IN THE SUPREME COURT OF FLORIDA

Case No. SC18-740
L.T. Case Nos. 1D18-1505; 372017CA002403XXXXXX

JOSEPH REDNER,
an individual,

Petitioner,

v.

FLORIDA DEPARTMENT OF HEALTH,

Respondent.

RESPONSE TO PETITION TO INVOKE "ALL WRITS" JURISDICTION

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PREFACE

Petitioner Joseph Redner will be referred to as Petitioner. Respondent Florida Department of Health will be referred to as the "Department."

Citations to the Petition to Invoke "All Writs" Jurisdiction filed on May 15, 2018, will appear as Pet. at [page #].

All record citations are to the Appendix filed by Petitioner on May 15, 2018, and will appear as App. at [page #].

RELEVANT FACTS & PROCEDURAL HISTORY

The Department accepts Petitioner's recitation of the language of article X, section 29 of the Florida Constitution (the "Amendment") and the procedural history of this case, but adds the following detail to provide context to the matter currently before this Court.

Nearly six months after the effective date of the Amendment, Petitioner filed a two-count complaint against the Department in circuit court in which he sought a declaration that, as a qualifying patient under the Amendment, he is entitled to cultivate and process marijuana plants for his own personal use, and an injunction prohibiting the Department from "barring" him from growing his own marijuana. App. at 4-13. The sole basis provided by Petitioner for seeking such relief was the following information posted on a "Frequently Asked Questions" page of the Department's website regarding the Amendment:

> **QUESTION:** Can I grow my own marijuana?
>
> **ANSWER:** No. Florida law only allows the licensed dispensing organizations to grow, process and dispense marijuana. The department will refer any business or individual suspected of violating state law to local law enforcement for investigation. It is important to remember marijuana is illegal under federal law.

App. at 6, 11. Prior to filing the complaint, Petitioner never contacted the Department regarding his ability to grow his own marijuana, nor did Petitioner

ever seek any form of administrative relief regarding the FAQ cited above. App. at 304-05.

Petitioner initially alleged that his "treatment [as a stage IV cancer patient] consists of utilizing the cannabis by creating his own oil and butter and by juicing the cannabis plant." App. at 5. Later, however, Petitioner admitted that he has never actually consumed juiced marijuana. App. at 194. Instead, during the proceedings on Petitioner's motion for a temporary injunction, Petitioner claimed he intended to juice and drink marijuana in an effort to prevent his lung cancer, now in remission,[1] from recurring. App. at 299, 302.

Petitioner testified that he had not discussed the benefits of juiced marijuana with his physician, Dr. Barry Gordon, but that as a qualifying patient it was his "chosen route of administration." App. at 301-02. He explained that juicing vegetables gives you the "optimum benefit" and "[t]here's no difference with the marijuana." App. at 302. Dr. Gordon testified that drinking juiced marijuana was the "optimal" way for Petitioner to prevent the recurrence of cancer, but he also acknowledged the lack of scientific research to support this claim. App. at 77-78, 86-87, 89, 97, 99-100, 113-14, 292.

[1] Petitioner was diagnosed in 2011 with stage IV lung cancer, which went into remission after he received extensive chemotherapy and radiation treatments. App. at 298.

Following a brief bench trial, the trial court entered its Order on Non-Jury Trial and Final Judgement [sic] (the "Final Judgment"), ruling that Petitioner has a constitutional right to grow marijuana for his personal use. App. at 658-79. The Department immediately filed a notice of appeal, which triggered an automatic stay of the Final Judgment pursuant to Florida Rule of Appellate Procedure 9.310(b)(2).

On Petitioner's motion, the trial court vacated the automatic stay. App. at 698-703. The First District Court of Appeal quashed the trial court's order and reinstated the automatic stay pending the outcome of the appeal, ruling as follows: "After this panel's preliminary review of the full wording of the constitutional amendment we determined that Appellee did not sufficiently demonstrate a likelihood of success on the merits as required to justify vacating the automatic governmental stay." App. at 799.

On May 4, 2018, eleven days before filing the instant petition in this Court, Petitioner filed a motion for expedited review in the First District in which he requested to accelerate the briefing schedule in the appeal of the Final Judgment. That motion, which the Department opposed, remains pending at the First District.

SUMMARY OF THE ARGUMENT

The extraordinary all writs remedy in article V, section 3(b)(7) of the Florida Constitution is limited to use in a very narrow set of circumstances when this Court must prevent a lower court's jurisdictional overreach. Put another way, the constitutional writ "operates as an aid to the Court in exercising its 'ultimate jurisdiction,' conferred elsewhere in the constitution."

Petitioner did not, and cannot, demonstrate how the appeal of the Final Judgment currently pending in the First District threatens any future jurisdiction this Court may exercise over this case. The state constitution does not confer ultimate jurisdiction to this Court over the subject matter of this case—whether article X, section 29 of the Florida Constitution permits qualifying patients to grow their own marijuana for personal use. Nor does the presence of the automatic stay of the Final Judgment threaten this Court's discretionary jurisdiction to later review the First District's decision on the merits.

Petitioner's attempt to invoke this Court's all writs jurisdiction amounts to an improper and unauthorized appeal of the First District's order reinstating the automatic stay. Engaging in such a review would not protect this Court's ultimate jurisdiction, but instead would expand it beyond its constitutional bounds. Accordingly, the Department asks this Court to deny the petition.

ARGUMENT

I. PETITIONER HAS FAILED TO ESTABLISH THE ELEMENTS NECESSARY FOR THIS COURT TO EXERCISE ITS ALL WRITS JURISDICTION.

A. Two elements are required for this Court to issue the constitutional writ authorized by article V, section 3(b)(7) of the Florida Constitution.

Pursuant to the Florida Constitution, this Court may issue "all writs necessary to the complete exercise of its jurisdiction." Art. V, § 3(b)(7), Fla. Const. Known as a "constitutional writ," this authority "is not an independent basis for this Court[']s jurisdiction." *Roberts v. Brown*, 43 So. 3d 673, 677 (Fla. 2010). Instead, its sole purpose is to preserve jurisdiction that has already been invoked or protect jurisdiction that likely will be invoked in the future. *Id.* Put another way, the constitutional writ "operates as an aid to the Court in exercising its 'ultimate jurisdiction,' conferred elsewhere in the constitution." *Williams v. State*, 913 So. 2d 541, 543 (Fla. 2005). Thus, to be entitled to the issuance of a constitutional writ from this Court, a petitioner must establish two things: (1) the constitution grants the Court "ultimate" jurisdiction over the case, either currently or in the future; and (2) some action is taking place in a lower tribunal that is a threat to that jurisdiction.[2]

[2] Petitioner cites to *Monroe Education Ass'n v. Clerk*, 299 So. 2d 1 (Fla. 1974), for the proposition that this Court may issue a constitutional writ in "extraordinary circumstances involving great public interest where emergencies and seasonable considerations are involved." Petitioner's reliance on that case is misplaced. In

The limited case law regarding this Court's use of the extraordinary all writs remedy makes clear that it is available only in a very narrow set of circumstances to prevent a lower court's overreach. For example, in 2010, this Court exercised its all writs jurisdiction to preclude the circuit court from taking any action in a case seeking to remove two citizen-initiative proposed constitutional amendments from the ballot. *Roberts*, 43 So. 3d at 683-84. The Court ordered the circuit court to dismiss the proceedings pending before it because the supreme court has exclusive jurisdiction to determine the validity of such proposed amendments. *Id.* at 679, 684.

Similarly, the Court has issued a constitutional writ to prohibit the circuit court from taking action that "encroach[es] upon this Court's ultimate jurisdiction

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Monroe, the Court was asked to issue a writ of mandamus to the Clerk of the Third District after he refused to accept an all writs petition and the corresponding filing fee on the grounds that it was "not ancillary to any matter pending in [the Third District]." *Id.* at 2. The Court determined that it was improper for the Clerk to refuse to accept the petition because "issuance of a constitutional writ [by a district court] is not dependent upon or altogether ancillary to independent appellate proceedings." *Id.* This Court's comment about "extraordinary circumstances" was made in reference as to why it was necessary for it to exercise its mandamus jurisdiction to intervene and direct the Clerk to perform a ministerial duty to accept the all writs filing. It was not intended to alter the standard for invoking all writs jurisdiction. *See generally* Harry Lee Anstead et al., *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 553-54 (2005) (explaining that in the early 1980s the Court reaffirmed the "aid[ing] of the ultimate jurisdiction" standard and effectively abandoned any past suggestion that "all-writs jurisdiction would exist if the case was simply important enough").

to adopt rules for the courts." *United Servs. Auto Ass'n v. Goodman*, 826 So. 2d 914, 915 (Fla. 2002) (directing circuit court to vacate orders prohibiting certain counsel from using law firm names in pleadings and requiring others to disclose company affiliations); *see also Wild v. Dozier*, 672 So. 2d 16, 18 (Fla. 1996) (concluding that "this Court has exclusive jurisdiction to review judicial assignments" and holding that a litigant who is affected by a judicial assignment may seek review in this Court via a "petition for relief under the 'all writs' power"); *Fla. Senate v. Graham*, 412 So. 2d 360, 361 (Fla. 1982) ("Because jurisdiction of the issue of apportionment will vest in this Court with certainty this year we have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction.").

In comparison, the Court declined to issue a constitutional writ to the Public Employees Relations Commission because it determined the commission's action related to collective bargaining by state-employed attorneys did not "encroach upon this Court's jurisdiction over the admission of attorneys to the practice of law or the discipline of attorneys." *State ex rel. Chiles v. Pub. Emps. Relations Comm'n*, 630 So. 2d 1093, 1095 (Fla. 1994).

Each of these cases illustrate how rarely this Court must step in to prevent a lower court from overstepping its jurisdictional boundaries into territory governed ultimately and exclusively by the supreme court. Here, Petitioner has failed to

establish how the circumstances of this case, in comparison to those discussed above, warrants this Court's intervention.

B. There are no events taking place in a lower court that threaten the exercise of this Court's jurisdiction.

Notably, Petitioner never once offers an argument in his 36-page petition as to how the appeal of the Final Judgment currently pending in the First District threatens any future jurisdiction this Court may exercise over this case. Instead, Petitioner asks this Court to issue a constitutional writ to vacate the automatic stay of the Final Judgment reinstated by the First District "for a valid personal need, as well as a valid public purpose." Pet. at 4. While the Department is not unsympathetic to Petitioner's medical condition, this is not an appropriate basis for invoking this Court's all writs jurisdiction. In fact, it is antithetical to this Court's constitutionally limited jurisdiction because, in effect, Petitioner is improperly attempting to appeal the First District's decision to reinstate the automatic stay. *See St. Paul Title Ins. Corp. v. Davis*, 392 So. 2d 1304, 1305 (Fla. 1980) ("The all writs provision of section 3(b)(7) does not confer added appellate jurisdiction on this Court . . . .").

First, the constitution does not confer ultimate jurisdiction to this Court over the subject matter of this case—whether article X, section 29 of the Florida Constitution permits qualifying patients to grow their own marijuana for personal use. On the contrary, Article V grants district courts authority to review final

judgments from circuit courts, including those involving the interpretation of a provision of the state constitution like the one in this case. *See* art. V, § 4(b)(1), Fla. Const. Likewise, district courts may review interlocutory orders, such as those vacating the automatic stay in Florida Rule of Appellate Procedure 9.310. *See id.*; Fla. R. App. P. 9.310(f).

Petitioner claims this Court has the authority to issue a constitutional writ in this case to vacate the automatic stay because one of the parties will likely invoke the Court's discretionary jurisdiction following a final decision by the First District on the merits of the Department's appeal. Pet. at 3-4. Indeed, this Court has discretion to review district court decisions that expressly construe a provision of the state constitution. Art. V, § 3(b)(3), Fla. Const.; *accord* Fla. R. App. P. 9.030(a)(2)(A)(ii). But as illustrated in the case law discussed above, the Court must have an independent, non-speculative (i.e., ultimate) basis for jurisdiction before it can exercise its all writs jurisdiction. *See, e.g.*, *Roberts*, 43 So. 3d at 678 (explaining that the determinative factor of whether the Court had all writs jurisdiction was "the exclusiveness of this Court's jurisdiction to consider pre-election challenges to proposed citizen-initiative constitutional amendments"). No such basis exists here; the propriety of reinstating an automatic stay does not fall into the small category of cases over which this Court has exclusive jurisdiction.

Second, allowing the automatic stay to remain in place while the First District engages in a deliberative review of the Final Judgment, does nothing to threaten this Court's discretionary jurisdiction to later review the First District's decision on the merits. While Petitioner may disagree with the First District's reason for reinstating the automatic stay—i.e., that Petitioner is not likely to succeed on the merits of the argument that he has a constitutional right to grow his own marijuana—that is not a basis for this Court to issue a constitutional writ.

Nor is a constitutional writ necessary to preserve the status quo regarding medical marijuana in Florida while this case makes its way through the courts. Prior to the circuit court's ruling in the Final Judgment, no qualifying patient in Florida was authorized to grow his or her own marijuana for personal use. Under the existing provisions of law, only a medical marijuana treatment center ("MMTC") is permitted to "sell[], distribute[], [and] dispense[]" medical marijuana. Art. X, § 29(b)(5), Fla. Const. And even if this Court were to issue a constitutional writ to vacate the automatic stay, there are no existing legal means for Petitioner to obtain the seeds or growing plants he desires other than by purchasing them from an MMTC. But MMTCs in Florida are currently not permitted to sell marijuana seeds or plants to qualifying patients.

Thus, the trial court's erroneous conclusion that Petitioner has a constitutional right to home-grown, juiced marijuana, to which he needs immediate

access, upset the existing regulatory structure for medical marijuana in the state. In other words, the effect of the Final Judgment is to grant civil and criminal immunity under Florida law to any one of the thousands of qualifying patients in the state who may wish to grow and use medical marijuana as Petitioner does.[3] The only way to prevent the proliferation of unregulated homegrown marijuana is to maintain the status quo while the First District reviews the propriety of the trial court's interpretation of article 10, section 29 of the Florida Constitution. *See QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc.*, 94 So. 3d 541, 555 (Fla. 2012) ("The purpose of an appellate stay is to maintain the status quo in the lower tribunal while an appeal proceeds.").

II. THE FIRST DISTRICT PROPERLY REINSTATED THE AUTOMATIC STAY OF THE FINAL JUDGMENT PENDING APPELLATE REVIEW.

Even if this Court had the authority to review the First District's decision to reinstate the automatic stay, the issuance of a constitutional writ to vacate that decision would not be warranted.

The case brought by Petitioner in circuit court centered on a single, dispositive legal question—whether article X, section 29 of the Florida Constitution permits qualifying patients to grow and process their own marijuana

[3] The ultimate error of the Final Judgment illustrates Petitioner's fundamental misunderstanding of the purpose of the Amendment, which is to immunize qualifying patients from civil and criminal liability under Florida law, not to create a constitutional right to use, possess, or grow marijuana.

for personal use. The trial court ruled in favor of Petitioner, concluding that he has a constitutional right to grow and juice marijuana for medical use. But because no such right exists in the text of the Florida Constitution (or under any other provision of state or federal law), the First District properly reinstated the automatic stay pending appellate review of the Final Judgment.

The definition of "Marijuana" in article X, section 29(b)(4), by its cross-reference to the definition of "Cannabis" in section 893.02(3), Florida Statutes (2014),[4] includes "all parts of any plant of the genus *Cannabis*, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or resin." Petitioner argued below that the reference in section 893.02(3) to "all parts of any plant . . . whether growing or not," and the word "seeds" means that he, as a qualifying patient, has a constitutional right to obtain whole cannabis plants to be cultivated for his personal use. But his argument is belied by the application of other provisions of the Amendment, which provide the framework for the cultivation and use of medical marijuana in Florida.

Article X, section 29(a)(1), immunizes qualifying patients by providing that "[t]he medical use of marijuana by a qualifying patient . . . in compliance with this

[4] Article X, section 29(b)(4) states in part: '"Marijuana" has the meaning given cannabis in Section 893.02(3), Florida Statutes (2014) . . . ."

section is not subject to criminal or civil liability or sanctions under Florida law." "Medical use" is then defined in article X, section 29(b)(6) as "the acquisition, possession, use, delivery, transfer, or administration of an amount of marijuana not in conflict with Department rules, or of related supplies by a qualifying patient . . . for the treatment of a debilitating medical condition."

Based on the plain language of the definition of "Medical use" a qualifying patient is not entitled to cultivate (i.e., grow) or process marijuana because the words "cultivate" and "process" are not included in article X, section 29(b)(6). Instead, the right to cultivate and process medical marijuana is reserved for MMTCs, which are defined in article X, section 29(b)(5) as "an entity that acquires, *cultivates*, *processes* (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to qualifying patients or their caregivers and is registered by the Department." (Emphasis added).

Under well-established principles of constitutional and statutory construction, when words are used in one part of a section but omitted from another part of the same section, their omission must be given meaning. *See Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (explaining that under the doctrine of *expressio unius est exclusio alterius* "the

mention of one thing implies the exclusion of another"). Here, the use of the words "cultivates" and "processes" in the definition of "Medical Marijuana Treatment Center," but not in the definition of "Medical use," means only an MMTC is immune from liability under state law for growing and processing marijuana for medical use.

Judge Rice from the Thirteenth Judicial Circuit came to this same conclusion when ruling on the Department's motion to transfer venue to Leon County:

> [A]rticle X, section 29 expressly grants MMTCs the right to cultivate marijuana, but excludes the word cultivate from the definition of "Medical use." Therefore, rules of constitutional construction compel this Court to conclude that based on the plain language of article X, section 29, Mr. Redner has no constitutional right to cultivate (i.e., grow) marijuana. *See Fla. League of Cities v. Smith*, 607 So. 2d 397, 400 (Fla. 1992) ("[T]he law is settled that when constitutional language is precise, its exact letter must be enforced and extrinsic guides to construction are not allowed to defeat the plain language.").

Furthermore, under the doctrine of *in pari materia*, provisions of law addressing the same subject must be read together to give effect to the entire act; they cannot be read in isolation. *See Charles v. So. Baptist Hosp. of Fla., Inc.*, 209 So. 3d 1199, 1207 (Fla. 2017); *Fla. Dep't of Envtl. Protection v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008). To accept Petitioner's argument that he has a right to grow his own marijuana would be to improperly read the definition of "Marijuana" in article X, section 29(b)(4) in isolation without regard for the definitions of "Medical use" or "Medical Marijuana Treatment

Center" elsewhere in the Amendment, all of which relate to the same subject of medical marijuana.

Finally, even the citizens' organization that sponsored, drafted, and campaigned for the passage of the Amendment unequivocally stated on their campaign website that the Amendment was not intended to allow qualifying patients to grow their own marijuana:

> **FAQs**
>
> . . .
>
> **Why is home growing not mentioned in the ballot language?**
>
> The amendment does not allow patients to grow their own marijuana at home. While many supporters and patients expressed their desire to see this provision included in the law, United for Care left "home grow" out of the amendment in order to create a tightly regulated and controlled system that is best for the State of Florida.

App. at 366.

For each of these reasons, the trial court erred as a matter of law in determining that article X, section 29 of the Florida Constitution grants Petitioner a right to grow and juice his own marijuana. Accordingly, the First District properly reinstated the automatic stay pending appellate review of the Final Judgment. *See Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005) (recognizing that a stay may be vacated only upon a showing of a likelihood of success on appeal).

CONCLUSION

For these reasons, the Department respectfully requests this Court deny Petitioner's improper attempt to invoke this Court's all writs jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.100(*l*) because it was prepared using Times New Roman 14-point font.

/s/ *Amber Stoner*
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