**IN THE FIFTH DISTRICT COURT OF APPEAL**
**STATE OF FLORIDA**

**STATE OF FLORIDA,**

**Petitioner,**

**CASE NO.: 5D2023-_____**
**L.T. No.: 2004 001378 and 2004 001380**

**v.**

**TROY VICTORINO,**
**JERONE HUNTER**

**Respondents.**
_____/

**EMERGENCY MOTION TO STAY CIRCUIT COURT PROCEEDINGS**

COMES NOW the Petitioner, State of Florida, by and through undersigned counsel pursuant to Florida Rules of Appellate Procedure 9.100 and 9.030(b)(3), and asks this Court to stay the circuit court proceedings, and as grounds therefor, the Petitioner states the following:

1. Respondents, Troy Victorino and Jerone Hunter, are codefendants convicted in August 2004 of the first-degree murders of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo–Roman. Victorino was sentenced to death for the murders of Erin Belanger, Francisco Ayo–

Roman, Jonathan Gleason, and Roberto Gonzalez, and Hunter was sentenced to death for the murders of Jonathon Gleason, Roberto Gonzalez, Michelle Nathan, and Anthony Vega. *Victorino v. State*, 23 So. 3d 87, 94 (Fla. 2009); *Hunter v. State*, 8 So. 3d 1052, 1060–61 (Fla. 2008). Their convictions and death sentences were affirmed on direct appeal; however, their death sentences were subsequently vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). *Id.* The case is currently set before the Honorable Randell H. Rowe for resentencing proceedings in the Seventh Judicial Circuit Court of Florida.

2. Jury selection began on Monday, April 10, 2023. At the time of jury selection, the trial court and the parties knew there was a chance that Florida's death penalty law might change to no longer require a unanimous jury recommendation for a sentence of death. During voir dire, some jurors mentioned they were aware of a possible change in the death penalty law. At that time, the parties discussed the matter with the court, and the judge ultimately advised the potential jurors that he would instruct the jurors on the law that applied in the case.

3. On Monday, April 17th, 2023, the judge excused the combined first and second jury panels and told them to return on Monday, April 24th, when the final selection would take place. However, late Wednesday--without explanation--the court ordered the clerk to contact the excused first and second panels of jurors to have them return four days earlier than previously scheduled.

4. On April 20, 2023, at 10 a.m., Governor Ron DeSantis signed into law Senate Bill 450, which amends sections 921.141 and 921.142 of Florida Statutes, relating to the procedures for the imposition of the death penalty in Florida. Specifically, the amendment removes the requirement for jury unanimity for a recommendation of death and instead requires a majority of at least eight jurors for a determination that a defendant should be sentenced to death. At the time of the signing of the new law, the jury had not yet been empaneled and sworn in Respondents' case.

5. In response to enactment of the new law, the State filed a motion to implement the new statutory death penalty sentencing procedures. The State also advised the trial court that the defense had the right to question the potential jurors on their ability to follow the new law. The defense stated that it had no questions on that

topic, and instead chose to give up general voir dire questioning in an effort to get the jury empaneled sooner. The State informed the court that it would like an opportunity to question the jurors about their ability to follow the new law; however the court denied the State's request to question the remainder of the panel regarding the new law.

6. The State further requested that the court refrain from swearing in the jury until it ruled on the State's motion regarding the new statutory procedure. The judge reserved ruling on the motion and chose to empanel the jury that same day, after the new law had been signed into effect.

7. On April 25, 2023, the court entered an order denying the State's motion to utilize new statutory death penalty proceedings. The State filed a motion to stay the proceedings, which was denied April 25, 2023. The resentencing proceeding is scheduled to begin April 26, 2023

8. The State is currently preparing an emergency petition for writ of prohibition or alternatively a petition for writ of certiorari to be filed tomorrow morning in this Court regarding the lower court's denial of the State's motion to utilize new death penalty proceedings.

Based on the foregoing, the State seeks an order from this Court staying the lower court resentencing proceeding until this Court reviews the State's extraordinary writ based on the lower court's refusal to apply the new law to Respondents' resentencing.

9. While a petition for writ of prohibition divests a trial court of jurisdiction at the time the district court issues a show cause order, a petition for writ of certiorari has no such effect. Fla. R. App. P. 9.100(h); *Brinson v. State*, 789 So. 2d 1125 (Fla. 2d DCA 2001); *see also Curry v. State*, 880 So. 2d 751, 756 (Fla. 2d DCA 2004) (holding that the filing of a petition for writ of certiorari does not operate as a stay of the proceedings in the trial court). Therefore, in the event that this Court converts the case to a petition for writ of certiorari, the State will require a separate order to initiate a stay.

10. Further, even if a show cause order is issued on the petition for writ of prohibition to invoke a stay, because time is of the essence, the State nevertheless seeks a separate order to immediately halt the resentencing proceeding in this case. Until a stay is issued, the lower court retains jurisdiction and will continue to conduct the resentencing proceeding even though the validity of its judicial ruling is in doubt. An immediate stay is both necessary and appropriate to

prevent resentencing proceedings from continuing before the lower court and to prevent the jury from being instructed on the incorrect, outdated law. Without a stay, the State will surely be irreparably harmed and will further have no other recourse for seeking relief. *See generally Trepal v. State*, 754 So. 2d 702, 707 (Fla. 2000)("Drawing upon the district courts' use of the writ of certiorari to provide an instructive model of how this Court may exercise its jurisdiction in such cases, we hold that to obtain relief an appellant must establish that the order …does not conform to the essential requirements of law and may cause irreparable injury for which appellate review will be inadequate); *Spacebox Dover, LLC v. LSREF2 Baron LLC*, 112 So. 3d 751, 752 (Fla. 2d DCA 2013) (explaining that certiorari relief is warranted when a lower court order departs from the essential requirements of law, causing material harm that cannot be remedied on appeal, and an order denying a stay in these circumstances qualifies for certiorari review).

11. The State is very likely to prevail on a petition in this Court. Senate Bill 450 expressly indicates that "This Act shall take effect upon becoming a law." "When an act provides that it shall become effective 'on becoming a law,' it becomes effective immediately

upon the Governor's approval." *Negron v. State*, 932 So. 2d 1250, 1251 (Fla. 3d DCA 2006); *see also Parker v. Evening News Pub. Co.,* 44 So. 718, 718 (Fla. 1907) (holding that the act became effective upon approval by the executive when it stated that it "shall take effect immediately on becoming a law."). Here the Governor signed the bill on April 20, 2023, so it immediately became effective on that day and should be applied to all trials. In this case, the law went into effect before the resentencing proceedings are set to begin on April 26, 2023, and significantly, the law went into effect before the jury was empaneled and sworn on April 20, 2023. The trial court is improperly refusing to apply the new law to the instant case.

12. Notably, in *Dobbert v. Florida,* 432 U.S. 282 (1977), the Supreme Court rejected an ex post facto attack on a change to Florida's death penalty law, explaining that the penalty itself existed before the statute was amended, and the only change in the statute was the procedure by which it was imposed. The Court found the change to Florida's death penalty statute "clearly procedural" where it "simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the

quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293–94.

13. Here, the amendment at issue removing the requirement of a unanimous jury recommendation and changing it to a recommendation of at least eight jury members is merely a procedural change to Florida's death penalty law. This type of procedural change does not affect substantial rights of a defendant in such a manner as to implicate the prohibition against ex post facto laws. Any potential argument that removing the requirement of jury unanimity disadvantages defendants by making it easier for death sentences to be imposed does not support a court's application of the outdated law. "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Dobbert,* 432 U.S. at 293. *See also Collins v. Youngblood*, 497 U.S. 37, 50–52 (1990) (holding a Texas act did not violate the Ex Post Facto Clause because 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 one charged with crime of any defense available according to law at the time when the act was committed.").

14. Any claim the defense is prejudiced because it did not voir dire the jury on allowing a death recommendation on an 8-4 vote rather than a unanimous recommendation is unfounded. The trial court departed from the essential requirements of law by refusing to apply the law in effect at the time of the trial and by taking efforts to avoid having to apply the new law, such as recalling the jury sooner than scheduled and refusing the state's requests for voir dire regarding the new law. The State repeatedly asked for a stay of the matter, asked to question the jurors on the new law, and asked the defense to question the jury on the new law, which all fell on deaf ears. There was ample notice of the new law and there is no resulting due process violation. No prejudice resulted as the defense was seeking to empanel the most favorable possible jury and the defense failed to identify anything it would have done differently in voir dire.

15. This is a case of statewide importance concerning the applicability of state law, and a stay is required under these circumstances so this issue can be properly addressed by this Court.

WHEREFORE, The State respectfully requests that this Court grant an immediate stay of proceedings pending this Court's ruling on the State's petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of April 2023, I electronically filed the foregoing with the Clerk of the Court by using the e-filing portal system which will send a notice of electronic filing to the following: Ann E Finnell, Esq., Gonzalo Andux, and BeJae

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