IN THE SUPREME COURT OF FLORIDA

GUERRY W. HERTZ, *Petitioner,* *v.* STATE OF FLORIDA, *Respondent.*	No. SC23-885

MOTION TO DISMISS THE PETITION

On June 18, 2023, Guerry Hertz petitioned this Court for a writ of prohibition, arguing that Florida's recently amended death penalty statute, SB 450, should not apply in his pending case. Namely, he contests the law's authorization of the death penalty if at least eight jurors recommend death, principally on the theory that the law is being impermissibly "retroactively" applied to him—even though his resentencing has not yet commenced, making the new law *prospective* here. But the Court need not reach the merits of the petition. Instead, the petition should be dismissed because the petition raises issues best addressed in a post-trial direct appeal.

ARGUMENT

A. "In the normal course of proceedings, Florida law authorizes interlocutory appeals from only a few types of nonfinal orders." *State*

v. Garcia, 350 So. 3d 322, 325 (Fla. 2022) (quoting *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1098 & n.2 (Fla. 1987)). "Otherwise, appellate review is generally 'postponed until the matter is concluded in the trial court' and addressed in a final order." *Id.* (quoting *Savage*, 509 So. 2d at 1098). Consistent with that general principle, "a defendant in a criminal case does not have the right to an interlocutory appeal." *Lopez v. State*, 638 So. 2d 931, 932 (Fla. 1994). He instead "always has the right of appeal from a conviction in which he can attack any [allegedly] erroneous interlocutory orders," *State v. Pettis*, 520 So. 2d 250, 253 n.2 (Fla. 1988), reducing the need to allow defendants to seek piecemeal relief before trial.

Here, Hertz nominally seeks a writ of prohibition. Am'd Pet. 1. He ignores, however, that "[p]rohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction." *English v. McCrary*, 348 So. 3d 293, 296 (Fla. 1977). Hertz does not suggest that the trial court lacks jurisdiction; only that it erred in ruling that the amended death penalty law applies to him. Prohibition is thus out of the question.

Nor can the Court treat his petition as a request for certiorari. In *State v. Garcia*, this Court quashed the grant of a writ of certiorari

sought pretrial by a criminal defendant. 350 So. 3d at 327. In the trial court, the State moved to compel Garcia's passcode to facilitate a search of his encrypted smartphone, which the trial court granted. *Id*. at 324. Garcia then petitioned for a writ of certiorari in the Fifth District, seeking review of the trial court's order to compel. The district court granted the petition.

This Court held that the Fifth District did not have jurisdiction because there was no harm to Garcia that could not be corrected in a post-trial appeal. *Id*. at 323. A writ of certiorari, it observed, is "an extraordinary remedy." *Id*. at 325 (citing *Savage*, 509 So. 2d at 1098). To obtain such a writ, the petitioner must demonstrate that the non-final order was (1) a departure from the essential requirements of the law (2) resulting in material injury (3) that cannot be corrected on post-judgment appeal *Id*. (quoting *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters.*, 99 So. 3d 450, 454 (Fla. 2012)). The issues of "material injury" and "adequate remedy on appeal" are related, referring to the combined inquiry of whether the petitioner would suffer "irreparable harm." *Id*. (citing *Citizens Prop. Ins. Corp. v. San Perdido Ass'n*, 104 So. 3d 344, 351 (Fla. 2012)). This irreparable harm element is jurisdictional. *Id*. (citing *Williams v. Oken*, 62 So. 3d

1129, 1133 (Fla. 2011)).

Applying that standard, the Court concluded that Garcia had an adequate remedy for any material injuries in a post-judgment appeal of a final order: upon entry of a conviction and sentence, he could simply appeal and challenge the interlocutory order compelling him to turn over his passcode. *Id.* at 326 (citing *Pettis*, 520 So. 2d at 253 n.2). Consequently, "the district court had no jurisdiction to issue a writ of certiorari." *Id.* at 326.

As in *Garcia*, this Court lacks jurisdiction to issue a writ of certiorari here because Hertz has an adequate remedy in a post-trial appeal.

Mandamus and all-writs relief are similarly unavailable. Unlike in *Allen v. Butterworth*, 756 So. 2d 52, 54–55 (Fla. 2000), and *Abdool v. Bondi*, 141 So. 3d 529, 537 (Fla. 2014), the bulk of Hertz's challenge to the new 8-4 death penalty law does not allege that any portion of the law is facially unconstitutional. Hertz instead argues that the law is being impermissibly applied to him in retroactive fashion. *See* Am'd Pet. 8–17 (raising various statutory and constitutional reasons that the law cannot be "retroactively" applied here). The only facial challenge he raises is a single paragraph asserting that the

Sixth Amendment entitles him to a unanimous jury recommendation of death. *Id.* at 18. But that claim is inadequately pled and can be summarily dismissed for that reason alone. *See, e.g.*, *Sexton v. State*, 997 So. 2d 1073, 1086 (Fla. 2008) ("conclusory argument is insufficient to preserve [a] claim"). Either way, the claim is unripe because Hertz has not been sentenced to death based on a non-unanimous recommendation of death. This case therefore presents no facial challenge that might implicate the reasoning that led the Court in *Allen* and *Abdool* to consider a pretrial attack on Florida's death penalty statutes.

In any event, *Abdool* and *Allen*—to the extent they remain good law—are distinguishable given their unusual circumstances. *Allen* involved an innovative dual-track system combining direct appeals with postconviction appeals that was a far-reaching change to Florida's capital sentencing scheme. 756 So. 2d at 55–57 (discussing sweeping changes embodied in the Death Penalty Reform Act of 2000). *Abdool* involved the constitutionality of certain provisions of the Timely Justice Act of 2013. 141 So. 3d at 536-37 (describing the provisions of ch. 2013-216, § 13, Laws of Fla.). The systemic nature of those laws posed, in the Court's estimation, the "potential[] [to]

negatively impact [its] ability to ensure that the death penalty is administered in a fair, consistent, and reliable manner." *Id.* at 537; *see also Allen*, 756 So. 2d at 55 (noting concern that "the functions of government will be adversely affected without an immediate determination"). In contrast, this petition raises issues regarding a discrete procedural amendment to the existing death penalty statute.

B. At a minimum, the Court should exercise its discretion to dismiss or deny the petition. "[T]he granting of [an extraordinary] writ lies within the discretion of the court," *Warren v. DeSantis*, No. SC2023-247, 2023 WL 4111632, at *4 (Fla. June 22, 2023), and nothing about this case calls out for immediate resolution. Indeed, the merits issues Hertz seeks to raise now are straightforward; if raised on direct appeal, they will invariably require affirmance. *See, e.g.*, *Dobbert v. Florida*, 432 U.S. 282 (1977); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Love v. State*, 286 So. 3d 177 (Fla. 2019). This case, after all, involves no retroactive application of a new law: Hertz's penalty-phase proceeding were not set to commence until *after* the new law's enactment. *See Love*, 286 So. 3d at 188–89 (explaining that "the mere application of a new procedural statute . . . in a pending case is not a retroactive application," and holding that

an amendment to Florida's Stand Your Ground law was prospectively applied to immunity hearings conducted after the amendment's effective date).[1] Waiting to entertain those arguments in the ordinary course of a direct appeal thus does not risk frustrating the effective administration of the death penalty in Florida. *Contra Abdool*, 141 So. 3d at 537.

In sum, the petition should be dismissed for lack of jurisdiction or within the Court's discretion.[2]

CONCLUSION

The Court should dismiss the petition.

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[1] Hertz's unanimous-jury claim is also baseless. *See State v. Poole*, 297 So. 3d 487, 504 (Fla. 2020) (holding that jury need not unanimously recommend a sentence of death because the recommendation is not a "fact"); *McKinney v. Arizona*, 140 S. Ct. 702, 707–08 (2020) (holding that a jury is not constitutionally required to weigh aggravating and mitigating circumstances—meaning that weighing, like the ultimate death recommendation, is not an element—and explaining that *Hurst v. Florida*, 577 U.S. 92 (2016) merely required that the jury find the fact of an aggravating circumstance). Should the Court deny this motion, the State will elaborate on these arguments in its merits response.

[2] In response to Hertz's motion for a stay of the trial court proceedings, the State initially declined to object to a stay. *See* St.'s Resp. to Mot. to Stay, *Hertz v. State*, SC23-885, at * 1–2 (filed June 19, 2023). On reflection, a stay is unwarranted because this case is an improper vehicle to resolve the merits of Hertz's claims.

Dated: June 29, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion has been furnished by e-portal to Zachary M. Ward, 247 East Seventh Avenue, Tallahassee, FL 32301; Phone: (850) 222-1000; email: zack@cowheyward.comthis **29th** day of June, 2023.

/s/ Jeffrey Paul DeSousa
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