CASE NO.: SC20-985

Supreme Court of Florida

HON. GERALDINE F. THOMPSON,

Petitioner,

v.

HON. RON DESANTIS,
in his official capacity as Governor of Florida,
and **DANIEL E. NORDBY**,
in his official capacity as Chair of the
Florida Supreme Court Nominating Commission.

Respondents.

GOVERNOR'S RESPONSE IN OPPOSITION TO MOTION FOR REHEARING OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO AMEND EMERGENCY PETITION FOR WRIT OF QUO WARRANTO AND WRIT OF MANDAMUS

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INTRODUCTION

In response to Governor DeSantis naming the first Jamaican-American to the Florida Supreme Court, Petitioner Geraldine Thompson ("Petitioner") filed an emergency petition ("Petition") seeking to invalidate the appointment of Judge Renatha Francis and to require the nominating process to start from scratch. Petitioner sought to compel the Florida Supreme Court Judicial Nominating Commission ("JNC") to certify a new list of applicants for the Governor's consideration, contending this relief was "the only remedy that is fair." Pet. at 23.[1] On August 27, 2020, this Court issued a decision on the merits and concluded that, assuming Judge Francis was indeed appointed on May 26, 2020, such appointment "exceeded" the Governor's authority. *See Thompson v. DeSantis*, No. SC20-985, 2020 WL 5048539, at *1, 3-5 (Fla. Aug. 27, 2020). The Court determined Petitioner's asserted grievances against the JNC were untimely filed and her requested remedy of mandamus no longer available. *Id.* at *2, 5-6. Her Petition was unequivocally denied. *Id.* at *1, 6.

Petitioner now moves for rehearing or, in the alternative, leave to amend her

[1] Citations to the Petition will be abbreviated as "Pet. at __." Citations to Petitioner's Reply will be abbreviated as "Pet'r Reply at __." Citations to Petitioner's Motion for Rehearing and Alternative Motion for Leave to Amend will be abbreviated as "Pet'r Mot. at __."

Petition solely to seek—in hindsight—a very different remedy. Rather than demanding a *new* list from the JNC, she now requests a writ of mandamus directing the Governor to appoint one of the other seven individuals from the JNC's *existing* certified list. Pet'r Mot. at 6. But Petitioner's efforts amount to no more than an impermissible attempt at a second bite of the apple. Although styled as a motion for rehearing, she does not state any point of law or fact that the Court overlooked or misapprehended in denying her Petition. Nor can she. And she alleges no judicial oversight, error, or defect that denied her a fair decision on the merits. Rather, Petitioner improperly raises a novel, substitute position not previously articulated before this Court. Exacerbating the problem, her new position contradicts her pleadings and asks for something that this Court has described as "fundamentally different" from her initial Petition. *See Thompson*, 2020 WL 5048539, at *6. She provides no proper grounds for rehearing, and her request should thus be denied.

Petitioner's alternative motion for leave to amend the Petition fares no better. This Court adequately considered and ruled on the Petition, and it reached the merits of the case. Although Petitioner frames the request as mere substitution of a new remedy that was already inherent in her initial pleading, she does not—and cannot—change the factual and legal assertions in her original pleading that

are glaringly incompatible with such new relief. Courts have discretion to allow for amended pleadings in the interest of justice, but such grants are generally provided prior to final decisions on the merits. Amendment should not permit parties to relitigate substantive issues the Court already weighed and decided. Indeed, a review of case law reveals that parties have never been granted opportunities to fundamentally amend remedies *on re-hearing* to overturn the final, considered verdicts of this Court.

Finally, given the conflicting difference between Petitioner's initial pleadings and the relief she now seeks following an adverse ruling on the merits, her request to rehear or amend the Petition would violate inherent principles of estoppel. Therefore, her request should be denied.

ARGUMENT

I. Petitioner fails to articulate sufficient grounds for rehearing.

The rules of procedure establish rehearing as a narrow procedural mechanism designed to prohibit miscarriage of justice. Florida's Rules of Appellate Procedure prescribe the limited circumstances upon which requests for rehearing should be granted:

> A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its order or decision. *The motion shall not present issues not previously raised in the proceeding*.

Fla. R. App. P. 9.330(a)(2)(A) (emphasis added). A motion for rehearing is thus "not a vehicle for [continued] attempts at advocacy," and should be the exception to the norm. *Hicks v. American Integrity Ins. Co.*, 241 So. 3d 925, 928 (Fla. 5th DCA 2018) (citation omitted). Such motions should do "nothing more" than alert the Court to something "obviously overlooked or misapprehended." *Dabbs v. State*, 230 So. 3d 475, 476 (Fla. 4th DCA 2017) (quoting *Dep't of Revenue v. Leadership Hous., Inc.*, 322 So. 2d 7, 9 (Fla. 1975); *Goter v. Brown*, 682 So. 2d 155, 158 (Fla. 4th DCA 1996)). Critically for the matter at hand, a motion for rehearing does not present parties with the opportunity to raise an issue for the "first time." *Ayer v. Bush*, 775 So. 2d 368, 370 (Fla. 4th DCA 2000); *Fiesta Fashions, Inc. v. Capin*, 450 So. 2d 1128, 1129 (Fla. 1st DCA 1984).

Here, Petitioner's request runs headlong into these well-established principles. She suggests no point of law or fact that the Court overlooked or misapprehended in its decision. She does not contend the Court erred at all. Rather, her motion seeks, for the first time, a substitute remedy—an order requiring the Governor to pick from the other seven nominees on the existing list. Pet'r Mot. at 6. Such a request clearly violates Rule 9.330(a)(2)(A). Petitioner not only failed to raise the argument before the Court's final decision on the merits, but she also requests a remedy that cannot be squared with the incompatible objectives of her

otherwise unchanged case.

Petitioner had ample time and opportunity to deliver her arguments in this case and obtain a decision on the merits. She does not suggest otherwise. Petitioner briefed at length her concerns over diversity in the judiciary and her belief that the JNC failed to nominate a single constitutionally qualified African American candidate. Pet. at 3-4. She alleged a defect in the JNC's certified list and sought a remedy that might address her specific concerns—a mandamus order requiring the JNC to reconvene, certify a new list, and "strongly consider" the "6 fully-qualified African-American candidates" for the Governor's consideration and appointment. Pet. at 19. Petitioner described such relief as the "*only* remedy that is fair" and appropriate. Pet. at 23 (emphasis added); *see* Pet'r Reply at 22 (referencing the "*only* appropriate and fair remedy" (emphasis added)). But this Court denied Petitioner's untimely action against the JNC and determined the remedy she sought was unavailable. *Thompson*, 2020 WL 5048539, at *2, 5-6. Now Petitioner endeavors to retroactively pursue a different remedy through a motion for rehearing. The request is not appropriate and should be denied.

In her original Petition, Petitioner argued that, because the JNC certified an unlawful list, an order of mandamus reconvening the JNC and requiring certification of a new list was "the *only* remedy that complies with the Florida

Constitution." Pet. at 25 (emphasis added). She argued it was "impossible to know whether the JNC would have certified additional or different nominees to Governor DeSantis had it [concluded Judge Francis ineligible] and excluded her" from the list. Pet. at 18. She also asserted "the Governor is not required to appoint a Florida Supreme Court Justice until the JNC has complied with its constitutional duties." *See* Pet'r Reply at 22. Accordingly, Petitioner's request for rehearing would have the Governor select from a list Petitioner believes unconstitutional and flawed—indeed a result substantively diverging from the arguments made and relief sought by Petitioner throughout this litigation. Again, this novel request explicitly contravenes her hope for "the only remedy which would permit the JNC and the Governor to consider the 6 fully-qualified African-American candidates." Pet'r Reply at 22. To this end, she now asks for relief that this Court chose not to "impose" as "inconsistent with the Petitioner's stated goals." *Thompson*, 2020 WL 5048539, at *6.

To overcome her procedural missteps, Petitioner alternatively suggests Florida Rule of Appellate Procedure 9.040(c) requires this Court to impose a substitute remedy because the Court denied as legally unavailable the remedy Petitioner originally sought. *See* Pet'r Mot. at 5-6. But Petitioner misapplies this appellate procedural rule. The general provisions of Rule 9.040 focus on

jurisdiction, forum, and venue. Rule 9.040(c) does no more than prevent a court from automatically dismissing a case based on a procedural flaw or error where the court would otherwise have jurisdiction to rule dispositively in the case. The rule is often applied to re-characterize an appeal as a petition for writ of certiorari. *See, e.g.*, *Johnson v. Citizens State Bank*, 537 So. 2d 96 (Fla. 1989). At its core, Rule 9.040(c) works to ensure a party's fair hearing on the merits, even if the party fails to assert the correct categorical remedy or invoke jurisdiction of the right court. *See Schwartz v. Banks*, 273 So. 3d 241, 243 (Fla 3d DCA 2019) ("[P]ursuant to Florida Rule of Appellate Procedure 9.040(c), we exercise our discretion and treat Schwartz's certiorari petition as a petition for a writ of mandamus."); Fla. R. App. P. 9.040(c), *Committee Notes, 1977 Amendment* ("This rule is intended to supersede *Nellen v. State*, 226 So. 2d 354 (Fla. 1st DCA 1969), in which a petition for a common law writ of certiorari was dismissed . . . because review was properly by appeal to the appropriate circuit court[.]").

Although appellate courts frequently rely on Rule 9.040(c) to recharacterize actions suffering from errors in procedural posture, case law makes clear courts should not entertain substitute, substantive relief that a party consciously declined to pursue. In *Pullins v. Candelaria*, the First District Court of Appeal applied Rule 9.040(c) to convert an untimely filed appeal to a writ of prohibition. 291 So. 3d

168, 169 (Fla. 1st DCA 2020). Although affording the appellant the benefit of this procedural leniency, the Court nevertheless denied ultimate relief because the appellant "sat on his rights" and failed to seek remedies at law that were once available. *Id.* Here, Petitioner is squarely in the same boat. Petitioner did not commit a mere procedural error, such as mischaracterizing a request for mandamus as a writ of certiorari or mislabeling an appeal. On the contrary, she properly characterized the remedies to redress her complaints—writs of quo warranto seeking judicial clarity on issues of law and writs of mandamus ordering specific executive action. And although this Court denied the specific type of mandamus Petitioner sought, it acknowledged such a remedy might have been legally available had the challenge been timely filed. *See Thompson*, 2020 WL 5048539, at *2; *cf. Pullins*, 291 So. 3d at 169 (refusing to grant an extraordinary writ of prohibition where the party's pursuit of an appellate remedy was untimely). The situation at present is not one for which Rule 9.040(c) presents a safety valve to a court otherwise obligated to deny relief for a procedural flaw or forum issue. No technical error or mistake prevented the Petitioner from having her day in court. Accordingly, Rule 9.040(c) should not be used to resurrect a petition that has been thoughtfully reviewed on the merits and denied.

In any event, even if Rule 9.040(c) did require the Court to substitute an

appropriate remedy different from the unavailable remedy Petitioner originally sought, this Court lacks authority to substitute a new remedy into a pleading that is completely at odds with her original request. Petitioner's goals are clear. As stated above, *see supra* at 2, an order directing the Governor to appoint from the other seven nominees on the JNC list would frustrate the very purpose of the Petition. By Petitioner's own argument, such a remedy would require executive action that Plaintiff claims unconstitutional, and it would eliminate any opportunity for the Governor to consider an African American or Caribbean American candidate—the "only remedy" Plaintiff deemed appropriate in her quo warranto action. *See* Pet. at 23, 25. Indeed, to entertain Petitioner's request, this Court must effectively accept her attempt to relitigate what has already been decided. Perhaps that is why Petitioner alternatively seeks to amend her Petition. But as the Court has already stated, its role is not to impose such a remedy.

II. Petitioner's alternative request for leave to amend the Petition should also be denied.

It is the rare case indeed where the Court overlooks or misapprehends points of law or fact that would justify granting rehearing. Petitioner therefore hedges her bets: she requests that the Court take the extraordinary step of granting her leave to amend her Petition after the issuance of an opinion on the merits. Petitioner's request should be denied because its falls outside the bounds of the relevant rule of

appellate procedure.

Florida Rule of Appellate Procedure 9.040(d) contains two provisions relating to amendment: (1) a provision noting that "[a]t any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits" and (2) a caveat that "[i]n the absence of amendment, the court may disregard any procedural error or defect that does not adversely affect the substantial rights of the parties." Neither provision applies to the circumstances here.

The first sentence of Rule 9.040(d)—the amendment rule—is textually limited to those cases that have not yet been "disposed of on the merits." As a matter of course, this exception cannot apply. This Court's decision accomplished that very result—it disposed of the merits of Petitioner's case.

Several contextual clues support this conclusion. First, the Court did not dismiss the Petition in an unelaborated per curiam order—it denied it in a full written opinion. *See Topps v. State*, 865 So. 2d 1253, 1258 (Fla. 2004) ("When a court intends to deny an extraordinary writ petition on the merits, the court need only include in its order a simple phrase such as 'with prejudice' or 'on the merits' to indicate that the merits of the case have been considered and determined and that the denial is on the merits."). Second, the Court concluded its "analysis of the

merits" of the Petition with a restatement of first principles. *Thompson*, 2020 WL 5048539, at *5. And third, the Court concluded its opinion by reference to the appellate rule governing motions for rehearing and clarification. *Id.* at *6; *see* Fla. R. App. P. 9.330(e) ("This rule applies only to appellate orders or decisions that adjudicate, resolve, or otherwise dispose of an appeal, original proceeding, or motion for appellate attorneys' fees."). Each of these three indicators reveals that the first sentence of Rule 9.040(d) does not apply.

Likewise, the second sentence of Rule 9.040(d)—the amendment alternative—is inapplicable. This alternative is textually limited to those cases involving "procedural error[s] or defect[s]." Fla. R. App. P. 9.040(d). Yet Petitioner's decision to seek the precise relief she sought was not the result of a procedural error or defect—it was a strategic choice to further her "stated goals." *Thompson*, 2020 WL 5048539, at *6. As alluded to previously, Rule 9.040(d) is "meant to ensure that no person is deprived of the right to have his cause heard [on the merits] due to technical traps in pleadings or procedure." *Logan v. Fla. Parole & Prob. Comm'n*, 413 So. 2d 820, 821 (Fla. 1st DCA 1982) (citing Fla. R. App. P. 9.040(b)-(d)); *see* Fla. R. App. P. 9.040(d), *Committee Notes, 1977 Amendment* ("[This rule] incorporates the concept contained in former rule 3.2(c), which provided that *deficiencies in the form or substance of a notice of appeal* were not

grounds for dismissal, absent a clear showing that the adversary had been misled or prejudiced." (emphasis added)). It is not meant to provide litigants like Petitioner with an opportunity to reopen and refashion their initial pleadings after a decision on the merits. Because Petitioner's case was heard on the merits, as opposed to being denied on the basis of any procedural error or defect, she presents the Court with no legal justification for granting her leave to amend.

Whether by rehearing or amending her Petition, Petitioner seeks to substantively change her position to a request at odds with her initial filing. Petitioner's Motion clearly states her intention to "amend her claims"—that alone should defeat her request for rehearing. *See* Pet'r Mot. at 7. Further, she aims to amend her claims after this Court has decided the very case she intended to bring, without any claim of procedural error. That is beyond what is contemplated in the appellate rules.

In sum, the Court should deny Petitioner's motion because it offends traditional notions of judicial estoppel and the like. Petitioner's attempt to play both sides of the remedy coin flies in the face of the long-standing doctrine that "a party electing one course of action should not later be allowed to avail himself of an incompatible course." *See Williams v. Robineau*, 168 So. 644, 646 (Fla. 1936). This is especially true where newly raised positions are logically inconsistent from

the original. *See Blumberg v. USAA Cas. Ins. Co.*, 790 So. 2d 1061, 1067 (Fla. 2001) (denying litigant's post-verdict, inconsistent position in a subsequent suit because the courthouse is not "an all-you-can-sue buffet, in which litigants can pick and choose which verdicts they want"); *see also Barbe v. Villeneuve*, 505 So. 2d 1331, 1332-33 (Fla. 1987) (a violation of the "election of remedies doctrine" occurs where "opposite and irreconcilable" claims are raised and not elected prior to judgment). This Court has never endorsed such an about-face and should not do so here.

CONCLUSION

The Motion for Rehearing and Alternative Motion for Leave to Amend should be denied.

Respectfully submitted,

/s/ James W. Uthmeier

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that this computer-generated Response is prepared in Times New Roman 14-point font and complies with the font requirement of Florida Rule of Appellate Procedure 9.100(*l*), and that a true and correct copy of the Response in opposition to the Motion for Rehearing and Alternative Motion for Leave to Amend has been furnished by electronic service through the Florida Courts E-Filing Portal this 4th day of September, 2020, to all counsel of record.

/s/ James W. Uthmeier
Deputy General Counsel