IN THE FLORIDA SUPREME COURT
CASE NO. SC18-1999

PETITIONER'S EXECUTION SCHEDULED
FOR DECEMBER 13, 2018 AT 6:00 PM

JOSE ANTONIO JIMENEZ,

Petitioner,

v.

JULIE L. JONES,

Respondent.
_____/

MOTION TO STRIKE STATE'S RESPONSE TO APPLICATION FOR STAY OF EXECUTION OR IN THE ALTERNATIVE MOTION TO AMEND HIS REPLY AND/OR SUPPLEMENT HIS MOTION FOR STAY OF EXECUTION

COMES NOW, **JOSE JIMENEZ**, by and through undersigned counsel and respectfully requests that this Court either strike the pleading, entitled "State's Response to Application for Stay of Execution" that the State filed in Case No. SC18-1247, for the reasons stated herein or in the alternative allow Mr. Jimenez to supplement his motion for stay of execution filed in the above-entitled matter. As grounds for his request Mr. Jimenez submits:

1. At 4:54 PM, on December 11, 2018, Mr. Jimenez's counsel received an email from eservice@myflcourtaccess.com. The email's subject line stated: "Service of Court Document Case Number 18-1247 Jose Antonio Jimenez vs State of Florida." Under the word "Title," the email had the word "Response." Under the word "File," the email showed that attached electronic file was named: "FSC Opp stayScottupdate.pdf." Mr. Jimenez's counsel was

initially very confused by this email showing a filing in Case No. SC18-1247, which was the case number of the appeal that Mr. Jimenez filed on August 1, 2018. This Court in its October 4, 2018, opinion denied Mr. Jimenez's appeal in Case No. SC18-1247. This Court had the mandate issue immediately, thereby closing the case. When counsel opened the attachment, he saw that its caption showed that the pleading was meant to be filed in Case No. SC18-1247, and it listed Mr. Jimenez as the "Appellant" and the State of Florida as the "Appellee." However, the Court's case number for Mr. Jimenez's habeas petition is Case No. SC18-1999, with him shown as the "Petitioner" and Julie L. Jones as the "Respondent." But, the content of the body of the pleading itself referenced Mr. Jimenez's motion for stay that had been filed in connection with his habeas petition that concerned the applicability of Amendment 11.This suggested that the counsel for Respondent had filed the pleading in the wrong case, although why the electronic file was named "FSC Opp stayScottupdate.pdf is baffling.[1] In any event, the fact that pleading was filed in the wrong case is not the basis of this motion.

2. There are two reasons for this motion to strike. First, the State misrepresents Florida law regarding when this Court has discretion to enter a stay of execution when it states:

> A stay of execution is equitable relief and Jimenez has not come close to meeting his burden of establishing his entitlement to such relief. Both this Court and the United States Supreme Court have held that a defendant must show that he has presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay. *See Buenoano v. State*, 708 So. 2d 941, 953 (Fla. 1998);

[1]Later, Mr. Jimenez's counsel noticed that the Court's online docket did not reflect the pleading's filing in Case No. SC18-1247, even though the email serving counsel clearly indicated the pleading was to be filed in that case. Instead, it is listed as a filing in Case No. SC18-1999. Mr. Jimenez's counsel does not dispute that is the case in which opposing counsel meant to file the pleading. Mistakes are made when litigation is conducted under the exigencies of a death warrant. Counsel simply hopes that this Court is as understanding when he makes similar mistakes in the course of under warrant litigation.

> *Delo v. Stokes*, 495 U.S. 320, 321 (1990); *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983); *Bowersox v. Williams*, 517 U.S. 345 (1996).

The State makes reference to the United States Supreme Court rulings in *Delo v. Stokes*, *Barefoot v. Estelle*, and *Bowersox v. Williams*. Those cases address federal law, not federal constitutional law, just federal law regarding the entry of a stay of execution in a federal habeas proceeding which is governed by 28 U.S.C. § 2254.[2] The federal law regarding stays of execution within the statutory limits on a federal court's jurisdiction to consider a § 2254 petition is no more relevant than California law regarding when a court has the discretion to enter a stay of execution. In addition to citing case law that does not govern Mr. Jimenez's motion for a stay, the State misrepresents the federal law. The governing federal standard for the entry of a stay of execution was set forth in *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) ("If the district court cannot dismiss the petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot.").[3] The State's citation to

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[2]For example, *Barefoot v. Sanders*, 463 U.S. at 892, made specific reference to the statutory limits on a federal court's jurisdiction in § 2254 proceedings: "Congress established the requirement that a prisoner obtain a certificate of probable cause to appeal in order to prevent frivolous appeals from delaying the States' ability to impose sentences, including death sentences."

[3]In *Arthur v. Haley*, 248 F.3d 1302, 1302-03 (11th Cir. 2001), the Eleventh Circuit denied a motion to vacate a stay entered by the district court. In denying the State's motion to vacate, the Eleventh Circuit stated:

> The grounds on which the stay was granted include a threshold jurisdictional question under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the resolution of which may require an evidentiary hearing. See Dist. Ct. Order at 15 ("[T]here may be ... claims that carry the potential to invoke equitable tolling. Without proper briefing, perhaps a hearing, and sufficient opportunity to contemplate the various claims and their implications vis-a-vis the limitations period, the court cannot permit the execution to go forward."). **Under these circumstances, we do not find that the district court has abused its discretion**.

the irrelevant federal decisions and the State's erroneous representation of federal law should be ordered stricken from the State's Response to Application for Stay of Execution.

3. The State also falsely represents that *Buenoano v. State* held that "a defendant must show that he presented substantial grounds for relief from his conviction and sentence in order to be entitled to a stay."[4] In *Buenoano*, this Court set out the context in which the issue of a stay arose: "Finally, we address Buenoano's claim that the trial court erred in refusing to grant a stay while she litigated her chapter 119 public records requests made to various state agencies." 708 So. 2d at 952. Buenoano was seeking a stay of her execution so she could seek access to public records. In this context, all that this Court said in *Buenoano* regarding a stay of execution is the following sentence: "Buenoano's eleventh-hour public records requests and resulting litigation are insufficient to justify a stay of execution, particularly where she has not alleged that the requests will produce newly discovered evidence." 708 So. 2d at 953. The State's misrepresentation of what *Buenoano* held should also be stricken from the State's Response to Application for Stay of Execution.

4. The State's pleading ignores and does not address the law that Mr. Jimenez set out in his motion for a stay of execution. *See Correll v. State*, Case No. SC15-147, Order Issuing Stay of Execution (February 17, 2015) (a stay of execution issued when the capital defendant facing execution presented a claim with a significant possibility of relief.). It also did not address this Court's entry of a stay of execution in *Tompkins v. State*, SC08-992 (Oct. 6, 2008) (a stay was entered so that this Court would be able "conduct meaningful review" of the issues then

[4]Not acknowledged by the State is that this Court has granted stays of execution on issues that cannot result in relief from the judgment and sentence, but concern the method of execution.

pending before it). The State also does not acknowledge Fla. Stat. § 922.06 ("The execution of a death sentence may be stayed only by the Governor or incident to an appeal.").

5. Mr. Jimenez also seeks to strike the State's Response to Application for Stay of Execution because in it, the State makes an argument that it did not raise in its response to the habeas petition. The State has now made the additional argument that "Amendment 11 ... is not self-executing." Response at 2.

6. Mr. Jimenez wrote in his habeas petition the following:

> Finally, this Court has held that:
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> > The will of the people is paramount in determining whether a constitutional provision is self-executing and **the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.**
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> *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960) (emphasis added). Under *Gray v. Bryant*, Amendment 11 and the changes made to the Savings Clause must be self-executing. Changes in criminal statutes which would operate for those whose crimes were committed before the favorable changes in criminal statutes were enacted should immediately be able to rely upon the will of the people as reflected in their approval of Amendment 11 to obtain the benefit of an already enacted statutory change. To require the legislature to go through statutory changes and pick and chose which ones, if any, warrant retrospective application would clearly grant the legislature the power to nullify the will of the people when Amendment 11 was approved.

Petition at 41-42 (emphasis in original). In the response that the State filed on December 7, it did not reference *Gray v. Bryant*, the language quoted from that decision, the presumption that a constitutional amendment is intended to be self-operating, or Mr. Jimenez's statement that *Gray* meant that Amendment 11 "must be self-executing." The State also did not address Mr.

Jimenez's argument that *Gray* held that a constitutional amendment cannot be read to grant the legislature the power "to nullify the will of the people." Because the State did not address *Gray* in its response to the habeas petition or assert that Amendment 11 "is not self-executing" as it did in its response to the motion for a stay of execution, Mr. Jimenez did not address the matter in his December 10 reply.

7. Had the State made an argument in its response that it was contesting whether Amendment 11 was self-executing, Mr. Jimenez would have been able to cite additional law. *See e.g. Browning v. Florida Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1064 (Fla. 2010) ("constitutional provisions are presumed self-executing to prevent the Legislature from nullifying the will of the people as expressed in their Constitution."); *Notami Hosp. of Florida, Inc. v. Bowen*, 927 So. 2d 139, 144 (Fla. 1st DCA 2006) ("Constitutional provisions are presumed to be self-executing.").[5] Mr. Jimenez would have pointed out that the State has not explained how it overcomes the presumption that Amendment 11 is self-executing.

8. Accordingly, Mr. Jimenez moves this Court to strike the State's shoe horning into its response to the motion for stay, an argument that it did not make in its response. Alternatively, this Court should allow Mr. Jimenez to amend his December 10 reply to include an argument addressing the State's contention which was made without citation to any citations to any legal authority of any kind.

9. The State in its response to the motion for stay argues that Amendment 11 will

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[5]"The Constitution is the charter of our liberties. It cannot be changed, modified or amended by [governmental] fiat. It provides within itself the only method for its amendment," *Thomas v. State ex rel. Cobb*, 58 So.2d 173, 174 (Fla.1952).

have no effect on the retrospective application of the revised § 921.141. In doing so, it ignores the fact that in *Boyd v. State*, counsel for the State filed a reply to a response to an order to show cause in which the Savings Clause was cited as the reason why the revised § 921.141 could not apply to Boyd's case arising from a 1999 homicide. *See Boyd v. State*, Case No. SC18-1589, Reply to response at 3 ("The fact that a new sentencing statute is enacted does not require resentencing on cases final on appeal See Article X, section 9 of the Florida Constitution."), Reply to response at 15 ("The new statute does not apply to Boyd. See Article X, section 9, Florida Constitution.").[6] The position taken by the Assistant Attorney General in Mr. Boyd's case is inconsistent with the position taken by the Assistant Attorney General in Mr. Jimenez's case. The position set out by the State in *Boyd* is correct and shows why the approval of Amendment 11 gives rise to Mr. Jimenez's claim. The fact that two assistant attorneys general have taken diametrically opposite positions as to the relevance of the Savings Clause to the retrospective application of the revised § 921.141 demonstrates that the issue is a significant and a stay should issue so that the matter can be fully and meaningfully reviewed. Though Mr. Jimenez did make reference to the *Boyd* briefing, the State's refusal to acknowledge it while making arguments that conflict with those made by counsel for the State in *Boyd* should be a basis for allowing Mr.

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[6]The State's reliance on the Savings Clause is not only significant in light of the effect of Amendment 11, but it is also odd in the context of the circumstances of *Boyd v. State* which arise from a 1999 homicide. In *Hurst v. State*, the homicide occurred May 2, 1998. So under the Savings Clause the governing law as to Tim Hurst's prosecution and punishment was the version of § 921.141 in effect on May 2, 1998. And of course, it was that version of the statute that was construed by this Court in *Hurst v. State*, and thus this Court's construction of § 921.141 in *Hurst v. State* would have to mean under the Savings Clause that on May 2, 1998, § 921.141 contained statutorily identified facts that were so like elements that the right to a unanimous jury find all of the elements established before a conviction of the offense could be entered also applied to those facts. Surely if that is what § 921.141 provided on May 2, 1998, it provided the same thing in 1999 at the time of the murder at issue in *Boyd v. State*.

Jimenez to supplement his motion for stay.[7]

10. Finally, the State's assertion that a stay of execution should be denied because "Amendment 11 is not currently law" is itself a compelling reason why a stay of execution must be granted under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This argument implies that in case Mr Jimenez is right as to the approval of Amendment 11 as reflecting the will of the people that the revised § 921.141 should be applied retrospectively and give him the same benefit that James Card and Paul Johnson have received, proceedings at which the State will have to proven the statutorily identified facts beyond a reasonable doubt to the satisfaction of a unanimous jury before a death sentence is an authorized punishment. The State's argument that Mr. Jimenez should be executed now before Amendment 11 is officially the law and before he benefits from it, is morally repugnant. Is that why on November 15 after Amendment 11 was approved Attorney General Bondi advised the Governor that this Court had lifted Mr. Jimenez's stay? So the State of Florida could hurry up and execute him before January 8, 2019.

11. The State's argument that "Amendment 11 is not currently law" so the motion for a stay should be denied is tantamount to saying, "Let's hurry up and execute him before we might not be able to." The State's argument violates concepts of fundamental fairness. It is a call to the unequal application of the law, i.e. while every other death row inmate may benefit from Amendment 11, at least if we execute Mr. Jimenez, he won't see any benefit from Amendment

[7]The State also ignores the fact that the interpretation of Amendment 11 has ramifications beyond death row. More people than Mr. Jimenez, and other death row inmates have an interest in how Amendment 11 is construed, and they should be given an opportunity to be heard before, in a rush to execute Mr. Jimenez, the will of the people in approving Amendment 11 is decided. Surely, this is an important issue not to be decided under the exigencies of a death warrant.

11, or the will of the people when approving it. It is also a violation of the Eighth Amendment and the bar on the arbitrary or capricious infliction of death sentences.

12. The State's argument in this regard is actually a compelling reason for why a stay of execution is warranted.[8] Stay the execution, so the State's argument about the effective date, which was not on the ballot summary, is off the table. If the will of the people in approving Amendment 11 was to make statutory revisions in the criminal law retrospective, then the people meant for the revised § 921.141 to apply to Mr. Jimenez and his death sentence.

13. And because the State insists on falsely claiming that Mr. Jimenez has or is arguing that Amendment 11 requires that he receive a life sentence, Mr. Jimenez wishes to make clear: that is not his argument no matter how many times the State repeats its falsehood. Mr. Jimenez seeks what James Card and Paul Johnson will be receiving as a result of the § 921.141, a proceeding at which the State will have to prove those facts identified in *Perry v. State* beyond a reasonable doubt to the satisfaction of a unanimous jury.

WHEREFORE, Mr. Jimenez respectfully requests that this Court strike the portions of the State's Response to Application for Stay of Execution identified herein and/or allow him to supplement his reply to the response to his habeas petition and supplement his motion for a stay for the reason stated herein.

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[8]The basis for Mr. Jimenez's motion for stay is certainly more compelling than the one that got Marshall Gore's execution date vacated and re-scheduled for a date three weeks later. The execution was put off because the September 10, 2013 execution date that Governor had set was when Attorney General Bondi had a campaign event scheduled. Pursuant to her request, the Governor vacated the September 10 execution date and rescheduled the Gore's execution for October 1, 2013.

Respectfully submitted,

/s/ Martin J. McClain
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the motion has been furnished by electronic mail to Lisa-Marie Lerner, Assistant Attorney General, on this 12th day of December, 2018.

/s/ Martin J. McClain
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