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**IN THE SUPREME COURT OF FLORIDA**

**PATRICK ALBERT EVANS,**

**Petitioner,**

**v.**

**CASE NO. SC16-1946**
**DEATH PENALTY CASE**

**STATE OF FLORIDA,**

**Respondent.**
_____/

**RESPONSE TO EMERGENCY PETITION FOR WRIT OF PROHIBITION #2**

**COMES NOW** the State of Florida, by and through the undersigned assistant attorney general, and files this Response to Petitioner's Emergency Petition for Writ of Prohibition pursuant to this Court's Order to Show Cause entered October 28, 2016.

Patrick Albert Evans was convicted of two counts of first-degree murder in late 2011, and he was sentenced to death on both counts in 2012. On direct appeal, his convictions and sentences were ultimately vacated due to various errors that occurred during the trial, and his case was remanded for a new trial. *See Evans v. State*, 177 So. 3d 1219 (Fla. 2015).

This Court's opinions in *Hurst v. State*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) and *Perry v. State*, __ So. 3d 2016 WL 6036982 (Fla. Oct. 14, 2016) were issued October 14, 2016. Petitioner filed a demand for speedy trial later that day. Petitioner's trial was scheduled for October 31, 2016.

During a hearing on October 25, 2016, Petitioner (through his counsel) explained that the demand for speedy trial was made due to the belief that there was no death penalty statute currently in existence. (Petitioner's Appendix "B", p. 25). Petitioner expressed the opinion that if he were convicted of first-degree murder, the only possible penalty that could be imposed would be a sentence of life in prison. (Petitioner's Appendix "B", pp. 7, 15). Petitioner further stated that empaneling a death qualified jury under such circumstances would exclude a class of jurors that he would normally be entitled to have in a non-capital case, and therefore, he would not be participating in the death qualification of the jury. (Petitioner's Appendix "B", pp. 25-26, 23-33).

After hearing argument from the parties, the court entered an order stating that it would death qualify the jury, and if Petitioner is found guilty of first-degree murder, they would "proceed to a penalty phase as directed by the Florida Supreme Court." The court explained that it would instruct the jury on the following findings that must be unanimous: that the aggravating factor was proved beyond a reasonable doubt, that sufficient aggravation exists to impose death, that the aggravating circumstances outweigh any mitigating circumstances; and if they answered "yes" to all of those questions, whether

they unanimously find that death is the proper sentence. (Petitioner's Appendix "A", pp. 1-2).

Subsequently, on October 26, 2016, Petitioner filed a Petition for Writ of Prohibition in this Court to preclude the circuit court judge from having the jury death qualified. Petitioner argues that because this Court's recent decisions in *Hurst v. State*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) and *Perry v. State*, __ So. 3d 2016 WL 6036982 (Fla. Oct. 14, 2016), render Florida's death penalty statute unconstitutional, the trial court is unable to hold death penalty proceedings under the current statute without improperly rewriting the law. As this Response will show, Petitioner's argument is flawed and entirely without merit.

Prohibition is an extraordinary writ, which is extremely narrow in scope and operation and used to prevent a lower court from exceeding jurisdiction or usurping jurisdiction over matters not within its jurisdiction. *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977). While prohibition is generally available only to prevent courts from acting when there is no jurisdiction to act, it is also appropriately used for immediate review of the denial of a motion to disqualify a trial judge. *Sutton v. State*, 975 So. 2d 1073, 1076-77 (Fla. 2008). A writ of prohibition should not be used to prevent an erroneous exercise

of jurisdiction. *Sutton v. State*, 975 So. 2d at 1076.[1]

Furthermore, prohibition is available only where there is no other "appropriate and adequate legal remedy." *Sutton*, 975 So. 2d at 1076 (Fla. 2008) (quoting *S. Records & Tape Serv. v. Goldman*, 502 So.2d 413, 414 (Fla. 1986)); *see also State v. Barati*, 150 So. 3d 810, 813 (Fla. 1st DCA 2014) (Prohibition "must be employed with caution and utilized only in emergency cases to prevent an impending injury where there is no other appropriate and adequate legal remedy.").

Petitioner has altogether failed to show that he meets these requirements. The petition neglects to explain how the trial court is apparently acting without jurisdiction by death qualifying the jury. Petitioner does, however, argue that relief is warranted because the trial court cannot require the jury to reach a unanimous decision to impose the death penalty without encroaching upon the powers of the legislature and effectively rewriting the law. Therefore, Petitioner appears to be arguing

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[1] Respondent also questions whether this Court has jurisdiction under such circumstances. *See State v. Fourth District Court of Appeal*, 697 So. 2d 70 (Fla. 1997) (explaining that the Court lacks jurisdiction in cases in which the death penalty is sought but not yet imposed or in cases which the conviction and sentence of death have been vacated and the case remanded for a new trial); *see also Williams v. State,* 913 So. 2d 541 (Fla. 2005) (holding that the court lacked jurisdiction to issue a writ when there was no independent jurisdictional basis allowing the court to exercise its writs authority); Fla.R.App.P.9.030(a); and Art. V, § 3(b), Fla. Const.

that because it would be allegedly improper to impose the death penalty if he were convicted, the trial court is without jurisdiction to death qualify the guilt-phase jury.

The trial judge is certainly acting within his power to require death qualification of the jury in this case. Petitioner has been charged with two counts of first-degree murder, and the State has filed a notice of intent to seek the death penalty. There is no federal or state law declaring the death penalty to be unconstitutional in Florida. Therefore, the trial court cannot possibly be acting beyond its authority by permitting the jury to be death qualified.

In order to preclude death qualification of the jury, the death penalty must be unavailable as a matter of law. *Washington v. State*, 737 So. 2d 1208, 1226 (Fla. 1st DCA 1999). In *Reed v. State*, 496 So. 2d 213, 214 (Fla. 1st DCA 1986), the trial court erred by permitting the State to death qualify the jury panel where the circumstances of the charged crime precluded imposition of the death penalty. Specifically, the State intended to try the defendant only on a theory of felony murder as a participant in an underlying robbery when *Enmund v. Florida*, 458 U.S. 782 (1982), prohibited imposition of the death penalty under such circumstances. *Reed, 496 So. 2d at 214*. Despite the ruling in *Enmund*, the State requested that the jury

be death qualified and the court permitted the qualification. *Id.* In reversing the defendant's convictions and sentences and remanding for a new trial, the First District noted that it "strains credulity […] to believe that the trial judge was not sufficiently apprised of the facts to exclude the consideration of the death penalty before the jury selection began." *Id.*

The circumstances of this case are altogether different, as the State has a legal basis to seek the death penalty. Capital punishment as a penalty is constitutional in Florida. This Court has recently explained that the Supreme Court's holding in *Hurst v. Florida* **"did not declare the death penalty unconstitutional."** *Hurst v. State*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) (emphasis added); *see also Perry v. State*, __ So. 3d __ 2016 WL 6036982 (Fla. Oct. 14, 2016). *Hurst v. Florida* was decided on Sixth Amendment grounds and **"nothing in that decision suggests a broad indictment of the imposition of the death penalty generally."** *Hurst*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) (emphasis added). **"[T]he death penalty still remains the ultimate punishment in Florida,** although the Supreme Court has now required that all the critical findings necessary for imposition of the death penalty be transferred to the jury." *Id.* (emphasis added).

There is no indication that in deciding *Hurst v. Florida*,

the Supreme Court intended that death sentences in Florida be commuted to life or that the death penalty be categorically prohibited. *Id.* Moreover, this Court rejected Hurst's argument that he was entitled to a life sentence after the Supreme Court's ruling in *Hurst v. Florida*. *Id.* This Court has made it abundantly and unequivocally clear that the death penalty is still an available punishment in Florida. Petitioner has failed to show that the court is without jurisdiction to death qualify the jury.

In fact, in *State v. Jones*, __ So. 3d __ 2016 WL 4197854 (Fla. 2d DCA 2016), the Second District held that trial judges lacked authority to determine that the State could not prosecute capital cases as death penalty cases, and courts are without authority to make pretrial determinations that death is not an available sentence. "The trial courts simply have no authority to determine the applicability of the death penalty to defendants who have not been convicted of capital felonies." *State v. Jones*, __ So. 3d __ 2016 WL 4197854 (Fla. 2d DCA 2016). If a trial court is acting beyond its authority by prohibiting the State from prosecuting a case as death penalty case, it naturally follows that the judge in Petitioner's case cannot be acting beyond his jurisdiction by permitting death qualification of the guilt-phase jury.

In addition to failing to show that the court is acting without jurisdiction, Petitioner has also failed to meet his burden of demonstrating that no other legal remedy is available to him. A writ of prohibition is not available when another adequate remedy exists. *Sutton*, 975 So. 2d at 1076 (Fla. 2008). It has long been established that prohibition is not designed to perform the functions of an appeal. *Curtis v. Albritton*, 101 Fla. 853, 132 So. 677 (1931).

The petition completely excludes an analysis of this requirement. That is likely because Petitioner could clearly raise all of these issues on direct appeal. Petitioner cannot resort to a writ of prohibition where he has an adequate remedy via direct appeal. *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986); *Southern Records & Tape Service v. Goldman*, 502 So. 2d 413 (Fla. 1986).

By the same token, Petitioner has not shown any impending injury by having a death-qualified jury. As this Court has explained, the writ should only be utilized in emergency cases "to prevent an impending injury[.]" *Mandico v. Taos Const., Inc*, 605 So. 2d 850, 854 (Fla. 1992). Petitioner cannot show the likelihood of any injury, much less an impending one.

The petition attempts to blur the real issue by focusing on the manner in which the death penalty could be imposed if

Petitioner were to be convicted. As previously addressed, the proper analysis is whether the court is acting beyond its jurisdiction by death qualifying the jury during the guilt phase. However, even if the analysis were to include the trial court's ability to enforce the death penalty, Petitioner's argument would still fail.

In response to the Supreme Court's holding in *Hurst v. Florida*, the Florida Legislature recently amended the death penalty scheme (commonly referred to as "the Act"). *Perry v. State*, __ So. 3d __ 2016 WL 6036982 (Fla. Oct. 14, 2016); ch. 2016–13, Fla. Laws (2016). Notably, the Act changed the requirement that the jury recommend a final sentence of death by a majority vote, and instead required that at least ten jurors agree that the defendant should be sentenced to death. § 921.141 (2)(c).

However, this Court's recent decision in *Hurst v. State* requires that the jury unanimously recommend a sentence of death. Therefore, in *Perry*, the portion of the Act requiring ten, rather than all twelve, jurors to recommend a sentence of death was deemed unconstitutional and contrary to the Court's ruling in *Hurst v. State*. Because the Act does not require unanimity in the jury's final recommendation, this Court concluded that the Act cannot be constitutionally applied to

pending prosecutions. *Perry v. State*, __ So. 3d __ 2016 WL 6036982 (Fla. Oct. 14, 2016).

In reaching that conclusion, this Court analyzed the entire Act and found that most of the provisions could be "construed constitutionally and could otherwise be validly applied to pending prosecutions[.]" *Perry v. State*, __ So. 3d 2016 WL 6036982 (Fla. Oct. 14, 2016). While it is clear from the *Perry* opinion that the Act as written cannot be used in pending prosecutions because it includes an unconstitutional portion, the opinion does not directly address whether the Act can be used if the invalid portion is removed. This Court's opinion in *Hurst v. State*, at least implies that it can, as this Court remanded Hurst's case for a new penalty phase proceeding *consistent with the opinion*, rather than imposing a life sentence or instructing that the penalty-phase proceedings be stayed until after the Act is amended. *Hurst v. State*, __ So. 3d __, 2016 WL 6036978 (Fla. Oct. 14, 2016) (emphasis added).

The trial judge in the instant case has similarly indicated his intention to proceed to a penalty phase consistent with the *Hurst v. State* opinion if Petitioner is convicted. The court specifically explained that it would instruct the jury and provide special interrogatories or a verdict form to require that all of the jury's necessary findings be unanimous,

including the final determination for death. (Petitioner's Appendix "A", pp. 1-2). Under the doctrine of severability, the court is able to strike the unconstitutional portion of the Act requiring at least a 10-2 jury determination and instruct the jury that the ultimate determination for death be unanimous. "Severability is a judicial doctrine recognizing the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." *Ray v. Mortham*, 742 So. 2d 1276 (Fla. 1999) (citing *State v. Calhoun County*, 170 So. 883, 886 (Fla. 1936)).

The test for severability has been summarized as "whether the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail." *Schmitt v. State*, 590 So. 2d 404, 414 (Fla. 1991). That simply is not the case here. Section 921.141 (2), of Florida Statutes states the following:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.—This subsection applies only if the defendant has not waived his or her right to a sentencing proceeding by a jury.
>
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor set forth in subsection (6).
>
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that

> an aggravating factor exists must be unanimous. If the jury:
>
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
>
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all of the following:
>
> a. Whether sufficient aggravating factors exist.
>
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
>
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without the possibility of parole or to death.
>
> <u>(c) If at least 10 jurors determine that the defendant should be sentenced to death, the jury's recommendation to the court shall be a sentence of death. If fewer than 10 jurors 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.</u>

Here, the trial court can remove the underlined portion of subsection (c) without "infecting" the entire Act or otherwise rendering the rest of the Act invalid. Similarly, removing subsection (c) does not change the essential meaning of the Act or cause it to be "nonsensical." With subsection (c) removed, the court is able to respect the legislative intent of the Act to provide a constitutional procedure for the imposition of the death penalty while also simultaneously conducting Petitioner's penalty-phase proceedings in a constitutional manner.

The penalty-phase findings and determination process is

left undisturbed even after the removal of subsection (c). The remaining, valid portions explain the penalty-phase procedure to be followed and require the jury to make a determination for either life or death. Contrary to Petitioner's claim, the trial judge does not have to "write-in" the requirement that the final jury determination be unanimous; nothing at all has to be added to the statute in order to interpret it that way.

Rather, the judge must construe statutes in a constitutional manner, and given that this Court has held that a jury recommendation for death must be unanimous, the judge is interpreting the severed statute in that manner. Since the statute already requires the jury to make a recommendation for life or death in all cases in which the defendant has not waived his or her right to jury sentencing, the judge is merely ensuring that the determination be unanimous.

As this Court has acknowledged in *Perry*, "[t]he Act amends Florida's death penalty statute to provide that the jury must make a recommendation that is 'based on' the 'considerations' of whether sufficient aggravating factors exist and whether they outweigh the mitigating circumstances found to exist, **but it does not specify whether these findings themselves must be unanimous or explicit**." *Perry v. State*, __ So. 3d 2016 WL 6036982 (Fla. Oct. 14, 2016) (emphasis added). This Court

construed the Act to require that those findings be unanimous pursuant to *Hurst v. State*. *Id.*

Construing the severed Act to also require that a recommendation for death be unanimous is no different here when after severing subsection (c), the Act would require the jury to make an ultimate recommendation without specifying whether the recommendation be unanimous. Interrogatories will already have to be used under the current version of the Act, this is simply the addition of one more to ensure full compliance with *Hurst v. State.* The court's proposed instructions and interrogatories to the jury are within the court's authority and properly ensure that the jury's critical findings and ultimate determination are all unanimous.

This procedural process falls within the trial judge's inherent ability to adopt appropriate mechanisms that are necessary to apply the law in a constitutional manner. *See Galindez v. State*, 955 So. 2d 517, 527 (Fla. 2007) (Cantero, J., concurring) ("When confronted with new constitutional problems to which the Legislature has not yet responded, we have the inherent authority to fashion remedies."); *State v. Ford*, 626 So. 2d 1338, 1345 (Fla. 1993) ("A trial court may implement a procedure not expressly authorized by this Court or otherwise authorized by law if the procedure is necessary to further an

important public policy interest.”).

Based on the foregoing, the trial court is acting within its authority to permit death qualification of the jury, and if Petitioner is convicted, to proceed to the penalty phase with special interrogatories along with jury instructions regarding the requirement of unanimity in conformity with both *Hurst* and *Perry*. While Petitioner requests that his petition for writ of prohibition alternatively be considered for certiorari, for all the previously stated reasons why prohibition fails, a petition for writ of certiorari must also fail.

Petitioner is certainly not entitled to a life sentence, nor is he entitled to a capital trial by a jury that has not been death qualified. The trial court cannot restrict the State from prosecuting this case as a death penalty case, and Petitioner has failed to show that the court has acted in excess of its jurisdiction or otherwise departed from the essential requirements of the law by having the jury death qualified. Petitioner has further failed to demonstrate that he does not have an adequate remedy on appeal, especially given the fact that he would have the opportunity to raise these claims on direct appeal. For all these reasons, Petitioner is not entitled to a writ of prohibition or a writ of certiorari in this case.

**WHEREFORE**, the State of Florida respectfully requests that

this Honorable Court deny the emergency petition for writ of prohibition.

Respectfully submitted,

**PAMELA JO BONDI**
**ATTORNEY GENERAL**

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court by using the e-portal filing system, which will send a notice of electronic filing to the following: Allison Ferber Miller and Jane McNeill, Assistant Public Defenders, Sixth Judicial Circuit of Florida, 14250 49th Street North, Clearwater, Florida 33762, **allisonmiller@co.pinellas.fl.us, janemcneill@co.pinellas.fl.us**; Peter Mills, Assistant Public Defender, Tenth Judicial Circuit of Florida, 255 N. Broadway- 3rd Floor, Post Office Box 9000-PD, Bartow, Florida 33831, **pmills@pd10.org**; Thomas Koskinas, Assistant State Attorney, Sixth Judicial Circuit, Post Office

Box 5028, Clearwater, Florida 33758, **SA6eservice@co.pinellas.fl.us** and the Honorable Joseph Bulone, Sixth Judicial Circuit of Florida, Chamber 12, 14250 49th Street North, Clearwater, Florida 33762, **jbulone@jud6.org** and **ghahl@jud6.org**.

/s/ Christina Z. Pacheco_____
COUNSEL FOR THE STATE OF FLORIDA

**CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in the foregoing is 12-point Courier New, in compliance with the Florida Rules of Appellate Procedure.

/s/ Christina Z. Pacheco_____
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