SC23-1151

In the Supreme Court of Florida

COREY SMITH,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Prohibition or Certiorari
to the Circuit Court for the Eleventh Judicial Circuit
L.T. No. 2000-CF-40026-A

RESPONSE TO THE PETITION

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INTRODUCTION & SUMMARY OF ARGUMENT

In 2023, the Legislature enacted Senate Bill 450. That law provides that before the death penalty may be imposed in a capital murder case, the penalty-phase jury must recommend death by a vote of at least 8-4. SB 450 amends an earlier statute that went well beyond what the Constitution demands by requiring that death be imposed only upon a 12-0 jury recommendation.[1]

In this extraordinary writ proceeding, Petitioner Corey Smith urges the Court to intervene before his penalty phase to prevent the trial court from applying SB 450 to his case. His claims lack merit.

To start, Smith asserts that the *res judicata* and law-of-the-case doctrines require that the trial court apply the outmoded 12-0. As he sees it, this Court's 2017 mandate reversing Smith's original death sentence and remanding for resentencing speaks to what law applies at the new penalty phase. Smith ignores that an intervening change in law has long been an exception to those preclusion doctrines, and

[1] Critically, SB 450 preserves the Sixth Amendment requirement that the jury unanimously find the existence of an aggravating factor beyond a reasonable doubt.

SB 450 is such a change. This Court made that abundantly clear in *State v. Owen*, where it held that compliance with its earlier mandate reversing for a new trial meant conducting a new trial at which *current law* would control, not the law in effect when the Court issued the mandate. 696 So. 2d 715, 720 (Fla. 1997).

Smith's equal protection theories fare no better. He argues that applying SB 450 would deprive him of equal protection because other *Hurst* defendants were resentenced under the 12-0 law. But in *Dobbert v. Florida*, the Supreme Court rejected a nearly identical theory. 432 U.S. 282, 301 (1977). "Florida," the Court wrote, "obviously had to draw the line at some point" between those defendants subject to the old and new regimes. *Id.*

As for Smith's unfounded allegation that the Legislature was motivated by racial animus when enacting SB 450, he has not come close to overcoming the presumption of legislative good faith. Not one piece of evidence links the passage of this law to intentional discrimination against black jurors; instead, the law is most rationally understood to make Florida's death-recommendation requirement more representative of the views of the community. That *other* States, 100

or more years ago, enacted non-unanimity laws out of a desire to disenfranchise black jurors is irrelevant. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (noting that, even when it comes to the *same* State, "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful").

Finally, it is not cruel and unusual punishment to apply SB 450 to *Hurst* defendants resentenced after its enactment. *Cf. Dobbert*, 432 U.S. at 301. Again, Florida "had to draw the line somewhere." *Id.* And Florida's death-penalty statute contains numerous protections that narrow the class of offenders eligible for capital punishment and limit arbitrariness, with a similar scheme being upheld decades ago. *Spaziano v. Florida*, 468 U.S. 447, 457–65 (1984), *overruled on other grounds*, *Hurst v. Florida*, 577 U.S. 92 (2016).

In short, Smith has not shown legal error, let alone a departure from the essential requirements of law.

All that said, these straightforward answers must await another day, because the Court lacks jurisdiction. A criminal defendant has no right to interlocutory appeal, and this is not one of the rare instances when a defendant may seek an extraordinary writ. Writs of

prohibition require trial-court action in excess of jurisdiction, which has not been alleged here; certiorari is not a writ this Court is empowered to issue; and certiorari and mandamus both require the absence of other adequate remedies, also not alleged here. As for all-writs jurisdiction, it is available only where this Court's early intervention is necessary to preserve the Court's ultimate jurisdiction. But unlike where a pretrial ruling adverse to *the State* threatens to result in a life sentence (or an acquittal) over which this Court would later lack jurisdiction—causing irreparable injury—the Court's eventual jurisdiction to decide the claims Smith raises after a criminal trial is not in jeopardy here.

The petition must therefore be dismissed. If the Court reaches the merits, it should deny all forms of relief.

STATEMENT OF THE CASE AND FACTS

1. In December 2000, Corey Smith and seven other individuals were indicted by a Miami–Dade County grand jury in a seventeen-count indictment for crimes committed in connection with the John Doe organization, a drug gang. *Smith v. State*, 7 So. 3d 473, 479 (Fla. 2009). Smith was the leader of the group and named in fourteen

counts of the indictment, including conspiracy to engage in a criminal enterprise, engaging in a criminal enterprise, conspiracy to traffic in marijuana, conspiracy to traffic in cocaine, five counts of first-degree murder for the deaths of Leon Hadley, Cynthia Brown, Jackie Pope, Angel Wilson, and Melvin Lipscomb, four counts of conspiracy to commit murder, and second-degree murder for the death of Marlon Beneby. *Id.*

Smith either personally assassinated or ordered the assassination of each of those victims. *Id.* at 482–89. Some he had killed because they were rival gang members; some because they had "snitched" on the John Does; and others simply because they "disrespected" the gang. *Id.*

Smith's trial took place in October 2005, with jury selection and the guilt phase lasting over thirty days. *Id.* Smith was convicted of the first-degree murders of Hadley, Pope, Brown, and Wilson; four counts of conspiracy to commit murder, two counts of manslaughter, RICO conspiracy, racketeering, and conspiracy to traffic cocaine and cannabis. *Id.* at 489–90.

Florida law at the time of both the homicides and the trial

required that a capital jury issue an "advisory sentence" of life or death. § 921.141(2), Fla. Stat. (1996). Under that scheme, a majority of jurors expressed to the trial court a recommendation of either life imprisonment or death. *Id.* The jury was told to base that recommendation on its finding of an aggravating factor, its views on the sufficiency of the aggravating factors to warrant death, its views on the relative weight of the aggravating factors and any mitigating circumstances, and whether death was ultimately the appropriate penalty. *Id.* § 921.141(2)(a)–(c). But the ultimate decision of which sentence to impose lay with the trial court: "Notwithstanding the recommendation of a majority of the jury," the trial court retained the authority to impose a sentence either of life or death. *Id.* § 921.141(3). In other words, the trial court could override a jury's life recommendation and impose death, or reject a death recommendation and impose life.

The jury recommended life sentences for the murders of Hadley and Pope and death sentences for the murder of Brown by a vote of 10 to two and the murder of Wilson by a vote of nine to three. *Smith*, 7 So. 3d at 490. The court followed the jury's recommendations, imposing life sentences for the murders of Hadley and Pope and death

sentences for the murders of Brown and Wilson. *Id.* This Court affirmed the convictions and death sentences. *Id.* at 511.

2. In 2017, this Court ordered resentencing based on *Hurst v. Florida*, 577 U.S. 92 (2016) (*Hurst I*), which held that the Sixth and Fourteenth Amendments require that, before the death penalty may be imposed, a jury must find the fact of an aggravating factor beyond a reasonable doubt, not simply issue an advisory recommendation. *See Smith v. State,* 213 So. 3d 722, 744 (Fla. 2017).

In the wake of *Hurst I* and this Court's decision construing it in *Hurst II*, *see Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*) (expanding *Hurst I*'s holding by requiring that the jury unanimously find not only an aggravator but also that the aggravators outweigh any mitigators and that death is the appropriate sentence), the Legislature amended Florida's death-penalty statute, Section 921.141. In conformity with *Hurst II*, the Legislature required that, before the trial court may impose the death penalty, a jury must unanimously find: (1) the existence of an aggravating factor, (2) that the aggravating factors are sufficient to warrant death and that they outweigh any mitigating factors, and (3) that death is the appropriate sentence. *See* Ch.

2016-13, § 3, Laws of Fla. (effective Mar. 7, 2016); Ch. 2017-1, § 1, Laws of Fla. (effective Mar. 13, 2017); *see also* § 921.141(2)–(3), Fla. Stat. (2017). If any of those findings were not made, the defendant was to receive life in prison. This Court later overruled *Hurst II*. *See State v. Poole*, 297 So. 3d 487 (Fla. 2020).

3. On April 20, 2023, prior to Smith's new penalty phase, which was scheduled to begin August 28, 2023,[2] the Governor signed into law Senate Bill 450, which again amended Florida's death-penalty statutes. Ch. 2023-23, § 1, Laws of Fla.; *see also* § 921.141, Fla. Stat. (2023). The amendments became effective immediately.

Under SB 450, the jury must still unanimously find the fact of an aggravating factor, as required by *Hurst I*, before the defendant is eligible for the death penalty. § 921.141(2)(a)–(b), Fla. Stat. (2023). But the jury's recommendation of death now need not be unanimous; it is enough that at least eight jurors vote to recommend death. *Id.* § 921.141(2)(b)2., (3). That recommendation shall be based on the

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[2] On August 18, 2023, Smith filed additional motions, among them a Motion to Continue Trial. After a hearing on August 21, 2023, those motions were set for hearing on September 6, 2023.

jury's weighing of whether sufficient aggravating factors exist, whether those aggravators outweigh any mitigating circumstances, and whether the defendant should be sentenced to life imprisonment or death. *Id.* § 921.141(2)(b)2.a–c. A jury recommendation of life binds the trial court. *Id.* § 921.141(3)(a)1. But if the jury recommends death, the trial court may impose either that sentence or a sentence of life. *Id.* § 921.141(3)(a)2.

4. On June 22, 2023, Smith filed several motions in the trial court alleging that SB 450 could not be constitutionally applied to him as an *ex post facto* law and that applying SB 450 violated state rules governing retroactivity. Pet. 67. After oral argument, the trial court rejected each of Smith's claims on August 4. Pet. 66–68.

Smith then went straight to this Court, petitioning for an extraordinary writ on August 16, 2023.

STANDARD OF REVIEW

To the extent the Court has jurisdiction, it reviews Smith's claims for a "departure from the essential requirements of the law." *State v. Durousseau*, No. SC20-297, 2020 WL 7693135, *1 (Fla. Dec. 28, 2020) (citing *Trepal v. State*, 754 So. 2d 702, 707 (Fla. 2000)). Such a departure occurs "only when there has been a violation of a

clearly established principle of law resulting in a miscarriage of justice." *State v. Garcia*, 350 So. 3d 322, 326 (Fla. 2022) (internal emphasis omitted).

ARGUMENT

I. The Court lacks jurisdiction over the petition.

The Court lacks jurisdiction. "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) (citing *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). Beyond that, a defendant may seek relief via an extraordinary writ in only the most exceptional circumstances.

Prohibition. Here, Smith seeks a writ of prohibition. Pet. 2–3.

But "[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). Smith 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.

Certiorari. Nor can the Court grant the request for certiorari. Pet. 3. Most basically, the Florida Constitution does not give this Court the power to issue writs of certiorari. *Allen v. McClamma*, 500 So. 2d 146, 147 (Fla. 1987) (treating a petition for prohibition and mandamus as a petition for certiorari and transferring it to another court because the Court lacks jurisdiction over petitions for certiorari); *State v. G.P.*, 429 So. 2d 786, 788–89 (Fla. 3d DCA 1983) (detailing the 1957 amendments limiting petitions for writ of certiorari to the district courts of appeal and limiting the Court's jurisdiction to other types of writs). It instead gives the Court the power to issue writs of prohibition, mandamus, and quo warranto, and all writs necessary to the exercise of its jurisdiction. Art. V, § 3(b)(7)–(8), Fla. Const.

Either way, Smith has not established irreparable harm as

required 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 alleged injury: 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*, Smith has an adequate remedy in a post-trial appeal: if sentenced to death on the strength of a non-unanimous jury recommendation, he can seek a new penalty phase.

Mandamus and all writs. Mandamus and all-writs relief are similarly unavailable. Pet. 2, 3, 9. In the past, this Court has sometimes exercised original-writ jurisdiction in cases challenging the facial constitutionality of a state statute, including in the death-penalty context. *See, e.g.*, *Allen v. Butterworth*, 756 So. 2d 52, 54–55 (Fla. 2000); *Abdool v. Bondi*, 141 So. 3d 529, 537 (Fla. 2014). That practice is dubious in the best of circumstances. Nothing in the Florida

Constitution or rules of appellate procedure dispenses with the generally accepted rule of appellate practice that "a defendant in a criminal case does not have the right to an interlocutory appeal." *Lopez*, 638 So. 2d at 932. It makes little sense that this rule ceases to apply simply because a capital defendant wishes to obtain early appellate review of the constitutionality of a statute.

The ordinary rules governing mandamus and all-writs petitions do not support the exercise of this sort of jurisdiction. To warrant mandamus, "the petitioner must have a clear legal right to the requested relief, the respondent must have an indisputable legal duty to perform the requested action, and the petitioner must have no other adequate remedy available." *Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000). As detailed above, a capital defendant always has another adequate remedy: direct appeal. Here, for instance, if Smith is sentenced to death based on a non-unanimous jury recommendation, he can appeal. *See Hastings v. Krischer*, 840 So. 2d 267, 271 (Fla. 3d DCA 2003) ("Clearly, mandamus is not available to remedy alleged errors in a criminal case where the avenues of direct appeal and motions for postconviction relief provide an adequate remedy.").

Even setting aside that jurisdictional hurdle, mandamus is unavailable because the "respondent" here—the State of Florida—has no "indisputable legal duty to perform" any requested action. This Court in mandamus actions has sometimes treated the *Secretary of State* as having a legal duty to "expun[ge] [] unconstitutional provisions in [a] General Appropriations Act." *Moreau v. Lewis*, 648 So. 2d 124, 126 (Fla. 1995). But for one thing, the Secretary has not been sued here. And for another, this line of cases falls prey to the "writ of erasure fallacy"—the notion that a court has the "authority to alter or annul a statute." Jonathan Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 933 (2018) (cited in *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1585–86 (2020) (Thomas, J., concurring)). In truth, the judicial power allows a court to "decline to enforce a statute in a particular case or controversy" or to "enjoin executive officials from taking steps to enforce a statute." *Id.* at 936. It does not give courts the power to "erase a duly enacted law from the statute books." *Id.*; *see also Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (explaining that courts "have no power per se to review and annul acts of [the legislature] on the ground that they are unconstitutional";

their power is of "ascertaining and declaring the law applicable to the controversy," which "amounts to little more than the negative power to disregard an unconstitutional enactment"). The power to "expun[ge]" a statute belongs to the Legislature through subsequent legislation. *See* Art. III, Fla. Const.

Allen and *Abdool* also cannot be justified as an exercise of the Court's all-writs authority. "[T]he doctrine of all writs is not an independent basis for jurisdiction"; rather, it is a "means of 'preserving jurisdiction that has already been invoked or protecting jurisdiction that likely will be invoked in the future.'" *League of Women Voters of Florida v. Data Targeting, Inc.*, 140 So. 3d 510, 513 (Fla. 2014) (emphasis omitted). For instance, when a party would be "irreparabl[y] harm[ed]" by a lower court order before this Court can otherwise exercise its review, all-writs jurisdiction allows the Court to intervene immediately to "preserve [its] ability to *completely* exercise eventual jurisdiction." *Id.* at 514 (emphasis added); *see also* Philip J. Padovano, *Florida Appellate Practice*, 2 Fla. Prac., Appellate Practice § 30:7 (2023 ed.). That limited doctrine does not justify pretrial appellate review of the constitutionality of a state statute where the matter will

otherwise arise in the ordinary course of an appeal, sufficient to remedy the defendant's alleged constitutional injury.

But even if *Allen* and *Abdool* remain good law, most of Smith's challenges to the new 8-4 death-penalty law do not allege that the law is facially unconstitutional: Smith instead argues that the law is being impermissibly applied to him in violation of preclusion principles, equal protection, and the Eighth Amendment. *See* Pet. 10–25. None of those theories implicate the Court's cases permitting pretrial challenges to state statutes in this Court.

Smith raises only one facial challenge to SB 450: the notion that the Legislature enacted it out of racial animus. Pet. 26–37. That is unsupported by any evidence and is unserious. Even then, the claim does not resemble the sorts this Court has considered pretrial in the extraordinary writ posture. *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 about a discrete procedural amendment to the existing death-penalty statute. Thus, even if this Court were willing to stretch its jurisdiction along the lines of *Allen* and *Abdool*, that reasoning would not apply here.

Smith also suggests (Pet. 8–9) that this Court's decision in *State v. Jackson*, 306 So. 3d 936, 939–40 (Fla. 2020), permits him to seek pretrial all-writs review in this Court simply because the death penalty is at stake. That is incorrect. *Jackson*, involving a petition by the State, was a proper exercise of all-writs jurisdiction because if the Court failed to intervene pretrial it might have lost the power to ultimately review the case, potentially allowing "irreparable harm" to the State. *Data Targeting*, 140 So. 3d at 514. There, a postconviction

court initially vacated the defendant's death sentence and ordered a new penalty phase under *Hurst v. State*, 202 So. 3d 40 (Fla. 2016) (*Hurst II*), which held that the Sixth and Eighth Amendments required a unanimous jury recommendation of death before capital punishment could be imposed. *Jackson*, 306 So. 3d at 938. The State did not appeal that order. *Id.* Later, this Court receded from that portion of *Hurst II* in *State v. Poole*, 297 So. 3d 487 (Fla. 2020). *Jackson*, 306 So. 3d at 938–39. Invoking that ruling, the State argued to the trial court in *Jackson* that no new penalty phase was required because the death sentence was valid all along, and asked the trial court to reinstate that sentence. *Id.* The trial court refused, explaining that the postconviction order vacating the death penalty and setting the case for resentencing was final. *Id.* at 939.

That ruling had the potential to deprive this Court of ultimate jurisdiction over the case, irreparably injuring the State. Indeed, if the new penalty phase resulted in a *life* sentence, no grant of appellate authority would allow the State to appeal. *See* § 924.07(1), Fla. Stat. (2020) (describing bases for state appeals in criminal cases). And even if there were such a grant of authority, the appeal would

not have been to *this* Court, since the case did not involve a "final judgment[] . . . imposing the death penalty." *See* Art. V, § 3(b)(1), Fla. Const.

The State therefore petitioned this Court for a writ quashing the trial court's order. In those narrow circumstances, the Court concluded that it possessed all-writs jurisdiction. "The use of the all writs provision," the Court wrote, "'is restricted to preserving jurisdiction that has already been invoked or protecting jurisdiction that likely will be invoked in the future.'" *Jackson*, 306 So. 3d at 940. That form of jurisdiction applied in *Jackson* as a means of "preserving [the Court's] jurisdiction under article V, section 3(b)(1) to decide an issue—one that is 'unique to capital cases or to the death sentence itself'—that is already before this Court on direct appeal [in another case] and that has resulted in at least one vacated death sentence being reinstated by a circuit court in the absence of a resentencing proceeding." *Id.* (internal citation omitted). In other words, the Court could decide the merits of the State's petition because the Court was already exercising jurisdiction over the same issue in the related direct appeal (proof that it was the sort of issue that fell within the

Court's purview) and because the Court's review of that issue in *Jackson* would be frustrated if it did not review the matter on an interlocutory basis. Though the Court was not explicit, it appeared to recognize that the trial court's order, if left unchecked, could have resulted in the imposition of a life sentence that this Court would lack the power to review—an irreparable harm to the State. All-writs jurisdiction therefore "operate[d] as an aid to the Court in exercising its 'ultimate jurisdiction.'" *Id.* at 939.

Jackson has nothing to say about a *defendant*'s request that this Court to weigh in, pretrial, on the constitutionality of Florida's death-penalty laws. In that instance, unlike when the State seeks a writ,[3] there is no need for immediate review to preserve the Court's

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[3] The circumstances here would be quite different if the State sought an extraordinary writ quashing a trial court order refusing to apply SB 450. Were that the case, the prospect of a life sentence following the penalty phase would threaten to deprive this Court of mandatory jurisdiction it would otherwise possess in the case by virtue of Article V, Section 3(b)(1). Indeed, in response to a small number of adverse rulings from the circuit courts, the State is currently seeking a similar form of relief in the Fifth and Sixth Districts. *See State v. Riley*, No. 6D23-3168 (State petition challenging a pretrial order refusing to apply SB 450); *State v. Victorino & Hunter*, No. 5D23-1569 (same). The circumstances are also different where a criminal defendant can articulate some irreparable harm that might result absent the Court's all-writs review, like when there is an

ultimate jurisdiction over a final judgment, because the defendant may urge reversal of the death sentence on direct appeal. If there is jurisdiction here, there must likewise be jurisdiction any time a defendant seeks to pause the trial proceedings to obtain this Court's views on death-penalty matters. But that is not Florida's system for appellate review in criminal cases.[4] And a contrary interpretation would flout the Florida Constitution's grant to this Court of limited appellate jurisdiction to review "*final judgments* . . . imposing the death penalty," Art. V, § 3(b)(1), Fla. Const. (emphasis added), not simply *any* death-penalty matter. The all-writs power permits the

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upcoming execution using a method of execution about which legitimate doubt exists. *See, e.g.*, *Lightbourne v. McCollum*, 969 So. 2d 326, 328 (Fla. 2007) (lethal-injection protocol); *Jones v. Butterworth*, 691 So. 2d 481, 481–82 (Fla. 1997) (electrocutions). To prevent the execution occurring in a cruel and unusual manner, an irreparable harm, this Court has reviewed those discrete matters under all-writs.

[4] On one occasion, the Court suggested that because it had previously exercised appellate jurisdiction over a defendant's sentence of death it could also issue all-writs relief well after the direct appeal, even though the defendant had by then been sentenced to life and the Court had no future capital jurisdiction in the case. *See Bedford v. State*, 633 So. 2d 13, 14 (Fla. 1994) (reviewing a decision of the Fourth District that did not meet the criteria for jurisdiction under Article V, Section 3(b)(3) and (4). That result cannot be squared with first principles, but in any event does not apply to this pretrial petition raising claims that can be addressed on direct appeal.

Court to preserve that jurisdiction in appropriate instances, but it is not a "separate source of original or appellate jurisdiction." *Jackson*, 306 So. 3d at 939–40.

The Court should dismiss the petition for lack of jurisdiction and order that the penalty phase commence.

II. On the merits, Smith's claims fail.

Smith seeks an extraordinary writ declaring SB 450 unconstitutional or otherwise inapplicable to him. But his claims are baseless, and in no event establish a departure from the essential requirements of law. If the Court reaches the merits, it should deny the petition.

A. Smith's law of the case and res judicata arguments fail because preclusion principles do not apply when there has been an intervening change in the law.

Smith leads by contending that both the "*res judicata*" and "law of the case" doctrines compel application of the 12-0 statute to his case. Pet. 10–18. To that end, he insists that this Court's 2017 "mandate . . . reversing Mr. Smith's death sentence" did not "simply require [that] he be afforded a vanilla 'new sentencing trial'"; rather, he says, the mandate required resentencing before a jury told that it must be unanimous before recommending death. Pet. 10–11.

Smith misapprehends the preclusion principles he invokes. The doctrine of res judicata states that "[a] judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action." *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 425 (Fla. 2013). By definition, res judicata does not bar the applicability of intervening legislative enactments, which could not have been litigated in the earlier suit. Instead, "[t]he cases are legion" holding that res judicata is silent when "there has been an intervening . . . change in the law between the first and second judgment." *Wagner v. Baron*, 64 So. 2d 267, 267–68 (Fla. 1953). The same is true of the law-of-the-case doctrine, which is subject to an exception for "an intervening change of controlling law." *Thompson v. State*, 341 So. 3d 303, 306 (Fla. 2022); *see also Nixon v. State*, 327 So. 3d 780, 783 (Fla. 2021) ("One 'generally accepted occasion for disturbing settled decisions in a case [is] when there has been an intervening change in the law

underlying the decision.'").

The final judgment on which Smith relies—this Court's 2017 opinion and mandate granting him resentencing—is thus preclusive on only one proposition: that Smith's original penalty phase violated the *Hurst* cases, entitling him to a new one. *Smith v. State*, 213 So. 3d 722, 744, 747 (Fla. 2017). Smith is receiving that new penalty phase now. But that judgment does not resolve what law should apply at the new penalty phase,[5] since the parties did not litigate that issue. Nor could they have, as SB 450 was enacted several years later.

The lone authority Smith cites (Pet. 11) for the idea that the mandate precludes application of SB 450 is *State v. Okafor*, 306 So. 3d 930 (Fla. 2020). The question there was whether a resentencing court could reinstate a previously vacated death sentence after this Court's mandate vacating that sentence had become final. The

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[5] By its terms, the Court's opinion reversing and remanding for a new penalty phase does not specify which law should apply at the new penalty phase. It says only: "Accordingly, Smith is entitled to a new penalty phase" and "[w]e vacate Smith's death sentence as unconstitutional under *Hurst* and remand to the trial court for a new penalty phase." *Smith*, 213 So. 3d at 744, 747.

answer was no. But *Okafor* did not consider whether a death-penalty law enacted in the interregnum between the grant of resentencing and the resentencing would have no force in the case. To the contrary, the Court clarified that the case "[wa]s not about the legal standards to be applied in Okafor's resentencing, but about whether there should be a resentencing at all." *Id.* at 934 n.3.

The applicable precedent is *State v. Owen*. 696 So. 2d 715 (Fla. 1997). Like Smith, Duane Owen was originally convicted of first-degree murder and sentenced to death. *Id.* at 717. On direct appeal, this Court reversed and remanded for a new guilt phase, concluding that Owen's confession was improperly admitted under *Miranda* because Owen's statements to police were an unequivocal invocation of his right to remain silent. *Id.* After that decision, the Supreme Court issued an opinion that vitiated the rule this Court applied to Owen's case; it thereafter was clear that Owen's statements had not required police to cut off questioning. *Id.* Yet, on remand, the trial court announced that it would not allow prosecutors to introduce the confession. *Id.*

In this Court, the State argued that the law-of-the-case doctrine

did not command that Owen's confession be excluded. *Id.* at 720. The Court agreed. *Id.* As it explained, "[a]n intervening decision by a higher court"—*i.e.*, a change in law—"is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case." *Id.* While this Court was unwilling to reinstate Owen's prior conviction and sentence of death (the same result as in *Okafor*), it instructed that current law should govern at Owen's retrial: "Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried. Just as it would be in the case of any other defendant, the admissibility of Owen's confession in his new trial will be subject to the [current law]." *Id.*

Smith fails even to cite *Owen*, let alone explain why it is not controlling here. SB 450 is not barred by preclusion principles.

B. SB 450 does not deprive Smith of equal protection.

Smith next alleges that SB 450 violates the Equal Protection Clause of the Fourteenth Amendment in not one but two ways. First, he says, applying SB 450 to him would draw an impermissible distinction between *Hurst* defendants sentenced before and after April 2023. Precedent rejects that theory. Second, Smith accuses the

Legislature of adopting SB 450 out of animus towards black jurors—a claim for which he lacks a shred of evidence.

1. Applying SB 450 here would not impermissibly distinguish between *Hurst* defendants.

Smith's first equal protection argument is barred by precedent. He contends that because 71 *Hurst* defendants have already been resentenced to life under the 12-0 law in effect between 2017 and 2023, applying SB 450 to him now would impermissibly "create[] a sub-classification" of *Hurst* defendants "denied the benefit of *Hurst* [*II*]." Pet. 20. That is, he deems it "arbitrary" to resentence some *Hurst* defendants under a 12-0 scheme and others under an 8-4 scheme. *Id.*

Because *Hurst* defendants are not a protected class, at most rational basis review applies. *Cf. United States v. Ayala-Bello*, 995 F.3d 710, 714 (9th Cir. 2021). Florida plainly has a rational basis for treating pre- and post-2023 *Hurst* defendants differently. As courts have explained in similar contexts, "Florida obviously had to draw the line at some point." *Lambrix v. Sec'y, DOC*, 872 F.3d 1170, 1183 (11th Cir. 2017) (quoting *Dobbert v. Florida*, 432 U.S. 282, 301 (1977)). And the Legislature has concluded that SB 450 reflects better

policy than the 2017 version of Section 921.141, which was adopted only because *Hurst II* at the time required it.

The Supreme Court's decision in *Dobbert* controls. In *Furman v. Georgia*, the Supreme Court paused application of the death penalty nationwide because it concluded that the States' death-penalty schemes were flawed. 408 U.S. 238 (1972). To rectify the problem, Florida enacted a new, more detailed death-penalty statute, which, coupled with a decision of this Court, divided those who had committed murders before *Furman* into two categories. *Dobbert*, 432 U.S. at 288. One category consisted of those who had already been convicted and sentenced to death by the time of *Furman*. *Id.* at 301. This Court commuted their sentences to life. *Id.* (citing *Anderson v. State*, 267 So. 2d 8 (Fla. 1972)). The second category were those who had not yet been tried at the time of *Furman* and the new statute. *Id.* That category, this Court held, remained subject to the death penalty. *Id.* A defendant in the second category then argued in the Supreme Court that this dichotomy violated his right to equal protection.

The Supreme Court rebuffed that challenge in *Dobbert*. The second category of offenders, it wrote, "is simply not similarly situated

to those whose sentences were commuted." *Id.* "Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process as to be governed solely by the old statute"—in our case, *Hurst* defendants resentenced before April 2023—"and those whose cases involved acts which could properly subject them to punishment under the new statute"—here, offenders like Smith resentenced after April 2023. *Id.* As such, there was "nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence." *Id.*

Smith cannot evade that holding.

What is more, this Court has recognized the need to draw lines in the very context of *Hurst* resentencings. Under this Court's approach to the retroactivity of *Hurst I*, some capital defendants are receiving *Hurst* resentencings while others are not, depending on whether their death sentences were final before *Ring v. Arizona*, 536 U.S. 584 (2002), a predecessor case to *Hurst I*. *Compare Asay v. State*, 210 So. 3d 1, 22 (Fla. 2016), *with Mosley v. State*, 209 So. 3d 1248, 1274, 1283 (Fla. 2016). This Court expressly rejected an equal

protection challenge to that dual regime in *Lambrix v. State*, 227 So. 3d 112, 113 (Fla. 2017).

2. Smith offers no evidence to rebut the presumption that the Legislature did not enact SB 450 out of racial animus.

Smith also contends that SB 450 was "designed with racist intent" and to "exclude Black voices," and thus is unconstitutional. Pet. 23; *see also* Pet. 30 (alleging that the Legislature had a "racially discriminatory intent [in enacting] this bill"). In making that accusation, Smith relies principally on *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), where the Supreme Court noted that non-unanimous-jury laws adopted in the late 18th and early 19th centuries in Louisiana and Oregon were motivated by a desire to disenfranchise black jurors. Pet. 30–31 (alleging that the Legislature was "aware[]," and in fact "intended," that SB 450 would "expan[d] [] a scheme the U.S. Supreme Court found steeped in racism"). A claim that our Legislature was motivated by racism is a serious charge demanding serious evidence. Yet Smith offers none of any kind.

Smith's claim sounds, if at all, in the Equal Protection Clause. *Contra* Pet. 23–34 (invoking the Sixth Amendment, Eighth Amendment, and Due Process Clause of the Fourteenth Amendment, not

equal protection).[6] Because SB 450 is not racially discriminatory on its face, Smith can show that SB 450 is tainted by racism only if he shows that the law has both a "racially disproportionate impact" and a "discriminatory intent or purpose." *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

In predicting that SB 450 will have a disparate impact, Smith relies on two pieces of "evidence": that Florida has a "Black population [of] 17%" and that black jurors exhibit "greater opposition to the death penalty." Pet. 28–29. None of that proves that SB 450 will "exclude Black voices." Pet. 23. Unlike the Louisiana and Oregon laws discussed in *Ramos*, Florida's death-penalty statute *does* require

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[6] Smith cites no case holding that claims of race discrimination against jurors are cognizable under the Sixth Amendment, Eighth Amendment, or Due Process Clause. At most he cites *Ramos*, which in a preface to the controlling opinion noted the race-tinged history of the law it considered. 140 S. Ct. at 1394. But the Court's holding in *Ramos* turned on Sixth Amendment theories unrelated to race discrimination. *Id.* at 1395; *see also id.* at 1426 (Alito, J., dissenting) (pointing out that considerations of race had "nothing" to do with the majority's Sixth Amendment holding). The Supreme Court has instead evaluated claims of discrimination against black jurors under the equal protection rubric. *See, e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

unanimity: all 12 jurors must find beyond a reasonable doubt both that the defendant committed first-degree murder and that an aggravator exists. Jurors simply need not be unanimous in recommending death. And even as to that, no member of the jury has a greater or lesser say than any other. Each gets exactly one vote.

Smith also fails to demonstrate racial animus. To prove animus, he must show "that an 'invidious discriminatory purpose was a motivating factor' in the [Legislature's] decision." *DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (plurality op.) (quoting *Arlington Heights*, 429 U.S. at 266); *see also Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (for a showing of animus, the Legislature must have adopted the challenged law "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group"). That means ascertaining the underlying motivation for the decision of "the legislature as a whole," *Brnovich v. DNC*, 141 S. Ct. 2321, 2350 (2021), a task that is demanding because "determining the intent of the legislature is a problematic and near-impossible challenge." *Greater Birmingham Ministries v. Sec'y of State*, 992 F.3d 1299, 1324 (11th Cir. 2021). Smith must also overcome "the presumption of

legislative good faith," *id.* at 1325 (citing *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)), for which "only the clearest proof will suffice." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted); *cf. Batson v. Kentucky*, 476 U.S. 79, 90, 93 (1986) (a defendant alleging that prosecutors struck a juror based on race bears the "burden of proving purposeful discrimination").

As the Supreme Court has explained, "discrimination is not a plausible conclusion" when there are "obvious alternative explanation[s]" for a law's adoption. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); *see also McCleskey v. Kemp*, 481 U.S. 279, 298–99 (1987) (when "there [a]re legitimate reasons for the [] Legislature to adopt and maintain capital punishment," courts "will not infer a discriminatory purpose"). Just so here. Writing separately in *Ramos*, Justice Kavanaugh observed that "one could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles." 140 S. Ct. at 1418 (Kavanaugh, J., concurring). Florida's Legislature, for instance, may merely have wished to revert Florida's capital-sentencing scheme closer to the system that existed prior to *Hurst II*, which this Court overruled in *Poole*. Under the pre-*Hurst II* regime, a

jury's normative determination that death is the appropriate sentence—arrived at by a majority of jurors—was more likely to represent the views of the community than a system requiring a unanimous recommendation. SB 450 means that an extreme outlier juror cannot deny justice to society and to the victims' families.[7]

Smith does not come close to countering this obviously race-neutral reason for adopting SB 450. As his primary proof of animus, he compares SB 450 to laws enacted by Louisiana in 1898 and Oregon in the 1930s, which *Ramos* found were adopted to disenfranchise black jurors. Pet. 30 (asserting that the Legislature was "aware[]" of *Ramos*, a decision that he says "condemned as racist the system the Legislature was adopting"); *see Ramos*, 140 S. Ct. at 1394 (discussing the Louisiana and Oregon laws). But the fact that *other* States many years ago passed certain laws out of animus hardly shows that Florida's Legislature in 2023 was motivated by the same impermissible

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[7] *See, e.g.*, Pet. 245, 247, 250–51, 274–75 (Remarks of Rep. Berny Jacques, House Jud. Comm. Hr'g (Mar. 31, 2023)) (explaining that the bill was intended to make a capital jury's recommendation more representative of the views of the community, and referencing the pre-*Hurst II* recommendation requirement of 7-5).

considerations. And even if Florida had a history resembling those of Louisiana and Oregon—which Smith has not deigned to show—that would not carry the day. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324. Instead, the "ultimate question" is "whether a discriminatory intent has been proved in a given case." *Id.* at 2324–25.

Nor does Smith's reliance on snippets of legislative history overcome the presumption of legislative good faith. Indeed, he cites not a single comment from a supporter of SB 450 linking the law to race discrimination.[8] His only reference to comments from supporters of the law plucks out of context (Pet. 31) five words from a broader

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[8] Even then, the statements of individual legislators do not "demonstrate discriminatory intent by the state legislature." *League of Women Voters of Fla. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam). That is because "legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents," *Brnovich*, 141 S. Ct. at 2350, so the allegations would be insufficient to support an inference of discriminatory purpose on the part of the Legislature as a whole. After all, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

statement[9] by the bill's House sponsor—who himself is black—explaining that SB 450 complies with *Ramos*'s holding. As the Sponsor explained, and as Smith has acknowledged, Pet. 32 n.12, this Court in *Poole* held that the jury's recommendation of death is not an element of the offense, and thus that the recommendation need not be unanimous. 297 So. 3d at 504. The Supreme Court agreed in *McKinney v. Arizona* that the recommendation is not an element. *See* 140 S. Ct. 702, 707 (2020) (holding that the jury is "not constitutionally required . . . to make the ultimate sentencing decision within the relevant sentencing range"). Unlike the elements of the offense, which involve a "purely factual determination," whether to recommend death is "mostly a question of mercy." *Poole*, 297 So. 3d at 503. The Sponsor therefore rightly concluded that *Ramos* does not require a unanimous recommendation. Nothing he said was tinged with race.

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[9] Pet. 240 (Remarks of Rep. Berny Jacques, House Jud. Comm. Hr'g (Mar. 31, 2023)) ("[U]nder our fact pattern of what we're trying to do [*i.e.*, addressing the jury recommendation, not the finding of an aggravator], it's not exactly in line with *Ramos*, but it does not run afoul of *Ramos* either."), 245–46 (explaining that this Court in *Poole* held that the recommendation of death need not be unanimous under the Sixth Amendment).

Even those legislators who opposed the law did not allege that their colleagues in the majority acted out of hatred for black jurors. *See* Pet. 30–32 & n.11 (collecting legislator comments). At most, a handful of dissenting legislators thought there were "flaws in our [justice] system" that could affect black members of the community, Pet. 31–32 (quoting Rep. Darry Campbell), not that fellow legislators intended to harm black jurors.

Smith's allegations of racial animus are unfounded and do not entitle him to extraordinary relief from this Court.[10]

C. SB 450 does not inflict cruel and unusual punishment in violation of the Eighth Amendment.

Finally, Smith's Eighth Amendment challenge runs headlong into precedent. Comparing himself with the 92 *Hurst* defendants re-sentenced under the 12-0 statute, many of whom received life sentences, Smith complains that a jury's non-unanimous recommendation of death under SB 450 would permit a circuit court to impose

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[10] The Court should also reject Smith's attempt to inject race into the penalty phase by asking jurors to report "the racial breakdown of those jurors voting for death and those voting for life." Pet. 35–37.

that penalty "based entirely on the arbitrariness of timing of the re-sentencing in this case." Pet. 20–21. Thus, he asserts, applying SB 450 would violate the Eighth Amendment's "ban on arbitrary death sentences." Pet. 20.

But the Supreme Court did not view it as "arbitrary" in *Dobbert* that Florida's new death-penalty statute would be applied to some capital defendants while other capital defendants would have their death sentences commuted to life, based solely on whether their convictions were final when *Furman* was decided. 432 U.S. at 301. Quite the opposite. In rejecting the defendant's equal protection challenge the Supreme Court reasoned that "Florida obviously had to draw the line at some point between those whose cases had progressed sufficiently far in the legal process . . . and those whose cases involved acts which could properly subject them to punishment under the new statute." *Id.* In the Court's eyes, "[t]here [wa]s nothing irrational about Florida's decision to relegate petitioner to the latter class, since the new statute was in effect at the time of his trial and sentence." *Id.* If that scheme was "[]rational," it could not have been arbitrary.

To this day, Florida's capital-sentencing scheme eliminates

arbitrariness in every relevant sense. The Supreme Court has said that it is not "cruel and unusual punishment[]," U.S. Const. amend. VIII, for a State to impose the death penalty, so long as the State "administer[s] that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460, *overruled on other grounds*, *Hurst I*, 577 U.S. 92. Along those lines, the State's scheme must "genuinely narrow the class of persons eligible for the death penalty" by requiring the showing of an aggravating factor, *Zant v. Stephens*, 462 U.S. 862, 877 (1983), and "must [] allow the sentencer to consider the individual circumstances of the defendant, his background, and his crime." *Spaziano*, 468 U.S. at 460. The point is to "minimize[] the risk of wholly arbitrary, capricious, or freakish sentences." *Pulley v. Harris*, 465 U.S. 37, 45 (1984).

SB 450 and amended Section 921.141 meet those requirements. Before death may be imposed under that regime, the jury, after a full-length penalty phase trial, must unanimously find beyond a reasonable doubt the existence of an aggravating circumstance. § 921.141(2)(a), Fla. Stat.; Fla. R. Crim. P. 3.780. Next, the jury must

consider whether the aggravators are sufficient to justify the death penalty, and whether the aggravators outweigh any mitigators. § 921.141(2)(b)2., Fla. Stat. In making that decision, the jury is aided by the defense's presentation of evidence of any and all mitigating circumstances, *id.* § 921.141(7), often including voluminous biographical information and the testimony of expert witnesses. *See* Fla. R. Crim. P. 3.202. The jury must then recommend to the judge whether to impose life imprisonment or death. § 921.141(2)(b)2.c., (2)(c), Fla. Stat. If the jury opts for leniency, the judge is bound by that recommendation and must sentence the defendant to life. *Id.* § 921.141(3)(a)1. It is only where a two-thirds supermajority recommends death that the judge may impose that penalty. *Id.* § 921.141(3)(a)2. Yet even then the judge has the discretion to extend mercy, *id.*, and must conduct its own assessment of the aggravators and mitigators and explain its order in writing. *Id.* § 921.141(3)(a)2., (4).

All of that ensures that the death penalty in Florida is imposed in a fair and measured fashion, and a similar scheme has been upheld. *Spaziano*, 468 U.S. at 464. Smith's claim fails.

CONCLUSION

The Court should dismiss the amended petition for lack of jurisdiction. But if it reaches the merits, the Court should deny the petition. Smith has not established bare legal error, let alone a departure from the essential requirements of law.

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CERTIFICATE OF SERVICE

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 8,666 words.

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