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IN THE SUPREME COURT OF FLORIDA

LEONARD P. GONZALEZ, JR., *Petitioner,* *v.* STATE OF FLORIDA, *Respondent.*	No. SC23-740

MOTION TO DISMISS THE PETITION

On May 23, 2023, Leonard Gonzalez petitioned this Court for an extraordinary writ, 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

This case falls within the general rule that a criminal defendant has no right to interlocutory appellate relief. In its merits response,

the State did not object to the Court's exercise of jurisdiction over this extraordinary writ proceeding. *See* Resp. 5–7. On reflection, the better view of the law is that the Court lacks jurisdiction and should dismiss. Though the Court has sometimes resolved a defendant's facial attack on Florida's death penalty statutes in a pretrial writ posture (a questionable practice in the best of circumstances), this case involves primarily as-applied claims and presents no facial challenge worthy of that extraordinary procedure. But even if there were jurisdiction, the Court should exercise its discretion to dismiss or deny the petition, as the claims it raises are insubstantial and undeserving of immediate resolution by the Court. Indeed, if *this* petition warrants departing from ordinary rules of appellate practice, nothing stops capital defendants from conjuring spurious attacks on Florida's death penalty laws anytime they wish to proceed directly to this Court, effectively doubling the time required for appellate review and only further delaying justice. Gonzalez must instead raise his claims on direct appeal in the event he is sentenced to death.

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). Beyond that, a defendant may seek relief via an extraordinary writ in only the most exceptional circumstances.

Here, Gonzalez seeks a writ of prohibition. Pet. 4. 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). Gonzalez 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 grant the request for certiorari. Pet. 4. 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 Gonzalez has an adequate remedy in a post-trial appeal.

Mandamus and all-writs relief are similarly unavailable. Pet. 4. 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 Gonzalez's challenge to the new 8-4 death penalty law does not allege that any portion of the law is facially unconstitutional. Gonzalez instead argues that the law is being impermissibly applied to him in retroactive fashion. *See* Pet. 13–21 (raising various reasons that the law cannot be "retroactively" applied here). The only facial challenge he raises is quite obviously baseless: the theory that the State of Florida lacks

"any legitimate grant of jurisdictional power . . . to execute its citizens." Pet. 22–25; *but see Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) ("The Constitution allows capital punishment."). 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.[1]

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

[1] That is true even if the Court were otherwise inclined to permit Gonzalez to amend his petition to incorporate additional retroactivity arguments, or even an argument that the Sixth Amendment requires a unanimous jury recommendation of death. *See* Mot. to Amend the Pet. and App'x Heretofore Filed in This Case in Lieu of Voluntary Dismissal, No. SC23-740 (filed June 22, 2023). Though the latter claim may be a facial challenge, it is unripe because Gonzalez has not been sentenced to death on the strength of a non-unanimous jury recommendation, and is baseless in any event. *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) (explaining that *Hurst v. Florida*, 577 U.S. 92 (2016) merely required that the jury find the fact of an aggravating circumstance).

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 Gonzalez 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: Gonzalez'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). And Gonzalez's facial attack on the death penalty is likewise barred by precedent. *See Bucklew*, 139 S. Ct. at 1122. Waiting to entertain those arguments in the ordinary course of a direct appeal 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.

* * *

Should the Court opt to consider the merits of the petition, the State stands by the well-reasoned merits arguments contained in its response in this case. Resp. 9–47.

CONCLUSION

The Court should dismiss the petition.

Dated: June 30, 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 Ira W. Still, III (ira@istilldefendliberty.com) and Joseph Chambrot (joseph@chambrotlaw.com) this **30th** day of June, 2023.

/s/ Jeffrey Paul DeSousa
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