause exists to prevent the same outcome from happening as a result of a change in statutory law.

III. APPLYING THE AMENDMENT TO § 921.141 VIOLATES THE SIXTH AMENDMENT RIGHT TO TRIAL BY UNANIMOUS JURY

The Sixth Amendment right to trial by jury applies to capital sentencing proceedings. *Hurst v. Florida,* 577 U.S. 92, 136 S. Ct. 616 (2016). Since this Court decided *Poole,* the U.S. Supreme Court has held that the Sixth Amendment right to a unanimous jury applies to the states through the Fourteenth Amendment. *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020). Therefore, allowing Petitioner to be sentenced to death on less than a unanimous verdict would violate the Sixth Amendment.

CONCLUSION

Based on the foregoing, the Petitioner requests that the Court issue a writ of prohibition directed to the Hon. J. Layne Smith, Circuit Judge of the Second Judicial Circuit of Florida, in and for Wakulla County, Florida, to prohibit application of § 921.141 as amended by Chapter 2023-23, *Laws of Florida,* to the penalty phase retrial in this case.

/s/ Baya Harrison
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this petition has been furnished by electronic service to the Office of the State Attorney, Second Judicial Circuit of Florida, at sao2_wakulla@leoncountyfl.gov, and to the Hon. J. Layne Smith, Circuit Judge, c/o Judicial Assistant Deanna Gravius, at graviusd@leoncountyfl.gov, and to the Office of the Attorney General at cappapp@myfloridalegal.com on June 18, 2023.

/s/ Baya Harrison
Baya Harrison, III
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing document was prepared in 14-point Arial font and consists of 3,500 words, excluding the appendix.

/s/ Baya Harrison
Baya Harrison, III

INDEX TO APPENDIX

Appendix A

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 1997-215CF

v.

JASON B. LOONEY,

Defendant.
_____/

ORDER GRANTING POST-CONVICTION RELIEF

On September 7, 2017 the Court heard arguments on Defendant Jason B. Looney's successive motion for post conviction relief. The motion is based on the United States Supreme Court decision in *Hurst vs. Florida*, 136 S.Ct. 616 (2016) and the Florida Supreme Court decision in *Hurst vs. State*, 202 So3rd 40 (Fla. 2016). Mr. Looney was sentenced to death following the penalty phase of his trial with co-Defendant, Guerry Hertz. The trial judge imposed the death sentence upon Mr. Looney after a 10 to 2 recommendation of the jury hearing the case. Mr. Looney's case became final on June 28, 2002, 4 days after the United States Supreme Court rendered its decision in the case of *Ring vs. Arizona*, 536 U.S. 584 (June 24, 2002). In his initial post conviction motion, timely filed in 2003, Mr. Looney raised, and hence preserved constitutional arguments under *Ring* and under *Apprendi vs. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). He again raises those issues arguing that he should be entitled to a new penalty phase trial because the judge, and not the jury, made the findings that resulted in the death sentence and the decision of the jury was not unanimous.

At the hearing and in written memoranda the State urges the Court to deny the relief requested arguing that the imposition of the death penalty by the trial judge on less than a unanimous recommendation for the death penalty by the trial jury was harmless error. The State's

argument is set out in "State's Answer to *Hurst vs. Florida* and *Hurst vs. State*" filed on September 20, 2017. The Defendant replied in "Defendant's Reply to States Successive Answer" dated September 22, 2017. These memoranda set out arguments of the parties and contain the controlling case law as it exists today.

The threshold question is whether this Court has authority, to make a harmless error evaluation. If it does, then to find harmless error the Court must conclude that a reasonable jury of 12 citizens, if properly instructed that the decision was theirs and that unanimity was required for imposing the sentence of death, must as a matter of law, based on the facts of this case and the matters presented during the penalty phase of the trial unanimously agree that a death sentence was appropriate in Mr. Looney's case. A jury, compiling with its legal obligations as contained in proper jury instructions could make no finding other than unanimous agreement for the death penalty.

A careful reading of all of the cited cases does not convince this Court that it has the authority to consider a harmless error evaluation. Further, this judge who did not preside over the trial or the penalty phase of this case, who did not see the witnesses and did not hear them testify, cannot presume to substitute his findings for that of a lawfully impaneled jury of 12 citizens who did hear the guilt and the penalty phase of this trial and who did see and hear the witnesses. To do so would do substantial harm to the sanctity of the jury's deliberations and would make meaningless the U. S. Supreme Court's decisions in *Ring, Apprendi* and *Hertz.*

Now therefore, relying on the cited cases from the Florida Supreme Court and the United States Supreme Court as contained in the written arguments of the parties and relying upon the arguments presented by the parties in the hearing and memos submitted to the Court and for the reasons stated in this Order it is:

ORDERED and ADJUDGED that Defendant Jason B. Looney's motion for post conviction relief filed on February 27, 2017 is granted and a new penalty phase trial is ordered in this case.

DONE and ORDERED in Chambers this 11th day of October, 2017.

JAMES O. SHELFER,
CIRCUIT JUDGE

copies furnished to:

All Counsel of Record

Appendix B

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA.

STATE OF FLORIDA

CASE NO. 97-0215CF

vs.

Jason B. Looney,
Defendant.
_____/

MOTION TO UTILIZE NEW STATUTORY DEATH PENALTY SENTENCING PROCEDURES OF CHAPTER 2023-23, LAWS OF FLORIDA (AMENDING SECTION 921.141, FLORIDA STATUTES)

COMES NOW the State of Florida and files this Motion to Utilize the New Statutory Death Penalty Sentencing Procedures of Chapter 2023-23, Laws of Florida which amended Section 921.141, Florida Statutes, and in support thereof would submit the following:

1. The Defendant in the above captioned case is before the Court for resentencing on two death sentences imposed following his original sentencing proceeding over 20 years ago.

2. Jury selection is scheduled to begin on Monday, June 19, 2023.

3. On April 20, 2023, Governor Ron DeSantis signed into law Committee Substitute for Committee Substitute for Senate Bill 450. The bill states that it is to "take effect upon becoming a law." It is now Chapter 2023-23, Laws of Florida. (See attached.)

4. Chapter 2023-23, Laws of Florida, amends sections 921.141 and 921.142 of the Florida Statutes, relating to the procedures for the imposition of the death penalty in Florida. Section 921.141(2)(c) of the Florida Statutes is now amended as follows regarding the jury's recommendation:

(c) If at least eight jurors determine ~~a unanimous jury determines~~ that the defendant should be sentenced to death, the jury's recommendation to the court must ~~shall~~ be a sentence of death. If fewer than eight jurors ~~unanimous jury does not~~ determine that the defendant should be sentenced to death, the jury's recommendation to the court must ~~shall~~ be a sentence of life imprisonment without the possibility of parole.

Chapter 2023-23, Laws of Florida, Section 1.

Subsection (3) of Section 921.141, (IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH) is amended to read:

(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.

Chapter 2023-23, Laws of Florida, Section 1.

Finally, subsection (4) was amended to require a written order from the sentencing judge for both a sentence of life imprisonment and death. It also requires that the court include "in its written order the reasons for not accepting the jury's recommended sentence, if applicable." Chapter 2023-23, Laws of Florida, Section 1.

5. The Florida Supreme Court has previously held that the sufficiency and weighing determinations in section 921.141, Florida Statutes (2021), are not elements of the crime of capital murder and are not subject to the reasonable-doubt standard. See *Wells v. State*, 2023 WL 2920535, SC2021-1001, slip opinion, at 22-23 (Fla. April 13, 2023) and the cases cited therein. The Court has also held that the jury's recommendation regarding whether to impose a death sentence, i.e., punishment, is not an element of the crime of capital murder. *State v. Poole*, 297 So. 3d 487, 503-504 (Fla. 2020).

6. The Court has found that neither the Sixth Amendment, nor the Eighth Amendment, require a unanimous jury's recommendation regarding whether to impose a life or death sentence, i.e., punishment. *State v. Poole*, 297 So. 3d 487, 504-505 (Fla. 2020).

7. The United States Supreme Court has found that the right of *ex post facto* which deals "the definition of crimes, defenses, or punishments" does not apply to the right to trial by jury. *Collins v. Youngblood*, 110 S.Ct. 2715, 2724 (1990).

8. The changes Chapter 2023-23, Laws of Florida, Section 1. made to section 921.141 of the Florida Statutes are procedural in nature and must be the law utilized by this Court in the Defendants' resentencing trial. A procedural law is one in which the law provides or regulates the steps by which a defendant who violated a law is punished. *Love v. State*, 286 So. 3d 177, 185 (Fla. 2019) (citing *State v. Garcia*, 229 So. 2d 236, 238 (Fla. 1969)).

This issue 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 Supreme Court of the United States addressed an ex post facto claim of the defendant related to Florida's death penalty statute. During the period of time between the commission of his crime and his trial, Florida amended section 921.141 removing the presumption of a death penalty absent a recommendation of the jury for mercy. *Id.* at 2299. The new procedure provided for a separate sentencing proceeding, presentation of mitigating circumstances, an advisory opinion of the jury, and final determination by the trial judge. *Id.* The defendant argued to the Court that the change in the sentencing procedure deprived him of his right to have the jury determine what penalty should be imposed, without review by the trial judge. *Id.* at 2297-2298. The Court found that the change in the law was procedural. *Id.* at 2298. The Court noted 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); *Thompson v. Missouri*, 18 S.Ct. 922 (1898)). The Court stated that the change in the statute simply altered the methods utilized in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime of First Degree Murder. *Id.* (Note: The

Court's discussion that the change was "ameliorative" of the prior statute was an alternative holding and noted that a change in procedure that was "by no means ameliorative" did not violate ex post facto clause. *Id.* at foot note 6.)

The changes contained in the now current version of section 921.141 are clearly procedural, like those addressed in *Dobbert*, as they do not increase the punishment and First Degree Murder. As such, they must be the laws applied to the Defendant in this matter, like the procedural changes discussed in *Dobbert*.

9. Defendant has no right to the application of any procedure other than that in effect at the time of his trial and that is the procedure set forth in Chapter 2023-23, Laws of Florida.

WHEREFORE, the State requests that this Court enter an Order ruling that Chapter 2023-23, Laws of Florida, Section 1 amendments to section 921.141, Florida Statutes are to be the law governing the Defendant's sentencing proceeding.

Respectfully submitted,

JACK CAMPBELL
STATE ATTORNEY

/s/Eddie D. Evans
Assistant State Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion has been furnished to Baya Harrison III, bayalaw@aol.com, on April 25, 2023, by e-service.

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Appendix C

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case Nos.:1997-CF-215

v.

JASON B. LOONEY,

Defendant.
_____/

AMENDED RESPONSE TO STATE'S MOTION
TO APPLY AMENDMENT TO SECTION 921.141
THAT DISPENSES WITH UNANIMOUS JURY RULE

COMES NOW the Defendant, Jason Looney, through undersigned counsel, and responds to the State's motion to apply a recent amendment to § 921.141, *Florida Statutes,* at the penalty phase retrial of this case. The Defendant opposes the State's motion and moves the Court to find that he is entitled to a unanimous jury verdict, to include the ultimate recommendation of death or a life sentence, at the upcoming penalty phase retrial in this case. The purpose of this amendment is to add additional constitutional argument, which is appended to the end of the response.

1. Until recently, § 921.141, *Florida Statutes,* provided in pertinent part as follows:

> If 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. If a unanimous jury does not determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of life imprisonment without the possibility of parole.

§ 921.141(2)(c), *Fla. Stat.* (2019).

2. A defendant's right to a unanimous jury recommendation before a death sentence can be imposed has existed since the Florida Supreme Court's decision in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). The Defendant's prior death sentence was vacated in 2017 based on that decision, and the State did not timely appeal that action. The case is now set for a penalty phase retrial in June of 2023.

3. In 2017, the Florida Legislature codified the right to a unanimous jury recommendation announced in *Hurst* by amending § 921.141 to read as quoted above. See Ch. 2017-1, *Laws of Florida.* (2017).

4. In 2020, the Florida Supreme Court receded from *Hurst v. State* in *State v. Poole,* 297 So. 3d 487 (Fla. 2020). However, the right to a unanimous jury recommendation of death remained intact thanks to the statutory amendment, and the Defendant has relied on that state of the law in preparing his trial defense.

5. On April 20, 2023, the Governor of Florida signed into law Chapter 2023-23, *Laws of Florida,* which amended § 921.141 to remove

the right to a unanimous jury with respect to the recommendation of death or life imprisonment in subsection (2)(c). The jury must still make a unanimous finding that at least one aggravating circumstance has been proven beyond a reasonable doubt, but the recommendation of a death sentence now requires the assent of only eight jurors.

6. Subsection 941.141(2)(c) as amended reads as follows:

> 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.

7. Chapter 2023-23 states that it shall take effect upon becoming a law, but is silent on whether the amendment applies retrospectively to conduct occurring prior to enactment. Absent an express provision, the court must resort to the rules of statutory construction.

8. On April 25, 2023, the State served a motion seeking to benefit from the statutory change at the upcoming trial of this case in June, 2023.

9. The general rule is that the sentencing statutes in effect when the crime is committed are to be applied at sentencing. *State v. Reininger,* 254 So. 3d 996 (Fla. 4th DCA 2018). In this case, the 2017 version of §

921.141 is the applicable version, as all prior versions were struck down as violative of the right to trial by jury in *Hurst v. Florida,* 136 S. Ct. 616 (2016).

10. Changes to statutes affecting the sentencing for a criminal offense are substantive changes, and retroactive application of a sentencing statute is unconstitutional. *See Stapleton v. State,* 286 So. 3d 837 (Fla. 5th DCA 2019) (citing *Reininger* and holding that defendant was not entitled to benefit of statutory amendment passed during pendency of his case that dropped the 20-year minimum mandatory sentence for discharge of a firearm during the commission of an aggravated assault).

11. The key determination is whether the statutory change is substantive or merely procedural or remedial. *Smiley v. State,* 966 So. 2d 330 (Fla. 2007). Substantive changes to criminal laws cannot be applied retroactively, whereas changes to procedural rules can be applied to pending cases in some circumstances:

> *Remedial* statutes or statutes relating to remedies or modes of *procedure,* which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing, do not come within the legal conception of a retrospective law, or the general rule against retrospective operation of statutes.

Id at 334.

12. A statute that achieves a remedial purpose by creating substantive new rights or imposing new legal burdens is treated as a substantive change in the law. *Id* at 334. On the other hand, a remedial statute that only operates in furtherance of rights already existing can be applied retrospectively. *Id.*

13. The right to a unanimous jury at capital sentencing was created by Chapter 2017-1, *Laws of Florida* (2017), in response to the Florida Supreme Court's holding in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016), that such unanimity was constitutionally required as to any "critical findings" necessary for imposition of a death sentence. This holding followed the decision of the United States Supreme Court in *Hurst v. Florida,* 136 S. Ct. 616 (2016), which held that § 921.141 was unconstitutional, and was based on the right to trial by jury in Art. I § 22 of the Florida Constitution and the Eighth Amendment. *Id* at 59.

14. Based on this history, it is clear that the amendment to § 921.141 in Ch. 2017-1 was a remedial statute intended to create a new procedural right to a unanimous jury verdict in capital sentencing in order to correct the constitutional deficiencies in the prior version of the statute. This amendment also placed an additional burden on the State and made it statistically less probable that a death sentence would be handed down in

any given penalty phase proceeding. This was not done in furtherance of an existing right, as the right to a unanimous jury verdict at capital sentencing did not exist prior to *Hurst v. State* and 2017-1.

15. The Florida Supreme Court receded from *Hurst v. State* in *Poole,* and held that neither the Sixth Amendment nor the Eighth Amendment compels a unanimous recommendation of death once the jury has found an aggravating circumstance. *Poole,* 297 So. 3d at 504. However, that does not change the nature and purpose of Ch. 2017-1 when it was enacted or the procedural right it created. To the extent the Legislature purports to rescind that vested right in Ch. 2023-23, that change can only be applied prospectively in future cases.

16. Furthermore, since *Poole* was decided, the U.S. Supreme Court abrogated *Apodaca v. Oregon,* 92 S. Ct. 1628 (1972), and held that the Sixth Amendment right to a unanimous jury does apply to the states through the Fourteenth Amendment. *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020). Since it is doubtful that a death sentence could be constitutionally imposed absent a collective finding by a jury that such sentence is warranted, the holding in *Ramos* calls the continued vitality of *Poole* into question.

14. The Legislature has the power to take away by statute what was given by statute, but not in such a way that will disturb rights already vested under the former law. *Bradford v. Shine,* 13 Fla. 393 (Fla. 1869); *see also Spencer v. McBride,* 14 Fla. 403 (Fla. 1874) (stating that no statute is to be construed in a manner that will take away a vested right previously acquired under the former version of the statute).

15. Depriving a capital defendant of a vested procedural right will result in reversal of any subsequently imposed death sentence. *See Wike v. State,* 648 So. 2d 683 (Fla. 1994) (characterizing defendant's right to make last closing argument a vested procedural right and reversing death sentence based on violation of that right).

16. The State's reliance on *Dobbert v. Florida,* 432 U.S. 282, 97 S. Ct. 2290 (1977), is misplaced. The issue in *Dobbert* was whether it violated the Ex Post Facto clause to apply a purely procedural change in the capital sentencing law retrospectively to the defendant's prior conduct. The Supreme Court found no error because the change was purely procedural and did not change the "quantity or degree of proof" required to convict, *Id* at 294 (quoting *Hopt v. Utah,* 110 U.S. 574, 4 S. Ct. 202 (1884)), and because the statutory amendment was ameliorative and actually worked in the defendant's favor. *Id* at 294. The Court reasoned:

> We must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous. Under the old procedure, the death penalty was "presumed" unless the jury, in its unbridled discretion, made a recommendation for mercy. The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by Furman, thus providing capital defendants with more, rather than less, judicial protection.

Id at 294-295.

17. By contrast, the amendment to § 921.141(2)(c) at issue in this case is unquestionably more onerous on the Defendant than its predecessor. The amendment was passed as a knee-jerk reaction to the State failing to obtain a unanimous recommendation of death for Nicholas Cruz in the Parkland school shooting case. The purpose of the amendment wasn't just to change the manner in which the proceedings are conducted, but was clearly done to make it easier for the State to impose a death sentence and harder for the accused to defend against it. The statistics support this conclusion, as only 1 in 6 death sentences reviewed after *Hurst* was the result of a unanimous recommendation of death.

18. Previously, the State had to convince all 12 jurors that the aggravating circumstances were sufficient for death, outweighed the mitigating factors, and that a death sentence was appropriate. The statute did not place a burden of proof on these findings; rather, they were factors

to be considered during the weighing process, and the quantum of proof rested in the number of jurors who had to agree. See § 921.141(2)(b)2. With the amendment, the State now has to convince only 8 out of 12 jurors to reach these conclusions. In the context of capital sentencing, this change was both intended and will have the practical effect of increasing the frequency with which the death penalty will be imposed. That is a substantive change, not procedural.

Constitutional Arguments

19. In *Love v. State,* 286 So. 3d 177 (Fla. 2019), the Florida Supreme Court held that changes to the Stand-Your-Ground immunity statute could be applied to pending cases notwithstanding Art. X § 9 of the Florida Constitution. The Court reasoned that the changes were procedural and only affected the manner in which the pretrial immunity hearing was conducted, not the ultimate determination of guilt. The amendment did not change the elements of the crime nor the punishment therefor. Article X, § 9 only applies to statutes that "go to the essence of the underlying crime or to the character or degree of punishment," or which affect in some way the substantial rights of the defendant. *Id* at 189.

20. *Love* acknowledged the holding in *Smiley* that "a statute is deemed substantive if it achieves a remedial purpose by creating

substantive new rights or imposing new legal burdens." *Id* at 185 (internal quotation marks omitted). *Love* also reiterated that the Legislature cannot retroactively withdraw or interfere with any vested right. *Id* at 186.

21. Based on this language, applying the 8-4 jury amendment to this pending prosecution would offend *Smiley* and Art. X, § 9 of the Florida Constitution because the new legislation substantively lowers the bar for the State to obtain a jury recommendation of death, thereby increasing the probability of a death sentence.

22. In addition, applying the amended standard to pending prosecutions would also violate the Ex Post Facto clause in Article I, § 9 of the United States Constitution, which prohibits application of penal legislation to prior conduct. In *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483 (1994), the U.S. Supreme Court stated:

> The legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for the Court in *Weaver v. Graham,* 450 U.S. 24, 101 S. Ct. 960, 67 L.Ed 2d 17 (1981), the Ex Post Facto Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."

Id at 266.

23. The rationale in *Landgraf* is directly on point with what is happening in this case. As stated above, the amendment was a punitive and retributive response to the outcome of the Nicholas Cruz case, and was passed under strong political pressure from the executive. The Ex Post Facto Clause exists to protect defendants from such state action.

24. The *State's* reliance on *Hameen v. Delaware,* 212 F. 3d 226 (3rd Cir. 2000), and *U.S. v. Grimes,* 142 F. 3d 1342 (11th Cir. 1998) is misplaced. Both of those cases involved procedural changes that merely shifted the final sentencing decision away from the jury and transferred it to the judge. However, the actual findings to be made and burden of proof did not change, only the identity of the finder of fact. Therefore, the changes were procedural and could be applied to prior conduct. The question of juror unanimity in the jury's advisory recommendation was only raised in *Hameen* by amicus counsel, not the defendant, and was dismissed by the court in one sentence with no analysis.

25. Under the new Florida statute, the number of jurors that the State must convince regarding the sufficiency of the aggravating circumstances and whether they outweigh the mitigating factors has been reduced from 12 to 8 with no corresponding increase in the judge's role or

responsibility. In *Hameen,* the Delaware Supreme Court acknowledged that the jury's weighing process is a crucial and constitutionally required step in the capital sentencing process. *Hameen,* 212 F. 3d at 234 (quoting *State v. Cohen,* 604 A. 2d 846 (Del. 1992)). This process has now been made substantially easier for the State and correspondingly more onerous for defendants, and that is a substantive change protected by the Ex Post Facto Clause.

26. Applying the new statute and denying Mr. Looney a trial under the unanimous jury rule that other post-*Hurst* defendants benefitted from would violate the Eighth Amendment prohibition on arbitrary and capricious punishment. Numerous death row inmates obtained postconviction relief based on the decision in *Hurst v. State,* 202 So. 3d 40 (Fla. 2016). Some of those defendants have already been retried under the right to a unanimous jury announced in *Hurst* and codified in Ch. 2017-1. Others, including Mr. Looney, had their retrials stayed because the State unsuccessfully tried to summarily reimpose the death penalty after the decision in *Poole. See State v. Jackson,* 306 So. 3d 936 (Fla. 2020) (holding that State could not challenge final orders granting relief under *Hurst* and ordering a new trial after the time to appeal expired). The retrial in this case was also delayed by the late withdrawal of co-defendant Hertz's lead counsel for medical

reasons. Denying Mr. Looney the relief obtained by others similarly situated and through no fault of his own would be both arbitrary and a denial of equal protection of the laws as guaranteed by the Fourteenth Amendment.

27. Application of the new law would also violate the Eighth Amendment because it would deviate from evolving standards of decency in application of the death penalty. Only two other states allow imposition of the death penalty on less than a unanimous jury, and none by fewer than a 10-2 vote. That makes Florida an outlier.

28. The elimination of comparative proportionality review on direct appeal also increases the importance of the weighing process to ensure that the death penalty is fairly imposed. Forcing a divided jury to recommend death with no comparison of the sentence to similar cases on appeal falls short of ensuring that the death penalty is reserved for the worst of the worst.

29. Applying the new law would also violate the Fourteenth Amendment right to fair warning and due process of law. As stated above, Mr. Looney's right to a retrial with a unanimous jury vested when the State elected not to appeal the final order granting postconviction relief in 2017. The basis for vacating the prior death sentence and granting a new trial was the lack of juror unanimity at the original penalty phase. It makes no

sense to now conduct a retrial where the right to a unanimous jury will not be followed. The State is simply trying to circumvent the law of the case and its procedural default for failing to appeal by retroactively taking away that which has already been granted.

30. At least one Florida trial court has already declined to apply the new law to a pending prosecution on due process grounds. In *State v. Troy Victorino,* Volusia County Case No. 2004-1378, the court denied the State's motion filed during the trial to apply Ch. 2023-23 and reduce the number of jurors required to mandate a recommendation of death. The matter is now pending review on certiorari to the Fifth District Court of Appeal in Case No. 5D23-1569.

31. Pretrial preparation in death penalty cases takes years to complete, as it has in this case. Defendants should not have to rush their cases to trial unprepared or with an incomplete investigation out of fear that the legislature will rewrite the law during the pretrial period and then use the harsher legislation against him to impose a death sentence. Applying the punitive amendment in § 921.141 to Mr. Looney would be patently unconstitutional.

32. Finally, the Sixth Amendment right to a unanimous jury has been applied to the states through the Fourteenth Amendment. *See Ramos*

v. Louisiana, supra. The Sixth Amendment right to trial by jury has been held to apply in capital sentencing proceedings in *Hurst v. Florida,* 136 S. Ct. 616 (2016). If the weighing of aggravating and mitigating circumstances is a constitutionally required step in that process, then applying the new law would violate the Sixth Amendment as construed in *Ramos.*

Conclusion

Mr. Looney is entitled to a unanimous jury recommendation of death under the version of § 921.141 that was in existence prior to the enactment of Ch. 2023-23. This was a vested right, and the Legislature's attempt to abrogate that right must be applied prospectively only to future cases. Accordingly, the Defendant requests that the court deny the State's motion to apply § 921.141 as amended by Ch. 2023-23, *Laws of Florida,* at the trial of this cause.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing notice was furnished by electronic service to Assistant State Attorney Eddie Evans at evanse@leoncountyfl.gov and sao2_wakulla@leoncountyfl.gov, Zach Ward, Esq., Attorney for Guerry Hertz, at zach@cowheyward.com; David W. Collins, Attorney for Guerry Hertz, at collins.fl.law@gmail.com; and Roger Maas, co-counsel for Jason Looney, at rogermaas@yahoo.com, on May 3, 2023.

/s/ Baya Harrison
Baya Harrison

Appendix D

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,
v.

Case Number 1997-CF-214

GUERRY WAYNE HERTZ,
Defendant.
_____/

STATE OF FLORIDA,
v.

Case Number 1997-CF-215

JASON LOONEY,
Defendant.
_____/

ORDER APPLYING AMENDED STATUTE TO PENALTY PHASE RETRIALS

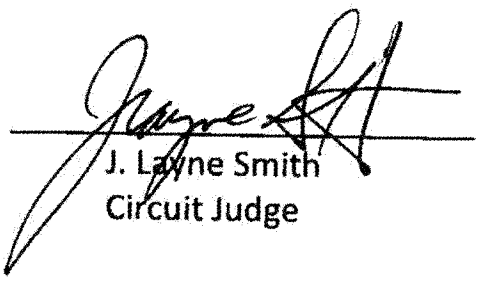
On April 23, 2023, Governor DeSantis signed Chapter 2023-23 into law, amending section 921.141. Afterward, the State moved the Court to apply the amended law to the parties' pending penalty phase retrial. The prior statute required a unanimous jury to recommend the death sentence. The new statute allows no less than eight jurors to recommend the death sentence.

The State moved the Court to apply the new law to these cases. The Defendants filed opposing memoranda, asking the Court to apply the prior law.

Distinguishing substantive from procedural is tricky at best. The answer turns on whether the amendments rob the Defendants of vested substantive rights or merely change modes of procedure. The Court's order is due no deference and is subject to de novo review. Thus, its order gets straight to the point.

The Court finds that the amendments are procedural and apply to the penalty phase retrials. *State v. Poole*, 297 So.3d 487, 503-504 (Fla. 2020); *Love v. State*, 286 So.3d 177, 185 (Fla.2019); *State v. Garcia*, 229 So.2d 236, 238 (Fla. 1969); *State v. Perry*, 192 So.3d 70, 75-76 (Fla. 5th DCA 2016); and *State v. Dionne*, 814 So.2d 1087, 1093 (Fla. 5th DCA 2002).

DONE AND ORDERED on May 22, 2023.



J. Layne Smith
Circuit Judge

Copies to counsel of record via e-service

Appendix E

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case Nos.:1997-CF-215

v.

JASON B. LOONEY,

Defendant.
_____/

RENEWED MOTION TO PRECLUDE APPLICATION OF CH. 2023-23 TO PENDING PROSECUTION UNDER § 775.022

COMES NOW the Defendant, Jason Looney, through undersigned counsel, and moves to preclude application of Ch. 2023-23, *Laws of Florida,* at the upcoming penalty phase retrial of this cause to the extent it abolishes the Defendant's right to a unanimous jury recommendation of death prior to imposition of the death penalty. The Defendant asserts that applying the new rule to this pending prosecution would violate § 775.022, *Florida Statutes,* and offers the following in support thereof:

1. This case is set for trial on June 19, 2023.

2. On April 20, 2023, the Governor of Florida signed into law Chapter 2023-23, *Laws of Florida,* which amended § 921.141, *Florida Statutes,* to remove a defendant's right to a unanimous jury

recommendation of death in capital sentencing proceedings. Under the amended statute, only 8 jurors must vote for death before a defendant is eligible for the death penalty.

3. The State moved to apply the new rule at the upcoming trial, which the Defendant opposed on Ex Post Facto and other grounds.

4. By order rendered May 23, 2023, the Court granted the State's motion and ruled that the amended statute applies to this pending prosecution.

5. Article X, Section 9 of the Florida Constitution was amended following the 2018 November election. Prior to that amendment, Article X, Section 9 prohibited the Legislature from "making an amendment to a criminal statute applicable to pending prosecutions…." *Jimenez v. Jones,* 261 So. 3d 502, 503-504 (Fla. 2018). After the amendment, "there will no longer be any provision in the Florida Constitution that would prohibit the Legislature from applying an amended criminal statute retroactively to pending prosecutions or sentences." *Id* at 504.

6. This language in *Jimenez* rebuts the position that retroactive application refers only to use in cases that have become final by the conclusion of direct review and not to pending prosecutions awaiting sentence. That may be the standard for interpreting the Ex Post Facto

Clause, but not for purposes of the savings clause in Article X § 9 or its companion statute, § 775.022, which was enacted following the constitutional amendment. What this Court ordered on May 23 is a retroactive application of an amendment to a criminal statute to a pending prosecution within the meaning of § 775.022.

7. Removal of the prohibition on retroactivity in Article X, Section 9 does not mean that every procedural amendment to a criminal statute applies retroactively to pending cases. Section 775.022, *Florida Statutes,* provides a standard for determining retroactivity as follows:

> (2) As used in this section, the term "criminal statute" means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.
>
> (3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:
>
> (a) The prior operation of the statute or a prosecution or enforcement thereunder.
>
> (b) A violation of the statute based on any act or omission occurring before the effective date of the act.
>
> (c) A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.

> (4) If a penalty, forfeiture, or punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty, forfeiture, or punishment, if not already imposed, must be imposed according to the statute as amended.
>
> (5) This section may not be construed to limit the retroactive effect of any defense to a criminal statute enacted or amended by the Legislature in a criminal case that has not yet resulted in the imposition of a judgment or sentence by the trial court or an appellate decision affirming a judgment or sentence of the trial court.

§ 775.022(3), (4), (5) *Fla. Stat.* (2022) (emphasis added).

8. The language in subparagraph (5) further confirms that retroactivity under this section includes application of a statutory amendment to pending prosecutions that are awaiting sentence.

9. Under the plain language of subparagraph (2), there is no distinction between substantive and procedural statutes as there is in an Ex Post Facto analysis. Therefore, any argument that procedural amendments always apply to pending prosecutions under § 775.022 is incorrect.

10. Under § 775.022, an amendment to a criminal statute only applies to pending prosecutions under three circumstances: (1) if expressly provided for in an act of the Legislature, § 775.022(3), (2) if the amendment reduces the penalty or punishment for a crime, § 775.022(4), *see Dean v. State,* 303 So. 3d 257 (Fla. 5th DCA 2020) (holding that defendant was

entitled to benefit of statutory amendment that increased monetary threshold for felony theft, making her crime a misdemeanor), or (3) if the amendment creates a new defense to a crime, § 775.022(5).

11. If none of these three exceptions applies, the general rule is that amendments to criminal statutes, whether substantive or procedural, do not apply to pending prosecutions, prior conduct, or a prior sentence. § 775.022(3)(a), (b), (c).

12. Chapter 2023-23 is not expressly retroactive. The act provides for the following effective date: "This act will take effect upon becoming a law." This is identical to the effective date language used in previous amendments to § 921.141 in Ch. 2016-13 and Ch. 2017-1, *Laws of Florida,* which the Supreme Court construed in *Jimenez* not to be an attempt to apply those laws retroactively. *Jimenez,* 261 So. 3d at 504. Therefore, the effective date language in Ch. 2023-23 is not an express provision of retroactivity that would trigger the exception in § 775.022(3).

13. In fact, Ch. 2016-13 was the legislative amendment that added a requirement that the State provide a list of aggravating factors in any case in which it intends to seek the death penalty. This procedural amendment was held not to apply to this case, and to date the State has not provided such a list to the Defendant. Now, however, the State wants to

apply a procedural amendment that inures to its benefit despite no express provision of retroactivity in the act.

14. The exception in § 775.022(4) also does not apply, as the amendment does not reduce the penalty for the Defendant's offense. Under an Ex Post Facto analysis, the Defendant has to show that the amendment increases the penalty in order to preclude retroactive application, but under § 775.022(4), the amendment must reduce the penalty to qualify for retroactive application. Therefore, if Ch. 2023-23 is deemed not to change the punishment for murder at all, it is not retroactive under subparagraph (4). *Dean* is distinguishable because it applied a reduction in penalty retroactively to a pending theft case that no longer qualified as a felony under the new law.

15. Subsection (5) also does not apply. Chapter 2023-23 does not create any new defense to the death penalty. To the contrary, it makes defending against the death penalty much more difficult for defendants. Neither the constitutional amendment to Article X nor the enactment of § 775.022 was intended to permit retroactive application of such a law.

16. Under the plain language of § 775.022 and *Jimenez*, the amendment to § 921.141 that eliminates the right to a unanimous jury

recommendation of death does not apply retroactively to the upcoming trial of this cause.

WHEREFORE the Defendant moves to preclude application of Ch. 2023-23, *Laws of Florida,* to the retrial of this case.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document was furnished by electronic service to Assistant State Attorney Eddie Evans at evanse@leoncountyfl.gov and sao2_wakulla@leoncountyfl.gov, Zach Ward, Esq., Attorney for Guerry Hertz, at zach@cowheyward.com; David W. Collins, Attorney for Guerry Hertz, at collins.fl.law@gmail.com; and Roger Maas, co-counsel for Jason Looney, at rogermaas@yahoo.com, on June 16, 2023.

/s/ Baya Harrison
Baya Harrison

Appendix F

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR WAKULLA COUNTY, FLORIDA.

STATE OF FLORIDA CASE NO. 1997 CF 215

vs.

JASON BRYCE LOONEY,
Defendant.
_____/

STATE'S RESPONSE TO DEFENDANT'S RENEWED MOTION TO PRECLUDE APPLICATION OF CH. 2023-23 TO PENDING PROSECUTION UNDER § 775.022

COMES NOW the State of Florida and files this response to the Defendant's renewed motion to preclude application of Ch. 2023-23 to pending prosecution under s. 775.022 and asks this Court to deny the motion and in support thereof would submit the following:

The defendant has filed a supplemental objection to this Court's prior ruling that the current version of Florida's death penalty statute being applied at the upcoming resentencing. Opposing counsel seems to argue that the amended death penalty statute, which allows for a recommendation of death based on eight jurors, is being applied retrospectively in violation of the saving statute. § 775.022(3), Fla. Stat. (2022). But the amended death penalty statute is not being applied retrospectively. Rather, it is being applied prospectively, as explained by the Florida Supreme Court in *Love v. State*, 286 So.3d 177 (Fla. 2019), because it is being applied to a future resentencing.

The savings statute

The legislature in 2019 enacted a savings statute to accompany to the amendments to the state constitutional savings provision. Fla. Const. Art. X, § 9; ch. 2019-63, § 1, Laws of Fla.; *Pappas v. State*, 346 So.3d 1200, 1203 (Fla. 1st DCA 2022) (explaining the history of the saving statute citing *Jimenez v. Jones*, 261 So.3d 502, 504 (Fla. 2018)). The savings statute, entitled the "effect of reenactment or amendment of criminal statutes" statute, section 775.022, Florida Statutes (2022), provides:

> (1) It is the intent of the Legislature that:
>
> (a) This section preclude the application of the common law doctrine of abatement to a reenactment or an amendment of a criminal statute; and
>
> (b) An act of the Legislature reenacting or amending a criminal statute not be considered a repeal or an implied repeal of such statute for purposes of s. 9, Art. X of the State Constitution.
>
> (2) As used in this section, the term "criminal statute" means a statute, whether substantive or procedural, dealing in any way with a crime or its punishment, defining a crime or a defense to a crime, or providing for the punishment of a crime.
>
> (3) Except as expressly provided in an act of the Legislature or as provided in subsections (4) and (5), the reenactment or amendment of a criminal statute operates prospectively and does not affect or abate any of the following:
>
> (a) The prior operation of the statute or a prosecution or enforcement thereunder.
>
> (b) A violation of the statute based on any act or omission occurring before the effective date of the act.

(c) A prior penalty, prior forfeiture, or prior punishment incurred or imposed under the statute.

(4) If a penalty, forfeiture, or punishment for a violation of a criminal statute is reduced by a reenactment or an amendment of a criminal statute, the penalty, forfeiture, or punishment, if not already imposed, must be imposed according to the statute as amended.

(5) This section may not be construed to limit the retroactive effect of any defense to a criminal statute enacted or amended by the Legislature in a criminal case that has not yet resulted in the imposition of a judgment or sentence by the trial court or an appellate decision affirming a judgment or sentence of the trial court.

(6) A reference to any other chapter, part, section, or subdivision of the Florida Statutes in a criminal statute or a reference within a criminal statute constitutes a general reference under the doctrine of incorporation by reference.

Specifically, Hertz relies on section 775.022(3), which provides an "amendment of a criminal statute operates prospectively." But the issue then becomes the meaning of the word "prospectively" in the phrase "amendment of a criminal statute operates prospectively."

Any reliance on *Gaulden v. State*, 195 So.3d 1123, 1125 (Fla. 2016), for the proposition that, if the statute is clear and unambiguous, courts will not "resort to rules of statutory construction," is misplaced. The Florida Supreme Court has recently clarified that the clarity or ambiguity of statutory language is determined by reference to language itself, specific context in which that language is used, and broader context of statute as whole. *Conage v. United States*, 346 So.3d 594 (Fla. 2022). The Florida Supreme Court receded from the exact language opposing counsel relies upon because it is "misleading and outdated." *Conage*, 346 So.3d at

598 (receding from *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984)). The Florida Supreme Court explained that courts "must exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Conage*, 346 So.3d at 598 (quoting *Alachua County v. Watson*, 333 So.3d 162, 169 (Fla. 2022), and *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1480 (2021)).

The word "prospective" is defined as being "effective or operative in the future." BLACK'S LAW DICTIONARY 1477 (11th ed. 2019). It is also defined as "relating to or effective in the future." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003). In contrast, "retrospective" is defined as "extending in scope or effect to matters that have occurred in the past." BLACK'S LAW DICTIONARY 1432 (9th ed. 2009).

Prospective application of the amendments

Defendant argues there is no provision in the amended statute that provides for retroactive application of the amendments and therefore, both the saving statute and the presumption against retroactive application of statutes applies. *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (discussing the presumption against statutory retroactivity); *Smiley v. State*, 966 So.2d 330, 334 (Fla. 2007).

But it is not accurate to speak of the new amendments to Florida's death penalty statute as being applied retrospectively or retroactively to the defendant. Rather, the amended statute is being applied prospectively to a future event. The new procedural amendments to the death penalty statute are being applied to a proceeding that will occur after its enactment. The saving statute, § 775.022(3), does not apply to future events.

For example, if a new procedural statute is enacted governing jury selection and jury selection started minutes after the effective date, then the new procedural statute would apply

during the jury selection because the jury selection would be a future event. But, if the trial had started and jury selection was completed before the new statute became effective, then the presumption would apply. The new statute would not apply to a completed jury selection and would not invalidate the already completed jury selection.

Here, the amended death penalty statute is being applied prospectively to a future penalty phase and to a future jury recommendation of a jury that has not even been selected yet. The new procedural amendments to the death penalty statute are being applied prospectively only because they are being applied to future events.

While the baseline event is the date of the crime when a new substantive statute is at issue or when the amendment to the statute is substantive, due to notice and ex post facto concerns, the date of the crime is not the proper baseline event with a new procedural statute. And the date of being granted a resentencing is certainly not the appropriate baseline. 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 (Fla. 2019). 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, 255-64 & n.29 (1994).

Landgraf held that a new civil rights statute allowing for punitive damages did not apply to a case pending on appeal. The United States Supreme Court explained that, while new procedural statutes or rules generally apply to pending cases, the application of even a new procedural statute or rule depends on the stage of trial or the "posture of the particular case." *Landgraf*, 511 U.S. at 275, n.29. The United States Supreme Court gave as an example a new procedural rule concerning complaints, explaining that the new rule "would not govern an

action in which the complaint had already been properly filed under the old regime." *Id.* at n.29. The *Landgraf* Court also gave an example of a new evidence statute adopted after the evidence stage of the trial was completed, explaining that the new procedural statute would not apply because the evidence stage was completed and the new statute would not require a new trial either. *Id.*

Justice Scalia, in his concurring opinion, explained the meaning of retroactive application of a new statute or rule. *Landgraf v. USI Film Products*, 511 U.S. 244, 290 (1994) (Scalia, J., concurring).1 Justice Scalia gave the example of a new statute regarding expert testimony, explaining the relevant event used as a baseline for a retroactivity analysis of the new statute would be the date of the expert's testimony at trial. The new procedural statute would not be applied to expert testimony if the expert had already testified before the new statute's effective date but would be applied to any expert's testimony after the effective date. *Id.* at 291-92. "No one has a vested right in any given mode of procedure." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring) (citing *Ex parte Collett*, 337 U.S. 55, 71 (1949), and *Crane v. Hahlo*, 258 U.S. 142, 147 (1922)). Justice Scalia acknowledged that it would not always be easy to determine the relevant event for retroactivity analysis of a new statute but ordinarily it is easy to determine.

This is one of the easy ones. The relevant event for retroactivity analysis of the amendments to Florida's death penalty statute is the date of the penalty phase. Here, the penalty

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1 Justice Scalia's concurrence was not critical to the five-justice majority holding in *Landgraf*. *See Marks v. United States*, 430 U.S. 188, 193 (1977). But the majority seems to have adopted Justice Scalia's approach to determining whether a new statute or rule was actually being applied retrospectively or prospectively in the footnote of the majority opinion.
Landgraf, 511 U.S. at 275, n.29.

phase will start after the effective date of the amendments. Therefore, this is a prospective application of the amended statute. The amendments to Florida's death penalty statute govern the jury's recommendation of a death sentence at the *future* resentencing. The procedural amendments are not being applied retroactively; they are being applied prospectively only. The new death penalty statute in this case is *not* being retroactively or retrospectively applied to Hertz. The amended death penalty statute is properly being applied prospectively under the reasoning of the United States Supreme Court in *Landgraf*.

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 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 noted that 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 19, 2022) (affirming the trial court's refusal to conduct a second immunity hearing applying the amended statute, relying on *Love*).

Both the United States Supreme Court and the Florida Supreme Court view this as being prospective application. Both courts conduct a retroactivity analysis by looking at the effective date of the procedural amendment and the date of the proceeding. If the proceeding has been

completed and the statute is silent, then the amended statute does not apply. But, if the proceeding has not started or has not been completed, then the amended statute applies to that upcoming proceeding.

To be being retrospectively applied, the amended statute would have to be applied to a penalty phase that was in progress on April 20, 2023, when the amendments become effective. If a penalty phase was ongoing in April of 2023 and the penalty phase jury had already been instructed under the older version of the statute requiring a unanimous vote and the jury deliberations regarding the sentence had begun and then the prosecution moved to have the deliberations stopped and the jury reinstructed with the amended version of the death penalty statute requiring an eight to four vote, that would be an example of a retroactive application of the amended statute. But the State is unaware of any capital case in Florida where the amended statute was applied in such a manner. The State is only seeking prospective application of the amended death penalty statute to penalty phases that had not even begun until after the effective date of the amendments, as in this case.

Under the reasoning of both the United States Supreme Court's decision in *Landgraf* and the Florida Supreme Court's decision in *Love*, the amended death penalty statute is not being applied retroactively to Hertz or to any other capital defendant in Florida for that matter. Rather, the amended death penalty statute is properly being applied prospectively to future capital trials and future resentencings.2

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2 Another subsection of the savings statute should be discussed in passing. Section 775.022(4) provides that if a criminal punishment is "reduced" by an amendment of a criminal statute, the punishment, if not already imposed, must be imposed according to the statute as amended. But the recent amendment to Florida's death penalty statute did not reduce the penalty for first-degree murder. The penalty before the recent amendment was a death sentence or a life-without-

Accordingly, this Court should not reconsider its prior ruling. Florida's amended death penalty statute should be applied in this case at the upcoming resentencing.

WHEREFORE, the State requests that this Court deny the Defendant's renewed to preclude proceeding with resentencing with a non-unanimous jury.

Respectfully submitted,

JACK CAMPBELL
STATE ATTORNEY

/s/ Eddie D. Evans
Assistant State Attorney

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed and electronically served on Baya Harrison via e-file, on this 16th day of June, 2023.

/s/ Eddie D. Evans
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parole sentence and the penalty after the recent amendment is still a death sentence or a life without-parole sentence. So, section 775.022(4) does not apply.

Appendix G

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR WAKULLA COUNTY, FLORIDA

STATE OF FLORIDA,

v.

Case Number 1997-CF-215

JASON B. LOONEY,

Defendant.
_____/

ORDER

This case is scheduled for jury selection on June 19, 2023.

On June 16, 2023, the Defendant renewed his motion to preclude the application of the recently enacted version of Florida Statute Section 921.141 to the upcoming penalty phase trial. The Court again denies the motion.

DONE AND ORDERED on June 16, 2023.

J. Layne Smith
Circuit Judge

Copies to counsel of record via e-service