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IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner, **CASE NO.: 2023-______________**
Lower Tribunal No.:2004 001378
2004 001380

v.

TROY VICTORINO,
JERONE HUNTER

Respondents.
___________________________________/

EMERGENCY PETITION FOR WRIT OF MANDAMUS OR/PETITION FOR WRIT OF CERTIORARI/OR WRIT OF PROHIBITION

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

<u>Nature of Relief Sought</u>

The nature of the relief sought is an Order of the Court preventing the trial court from proceeding on the outdated version of section 921.141 and directing the lower court to utilize the new statutory death penalty sentencing procedures of Section 921.141 of the Florida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

<u>Basis For Invoking Jurisdiction</u>

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

Certiorari jurisdiction is appropriate where there has been a departure from the essential requirements of the law. *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011). The Florida Supreme Court has explained that although certiorari jurisdiction cannot be used to create new law, "clearly established law" "can derive from a ***variety of legal sources***, including recent controlling case law, rules of court, statutes, and constitutional law. (emphasis added).

Accordingly, a district court may grant a writ of certiorari after determining that the decision is in conflict with the relevant statute, so long as the legal error is also "'sufficiently egregious or fundamental to fall within the limited scope' of certiorari jurisdiction.'" *Nader v. Florida Dept. of Highway Safety & Motor Vehicle*s, 87 So. 3d 712, 723 (Fla. 2012) (quoting *All State Ins. Co. v Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003); *State v. Caamano*, 105 So. 3d 18 (Fla. 2d DCA 2012) (quoting *Nader* and granting certiorari relief as the trial court's order departed from the essential requirements of the law as the lower court applied the incorrect statute when it dismissed the charge).

It is well settled that mandamus will lie where the Petitioner has a clear legal right to the performance of the particular duty sought and that he has no other legal method for obtaining relief. *Caldwell v. Estate of McDowel,* 507 So. 2d 607, 608 (Fla. 1987). Here the trial court departed from the essential requirements of the law by failing to apply the new statutory death penalty sentencing procedures of Section 921.141 of the Florida Statutes (2023), that was signed into law before the jury was empaneled and sworn. The judiciary is obligated to uphold the constitutionality of legislative enactments and fashion instructions consistent with the law.

In the alternative, the court is acting outside of its authority by not applying the law in effect at the time of trial. A writ of prohibition is the appropriate remedy to prevent a lower tribunal from the improper use of judicial power. *See English v. McCrary*, 348 So. 2d 293 (Fla. 1977) (explaining that prohibition is an extraordinary writ by which a superior court prevents an inferior court from exceeding or usurping jurisdiction over matters not within its jurisdiction). The State is irreparably harmed and a writ of mandamus and writ of prohibition and/or certiorari is necessary.

Facts and Procedural History

As a preliminary note, jury trial started on April 25, 2023. The operative event, the reading of the jury instructions, has yet to occur.

The Respondents in the above captioned cases bludgeoned to death six people and a dog with baseball bats inside a Deltona home in August 2004 over a dispute about stolen property. *Victorino v. State*, 23 So. 3d 87 (Fla. 2009). Respondents are now both before the trial court for resentencing on four death sentences imposed following their original sentencing proceeding almost 20 years ago.

The Respondents are being tried together. This petition arises from the Order Denying State's Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141 of the Florida Statutes (2023) ("Order") filed on April 25, 2023. (Exh. A).

Troy Victorino and Jerone Hunter were convicted of the August 6, 2004, first-degree murders of Erin Belanger, Roberto Gonzalez, Michelle Nathan, Anthony Vega, Jonathon Gleason, and Francisco "Flaco" Ayo–Roman. As to Victorino, the jury recommended life sentences for the murders of Michelle Nathan and Anthony Vega and death sentences for the murders of Erin Belanger (by a vote of ten to two), Francisco Ayo–Roman (by a vote of ten to two), Jonathan Gleason (by a vote of seven to five), and Roberto Gonzalez (by a vote of nine to three). *Victorino v. State*, 23 So. 3d 87, 94 (Fla. 2009). As to Hunter, the jury recommended a death sentence for the murder of Gleason by a vote of ten to two, a death sentence for the murder of Gonzalez by a vote of nine to three, a death sentence for the murder of Nathan by a vote of ten to two, a death sentence for the murder of Vega by a vote of nine to three, and life sentences for the murders of Belanger and Ayo–Roman. *Hunter v. State*, 8 So. 3d 1052, 1060–61 (Fla. 2008). The Florida Supreme Court affirmed their convictions and death sentences on direct appeal; however, Respondents' death sentences were subsequently vacated pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and the cases were remanded to the trial court for resentencing.

Jury selection[1] began on Monday, April 10, 2023, in Deland, Florida. At the time of jury selection, the trial court as well as defense counsel knew there was a chance the law might change. In fact, 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. The Court instructed the potential jurors that he would instruct the jurors on the law that applied in the case.

On Monday, April 17th, Judge Rowe had excused the combined first and second panel and told them to return on Monday, April 24th, when the final selection would take place. However, upon request of the Defendants' counsel, late Wednesday the Court ordered the clerk to contact the excused first and second panel of jurors ordering them to return four days earlier on Thursday. Contrary to his previous scheduling Order, the Judge made his intentions clear that he

[1] Jury selection transcripts are being prepared and will be filed upon receipt.

planned to finish jury selection and swear the jury to hear the case on Thursday April 20th.

On April 20, 2023, at 10am, Governor Ron Desantis signed into law Senate Bill 450 that was to "take effect upon becoming a law." Senate Bill 450, now enacted and signed into law by the Governor of the State 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 now provides as follows regarding the jury's recommendation:

> (c) If at least eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of death. If fewer than eight jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court must be a sentence of life imprisonment without the possibility of parole.

Fla. Stat. 921.141(2)(c) (2023).

Section (3) of the new statute (IMPOSITION OF SENTENCE OF LIFE IMPRISONMENT OR DEATH) is amended to reflect the following:

> (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.

Fla. Stat. 921.141(3)(a)2 (2023).

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." Fla. Stat. 921.141(4) (2023).

The State immediately filed a motion (Exh. B) arguing that the new law was applicable to the instant case and requested a ruling **PRIOR** to swearing the jury and a stay of the proceedings.[2] Judge Rowe refused to grant the State' request for a stay of the proceedings, stating:

> THE COURT: So, you know, we all knew this was going to happen today. There's nothing in the new law that says this trial comes to a screeching halt. We're going to proceed as planned. Whether I'm going to instruct the jury on a new law or not remains to be seen. I've already made it

[2]At the time of the motion, a jury was yet to be impaneled and sworn to try the matters.

> clear Defense gets an opportunity to brief the motion that you just gave me about 15 minutes ago.

(Exh. C; App. at 26).

The State announced 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 this topic. In fact, defense counsel forwent her entire general voir dire questioning seemingly to get the jury empaneled sooner. (Exh. E; App. at 75) The State then informed the court that it would like an opportunity to question the jurors about their ability to follow the new law. The Court denied the State's request to question the remainder of the panel regarding the lawful procedure in section 921.141 (2023). (Exh. C; App. at 35).

The State requested that the court refrain from swearing the jury until the court ruled on the State's Motion regarding the new statutory procedure in section 921.141. Judge Rowe refused to rule on the State's Motion and swore the jury even though he was advised that jeopardy would attach and have significant impact upon the State's ability to appeal an adverse ruling. When confronted with the possibility that swearing the jury would attach jeopardy, the Court responded:

> MR. REID: It will -- I mean, jeopardy's attached.·Once jeopardy's attached, we can't -- the State can't declare a mistrial. I mean, the Defense can get a mistrial if they disagree with your ruling.·The State can't. And, I mean, this absolutely –
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> THE COURT: I think if the Supreme Court wants to say these guys down in DeLand really screwed things up, they're applying the wrong law, we're going to stop it, I think they could certainly do that if they want to do it.

(Exh. C; App. at 52).

The Court reserved its ruling, indicating that its general position was that the trial already commenced and therefore the outdated version of section 921.141 would apply to this matter and requested briefing from the parties on the issue of which version of s. 921.141, Fla. Stat. applied to the re-sentencings. (Exh. C; App. at 49-50 and, 53-54). The State filed an Amended Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141 of the Florida Statutes (2023) on April 20, 2023. (Exh. D; App. 67-72). Responses from both defendants were filed with the court on April 21, 2023. (Exh. E; App. at 74-79) (Exh. F; App. at 81-104). The State filed its reply on April 24, 2023. (Exh. G; App. at 113).

On April 24, 2023, the State filed a Motion to Disqualify Judge Randell Rowe. (Exh. H), which was denied on April 25, 2023, finding it legally insufficient. (Exh. I).

On April 25, 2023, the trial court issued an order denying the State's Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141 of the Florida Statutes (2023). (Exh. A, App. at 6-14). The trial court concluded that based on settled law, the Defendant's *Hurst* penalty phase resentencing trial began on April 10, 2023, upon the swearing by the clerk of the venire. (Exh. A, App. at 6-14).

ARGUMENT

TRIAL COURT ORDERS DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW RESULTING IN MATERIAL INJURY TO THE PETITIONER THROUGHOUT THE REMAINDER OF THE PROCEEDINGS THAT CANNOT BE REMEDIED BY APPEAL.

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

The responsibility to ensure that the jury is properly instructed ultimately rests with the trial court, not counsel. The court has a duty to assure that the jury is instructed on the correct law to be applied to the case. While the standard jury instructions may be presumed to be correct, final responsibility for correctly instructing the jury remains with the trial court. *Silva v. State*, 259 So. 3d 278, 282 (Fla. Dist. Ct. App. 2018). "In that regard, a trial judge in a criminal case is not constrained to give only those instructions that are contained in the Florida Standard Jury Instructions." The "[j]ury instructions must relate to issues concerning evidence received at trial," and "the court should not give instructions which are confusing, contradictory, or misleading." *Hegele v. State*, 276 So. 3d

807, 810 (Fla. Dist. Ct. App. 2019). The trial court's decision to proceed on the outdated version of section 921.141 departs from the essential requirements of the law and supports the granting of the writ of certiorari.

I. TRIAL STARTED WHEN THE JURY WAS SWORN

The trial court believed that the new law did not apply to this case because trial had already commenced. But For purposes of determining when a new procedural law would be effective, a jury trial begins, and jeopardy attaches, when the jury is sworn.[3] *Martinez v. Illinois*, 572 U.S. 833, 840–41 (2014); *Knight v. State*, 211 So. 3d 1, 11 (Fla. 2016) (stating that double jeopardy attaches when the jury is impaneled and sworn in); *Turner v. State*, 37 So. 3d 212, 220 (Fla. 2010) (Double jeopardy attaches "when the jury is impaneled and sworn"); *State v. Gaines*, 770 So. 2d 1221, 1225 (Fla. 2000). (double jeopardy does not refer to a venire panel being sworn in to prepare

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3 In making this argument the State does not concede that the new procedural law could not be constitutionally applied to a capital defendant whose jury had been sworn and evidence taken when the new law was signed by the Governor. A defendant has no right to a particular penalty phase procedure and the penalty has not been made more onerous. Certainly, every defendant in Florida was on notice that first degree murder carried with it a potential penalty of death.

for voir dire, but to the jury of record, which has been selected to hear the case, being sworn in to prepare to hear testimony); *Serfass v. United States*, 95 S. Ct. 1055 (stating that the United States Supreme Court has "consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of facts…"); *Johnson v. State*, 660 So. 2d 648, 661 (Fla. 1995) (holding that the swearing in of jurors marks the point at which jeopardy attaches and jury was not sworn until the day trial commenced).

Here, when the jury was sworn, the new law was in effect. Notably, Senate Bill 450 states that it is to "take effect upon becoming a law." The Governor signed the bill, making it effective law, at 10:08 a.m. on April 20, 2023. This occurred <u>before</u> the jury was sworn in this case. Given that the law new was in effect, it must be applied to Respondents' trial.

The changes noted in section 921.141 of the Florida Statues are procedural in nature and must be the law utilized by the trial court in the Respondents' resentencing trial since the jury was sworn **after** the governor signed the bill. 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)). Therefore, a new "prospective" decision, a new rule of court, or a new procedural statute relating to a trial right will not be applicable in any case that is tried prior to the effective date of the new law. However, the new decision, rule, or statute will be applied in other pending cases in which the relevant operative event, the trial, has not yet occurred. *See, e.g., Jackson v. Green*, 402 So. 2d 553 (Fla. 1st DCA 1981) (the operative event for purposes of the new speedy trial rule was the taking of the petitioner into custody, and, because this event occurred prior to the effective date of the new rule, the new rule did not apply in the petitioner's case); *Johnson v. State*, 371 So. 2d 556 (Fla. 2d DCA 1979) (although the appellant's crime was committed prior to the effective date of a new procedural statute relating to sentencing, the statute was applicable in the appellant's case because the sentencing occurred after the effective date of the statute). In this case, the operative event has yet to occur as Respondents have yet to be sentenced and the jury has yet to be instructed on the applicable jury instructions.

II. THE NEW STATUTE IS PROCEDURAL AND DOES NOT VIOLATE THE EX POST FACTO CLAUSE

As to any procedural due process arguments, procedural statutes can be applied retroactively to pending cases because, unlike substantive statutes, "no one has a vested interest in any given mode of procedure." *State v. Kelley,* 588 So. 2d 595, 597 (Fla. 1st DCA 1991). 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.*

In order for a law to be ex post facto, it must be more onerous than the prior law. *Id.* Changes in laws regarding the admission of evidence, such as the creation of a new hearsay exception, are typically held to be procedural. *See Glendening v. State*, 536 So. 2d 212, 215 (Fla.1988). Such a statutory change does not violate the prohibition against ex post facto laws because it does not "alter 'substantial personal rights;' " the crime with which the defendant was charged, the punishment prescribed for it, and "the quantity or the degree of proof necessary to establish his guilt, all remain[ed] unaffected by" the enactment of section 90.804(2)(f). *See id.* Using this analysis, the Florida Supreme Court held that the application of another hearsay exception, section 90.803(23), Florida Statutes

(1985) did not violate the prohibition against ex post facto laws when it was applied to a crime that occurred before the effective date of the statute. *Id.* at 214–15; *see also McLean v. State*, 854 So. 2d 796, 803 (Fla. 2d DCA 2003) (holding that section 90.404(2)(b), involving a type of similar fact evidence, could be applied in a trial of a crime that occurred before the effective date of the statute). The Florida Supreme Court periodically adopts legislative changes to the evidence code "to the extent they are procedural" and usually specifies that the new rules "are effective on the dates they became law." *Mortimer v. State*, 100 So. 3d 99, 104 (Fla. 4th DCA. 2012).

The changes contained in the now current version of section 921.141 are clearly procedural, and as such, they must be the laws applied to the Respondents in this matter. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (Rules allocating decision making authority are "prototypical" procedural rules).The circuit court's refusal to consider the current version of section 921.141 will cause the State material injury, as it is left with no adequate remedy on appeal should the Respondents receive a life sentence.

III. THE SPEEDY TRIAL RULE DOES NOT DETERMINE WHEN A STATUTE BECOMES EFFECTIVE.

The trial court's assertion that it should proceed on the outdated version of section 921.141 because the trial had commenced upon initiating voire dire is contrary to well established Florida law.[4] The trial court mistakenly relies on *State v. Melendez,* 244 So. 2d 137, 139 (Fla. 1971), *State v. Singletary*, 549 So. 2d 996, 998 (Fla 1989), and *United States v. White*, 980 F.2d 838, 841 (2d Cir. 1992), for the legal conclusion that trial begins when the selection of a jury to try the case commences. However, the commencement of trial occurs at different times for different purposes.

For speedy trial purposes, rule 3.191(c) of the Florida Rules of Criminal Procedure states that trial commences when the jury panel is sworn for voir dire examination. *See McDermott v. State*, 383 So.

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[4] The effective date of the amended law at issue in this case is not subject to dispute-- the date it was signed by the Governor. *See Negron v. State*, 932 So. 2d 1250, 1251 (Fla. 3d DCA 2006); the court stated:

> When an act provides that it shall become effective "on becoming a law," it becomes effective immediately upon the Governor's approval. *See Parker v. The Evening News Pub. Co.,* 54 Fla. 482, 44 So. 718 (1907). In *Parker,* the act in question stated that "[t]his act shall take effect immediately on becoming a law." *Id.* The Florida Supreme Court held that this meant that the act became effective upon approval by the executive. *Id.*

2d 712, 714 (Fla. 2d DCA 1980) (stating that "[w]hen the jury panel was sworn for voir dire examination, the trial was deemed to have commenced for the purpose of the speedy trial rule.") (citing *Moore v. State*, 368 So. 2d 1291 (Fla. 1979)). For purposes of determining defendant's absence at trial, Rule 3.180(c) states that a jury trial commences when jury selection begins. *Daniels v. State,* 587 So. 2d 460, 461 (Fla.1991); *State v. Melendez,* 244 So. 2d 137, 139 (Fla. 1971). *State v. Singletary*, 549 So. 2d 996, 998 (Fla 1989), which the trial court references, dealt with the crucial function of a trial judge to ensure that a competent jury is selected, which begins with voire dire.

In *United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992), also cited by the trial court, inquiry was under § 851 (a)(1) for purposes of when the trial began to establish prior convictions:

> **§ 851. Proceedings to establish prior convictions**
>
> **(a) Information filed by United States Attorney**
> **(1)** No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney

> that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C.A. § 851 (West)

A jury sworn with a trial oath is an essential part to the commencement of trial.[5] A juror does not swear to "render a true verdict **according to the law** and the evidence" until after they have been selected and impaneled. Fla. R. Crim. P. 3.360 (Oath of Trial Jurors).[6] The Double Jeopardy Clause protects an individual from

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[5] There is a difference between the *voir dire* oath to the trial oath. Cases from other jurisdictions have also recognized that a jury oath was a common practice at common law. *People v. Moon*, 2022 IL 125959 (defendant's trial before an unsworn jury required automatic reversal, regardless of the strength of the evidence or any showing of prejudice to defendant; See, *e.g.*, *Commonwealth ex rel. v. Ashe*, 44 Pa. D. & C. 337, 339 (1942) ("At common law, when an accused was brought before the court, he was first arraigned and the indictment was read in English and he was then asked how he would plead; *** if he pleaded not guilty, a jury was called, challenged, *and sworn*, and the trial then proceeded." (emphasis added); *State v. Hartley*, 22 Nev. 342, 40 P. 372, 373 (1895) ("The common law: 'When the trial is called on, *the jurors are sworn* as they appear to the number of twelve, unless they are challenged by the party.' ") (emphasis added).

[6] Rule 3.300 - VOIR DIRE EXAMINATION, OATH, AND EXCUSING OF MEMBER, Fla. R. Crim. P. 3.300

twice being subject to the risk of a determination of guilt. *Serfass,* 420 U.S. at 391–92, 95 S. Ct. at 1064–65. That risk comes into play only when "a proceeding begins before a trier 'having **jurisdiction to try the question of the guilt or innocence of the accused**.' " *Id.* at 391, 95 S. Ct. at 1064 (quoting *Kepner v. United States,* 195 U.S. 100 (1904)) (emphasis added). Accordingly, the risk associated with trial does not occur, and jeopardy does not attach, until the jury has been empaneled and sworn, and is **thus competent to dispense a judgment of guilt**. *United States v. White*, 980 F.2d 836, 842 (2d Cir. 1992) (emphasis added)

In *Lockhart*, 476 U.S. at 184, the Court stated that "the Constitution presupposes that a jury selected from a fair cross section of the community is impartial *** so long as the jurors can conscientiously and properly carry out their *sworn duty* to apply the law to the facts of the particular case." (emphasis added). In *Patton*

(a)Oath. The prospective jurors shall be sworn collectively or individually, as the court may decide. The form of oath shall be as follows:
"Do you solemnly swear (or affirm) that you will answer truthfully all questions asked of you as prospective jurors, so help you God?"

If any prospective juror affirms, the clause "so help you God" shall be omitted.

v. Yount, 467 U.S. 1025, 1036 (1984), the Court addressed a criminal defendant's argument that a juror was erroneously seated over his challenges for cause. The Court stated that, in addressing a defendant's challenge to an individual juror's partiality, the key question was "did a juror *swear* that he could set aside any opinion he might hold and decide the case on the evidence and should the juror's protestation of impartiality have been believed." *Id.* (emphasis added). In *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868, (2017), the Court recently emphasized that "[j]urors are presumed to follow *their oath.*" (emphasis added). Likewise, in *Wainwright v. Witt*, 469 U.S. 412, 424, (1985), the Court held that "[t]he proper standard for determining when a prospective juror may be excluded for cause" "is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his *oath.*' " (emphasis added) (quoting *Adams v. Texas*, 448 U.S. 38, 45, (1980)). In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 564, (1976), the Court discussed the option of sequestering a jury in cases involving pretrial publicity as follows: "Although that measure insulates jurors only after they are *sworn*, it also enhances the likelihood of dissipating the impact of pretrial publicity and *emphasizes the elements of the jurors' oaths.*" (emphases added). In *United States v. Olano*, 507 U.S. 725, 740, (1993), the Court stated that jurors "commence[ ] their office *with an oath.*" (emphasis added).

In this case, when the twelve jurors and three alternate jurors swore to follow the law on the afternoon of April 20th, 2023, section 921.141 (2023) had been signed into law, as such, this oath was to follow the present version of 921.141 (2023).

IV. THE STATE HAS SHOWN A CLEAR ENTITLEMENT TO RELIEF.

A capital defendant has no right to insist on going to trial on a superseded statute governing penalty phase procedure. The trial court departed from the essential requirements of law by holding that the trial commenced upon swearing of the venire which is in direct conflict with settled law. The trial court further departed from the essential requirements of the law by refusing to apply the law in effect at the time the defendant is being tried and refusing the state's requests for voir dire regarding the new law. Florida Rule of Criminal Procedure 3.300(b) affords the parties a reasonable voir dire examination of prospective jurors. The operative consideration is what is reasonable and who is in the best position to evaluate what is a reasonable voir dire examination in order "to obtain a fair and impartial jury to try the issues in the cause." *Id.* (citation and quotation marks omitted). *Cassaday v. State*, 289 So. 3d 915, 919 (Fla. Dist. Ct. App. 2020). It is illogical to argue due process violations when they were self-inflicted. 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.

The State of Florida will be irreparably harmed because the State has no basis to challenge this ruling on appeal. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 112–13 (2003) (observing the double jeopardy bar may preclude a penalty phase retrial under certain circumstances) Because the court is applying an outdated law and stricter standard that requires a unanimous jury recommendation for a sentence of death, the State may have no recourse if a life sentence is imposed.

V. PROHIBITION IS NECESSARY TO PREVENT AN IMPENDING INJURY TO THE STATE THAT WILL OCCUR IF THE JUDGE INSTRUCTS THE JURY IN A MANNER INCONSISTENT WITH FLORIDA LAW.

Prohibition is the appropriate remedy to prevent a lower tribunal court from the improper use of judicial power. *See English v. McCrary*, 348 So. 2d 293 (Fla. 1977) (explaining that prohibition is an extraordinary writ by which a superior court prevents an inferior court from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction). For example, Florida courts have granted writs of prohibition when trial courts have interfered with the State's prosecutorial authority. *See e.g., State v. Bloom*, 497 So. 2d 2, 3 (Fla. 1986) ("A writ of prohibition is the appropriate remedy when a trial court attempts to interfere with the prosecutorial discretion of a state attorney.").

The separation of powers doctrine is expressly codified in Florida's Constitution, which provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Art. II, § 3, Fla. Const. A fundamental prohibition of the separation of powers doctrine is that no branch may encroach upon the powers of another. *See Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953) ("If the Judicial Department of the Government can take over the Legislative powers, there is no reason why it cannot also take over the Executive powers; and in the end, all powers of the Government would be vested in one body.").

In this case, the lower court exercised an improper use of judicial power by disregarding new law as well as making efforts to actively avoid applying the law enacted by the legislature. 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, at approximately 10 a.m., so it immediately became effective at that time. Notably, the law became effective hours before the jury was empaneled and sworn in this case. The trial court further refused the prosecutor's requests to question prospective jury members about the law, and denied additional motions related to the new law, such as to rule on the issue of the new law being applied before swearing in the jury.

In *Sanders v. Laird*, 865 So. 2d 649, 653–54 (Fla. 2d DCA 2004), the Second District determined that the circuit exceeded its authority pursuant to Florida law by issuing a writ of bodily attachment intended to be executed and enforced outside the State of Florida, when Florida Statutes limited the authority of courts to issue such writs to within the state. Here, the law in effect requires only a majority of eight jurors to recommend a sentence of death. By requiring a unanimous recommendation, the judge is exceeding its authority and effectively attempting to veto the new law.

Given that the resentencing proceeding has begun, prohibition is necessary to prevent an impending injury to the State that will occur if the judge instructs the jury in a manner inconsistent with Florida law. *English v. McCrary*, 348 So. 2d 293, 297 (Fla.1977). ("Prohibition will be invoked only in emergency cases to forestall an impending present injury where person seeking writ has no other appropriate and adequate legal remedy."). The State has no other appropriate and adequate legal remedy to prevent this egregious error from occurring. For these reasons, the issuance of a writ of prohibition is warranted.

CONCLUSION

Accordingly, the State of Florida respectfully requests that this Honorable Court grant the instant petition for writ of certiorari and quash the lower court's order denying the States Motion to Utilize New Statutory Death Penalty Sentencing Procedures of Section 921.141 of the Florida Statutes (2023). Alternatively, the judge had a clear and certain obligation to apply the law in effect at the start of the defendants' penalty phase. His refusal to do so warrants mandamus relief. *Milanick v. Town of Beverly Beach*, 820 So. 2d 317, 319–20 (Fla. 5th DCA 2001) (A writ of mandamus will issue when there is a legal right to the performance of a clear legal duty by a public officer, and the petitioner has no other available legal remedies).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished on April 26th, 2023, by e-portal to: Ann E Finnell, Esq., Gonzalo Andux, and BeJae Shelton, Finnell, McGuinness, Nezami, & Andux P.A., 2114 Oak Street, Jacksonville, Florida 32204-4464, afinnell@fmnlawyers.com, pleadings@fmnlawyers.com, jsantiago@fmnlawyers.com, gandux@fmnlawyers.com, bshelton@fmnlawyers.com; Christian Lake, 227 N. Bronough St. Suite 2100, Tallahassee, FL 32301-1339, pleadings@justiceadmin.org, christian.lake@justiceadmin.org; Heatha Trigones, and Rosemary Calhoun - 251 N. Ridgewood Ave., Daytona Beach, Florida, 32114-3275, trigonesh@sao7.org; eserviceputnam@sao7.org, calhounr@sao7.org, eservicevolusia@sao7.org; Christopher James Anderson, P.O. Box

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CERTIFICATE OF COMPLIANCE

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

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