SC23-1040

In the Supreme Court of Florida

SAMUEL E. VELEZ ORTIZ,
Petitioner,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Discretionary Review from the
First District Court of Appeal
DCA No. 1D22-0375

RESPONDENT'S JURISDICTIONAL BRIEF

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STATEMENT OF THE ISSUE

Whether a state corrections officer can be terminated for admittedly using medical marijuana.

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STATEMENT OF THE CASE AND FACTS

In May 2021, the Department of Corrections asked one of its corrections officers, Petitioner Samuel Velez Ortiz, to submit to a random drug test. Pet. App. 1. Petitioner complied and tested positive for marijuana metabolites. *Id.* Petitioner then presented his state-issued qualifying patient identification for the use of medicinal marijuana to treat his posttraumatic-stress disorder. *Id.* at 1, 3. The Department, however, has a zero-tolerance policy prohibiting all marijuana use by its officers. *Id.* at 1. It therefore notified Petitioner that it would terminate his employment unless he abstained from marijuana use for 30 days and provided a note from his doctor verifying that he was "no longer under the influence of medicinal marijuana." *Id.* at 1–2 & n.1. Petitioner rejected this offer. *Id.* at 2 n.2.

He instead requested a hearing and, citing Article X, Section 29 of the Florida Constitution, argued that the Department could not fire him because he had a constitutional right to use medicinal marijuana while not at work and that he had never worked impaired. *Id.* at 2. The hearing officer and Public Employees Relations

Commission rejected that argument and determined the Department had the authority to terminate Petitioner. *Id.*

Petitioner appealed. The First District affirmed "[b]ased on the nature of [Petitioner's] job and the law." *Id.* at 1. It explained that, as a corrections officer, Petitioner was required by Florida law to attend basic recruit training, "which included firearms training, qualifying with a firearm once a year, access to firearms," and, if necessary, "issuance of a firearm by the Department." *Id.* at 2 (citing §§ 943.13(9), 943.13(11), 943.135(1), 943.17(1), Fla. Stat.; Fla. Admin. Code R. 11B-35.0021(1)(a)). Yet federal law makes it a felony for "prohibited persons" to possess a firearm, *id.* (citing 18 U.S.C. § 924(a)(8)), and prohibited persons include those unlawfully using controlled substances under the Controlled Substances Act, like marijuana. *Id.* at 2–3 (citing 18 U.S.C. § 992(g)(3); 21 U.S.C. § 812(c)(10)). And, because Florida law also requires corrections officers to possess good moral character, which necessarily includes not engaging in felonious conduct, the court determined that Petitioner could not use medicinal marijuana and maintain his

certification as a corrections officer. *Id.* at 2 (citing Fla. Admin. Code. R. 11B-27.0011(4)(a)).

Petitioner moved for rehearing and rehearing en banc, which the First District denied. He then invoked this Court's discretionary jurisdiction.

ARGUMENT

The Court should deny review.

The Court should deny the petition because, most basically, Petitioner's jurisdictional brief identifies no basis for jurisdiction. He thus has waived any argument as to that critical threshold question. But even if this Court were to consider the grounds Petitioner cited in his notice to invoke, the First District's decision neither expressly declared a state statute valid nor expressly construed a state or federal constitutional provision.

A. Petitioner does not even attempt to explain why this Court has jurisdiction, and thus has waived any theory that would support the Court's review.

By rule, jurisdictional briefs must address "the issue of the supreme court's jurisdiction," Fla. R. App. P. 9.120(d), to aid the Court in deciding whether it has the power to hear a case. Indeed, this Court is one "'of limited jurisdiction' with authority to hear only

those matters specified in Florida's Constitution." *Mallet v. State*, 280 So. 3d 1091, 1092 (Fla. 2019) (quoting *Baker v. State*, 878 So. 2d 1236, 1245 (Fla. 2004)) (citing Art. V, § 3(b), Fla. Const.). It therefore follows that this Court will deny review when a "jurisdictional initial brief fails to identify a jurisdictional basis for this Court to consider [the] case." *Id.* at 1093; *cf. Hoskins v. State*, 75 So. 3d 250, 257 (Fla. 2011) (explaining that an "argument . . . not raised in the initial brief" was "barred"); *Fla. Bar v. Walton*, 952 So. 2d 510, 513 n.2 (Fla. 2006) ("However, as he did not raise this issue in his [merits] briefs, he has abandoned it.").

That alone suffices to deny review. In his jurisdictional brief, Petitioner makes no mention of Article V, Section 3 of the Florida Constitution and includes no argument concerning which provision empowers the Court to exercise jurisdiction here. *See* 2d Am. Jur. Br. 3. He instead argues that the First District's opinion is "contrary to the 2nd Amendment of the United States Constitution" and federal case law, "contrary to Article X section 29 of the Florida Constitution," and is "of great public importance and could have a great effect on the proper administration of justice." *Id.* at 8, 10, 11.

But none of those claims identifies a legitimate jurisdictional basis. That a district court decision contravenes the federal or state constitutions is not a ground for jurisdiction, *see Mallet*, 280 So. 3d at 1092–93; Art. V, § 3(b)(1)–(10), Fla. Const., and the great public importance of an issue is relevant only if the district court *certifies* a question, Art. V, § 3(b)(4), Fla. Const.

At most, Petitioner cites two non-existent subsections from Florida Rule of Appellate Procedure 9.030—Rules "9.030(1)(A)(iii)" and "9.030(2)(A)(ii)"—which we take to be references to the Court's jurisdiction over decisions that declare valid a state statute and construe a provision of the state or federal constitution, the two bases listed in Petitioner's notice to invoke. 2d Am. Jur. Br. 3, 10, 13; *see also* Not. to Invoke.[1] But "[m]erely making reference to" these rules "without further elucidation does not suffice to preserve" an argument. *Simmons v. State*, 934 So. 2d 1100, 1117–18 n.14 (Fla. 2006). Petitioner never attempts to describe what statute the First District purportedly declared valid, or what provision of the Florida

[1] Petitioner also states that "[t]he Court has Jurisdiction pursuant to 9.030(a)(2)(ii)," 2d Am. Jur. Br. 10, which also does not exist.

or United States Constitution it construed.

As a consequence, Petitioner has failed to place either this Court or the Department on notice of the jurisdictional arguments that might support jurisdiction. That warrants denying review.

B. The Court lacks jurisdiction in any event.

Even if the Court were to forgive Petitioner's failure to brief the jurisdictional question, it still would lack jurisdiction. The decision below neither declared valid a state statute nor construed a provision of the Florida or United States Constitution—the jurisdictional bases set forth in Petitioner's notice to invoke.

First, this Court has discretion to review a district court decision that "expressly declares valid a state statute." Art. V, § 3(b)(3), Fla. Const. But nothing in the decision below does that. Rather, the First District determined whether committing a crime under federal, but not state, law constitutes a lack of good moral character under Section 943.13(4), (7), Florida Statutes, which disqualifies a person from service as a corrections officer. It answered that question in the affirmative and held that due to his medical-marijuana use, Petitioner could not perform the firearm-training and -use requirements of his job as a corrections officer without violating

federal law. Pet. App. 3.

In reaching that holding, the First District observed that state law requires corrections officers to "attend basic recruit training," train with firearms, wield them when necessary, and possess good moral character. *Id.* at 2 (citing §§ 943.13(4), 943.13(7), 943.13(9), 943.13(11), 943.135(1), 943.17(1), Fla. Stat.). Federal law, however, criminalizes the possession of firearms by individuals unlawfully using controlled substances under the Controlled Substances Act. *Id.* at 2–3 (citing 18 U.S.C. §§ 924(a)(8), 922(g)(3)). Marijuana is a schedule I drug under the Controlled Substances Act, *id.* at 3 (citing 21 U.S.C. § 812(c)(10)), with "no medicinal purpose for treatment in the United States." *Id.* (quoting 21 U.S.C. § 812(b)(1)), Thus, "mere possession of marijuana is a felony under federal law." *Id.* (citing *Gonzales v. Raich*, 545 U.S. 1, 14 (2005)). And, because the state-law requirement that corrections officers possess good moral character prohibits them from "engag[ing] in any activity that could give rise to a felony conviction even if [they are] never charged with the offense," *id.* at 2 (citing Fla. Admin. Code R. 11B-27.0011(4)(a)), the First District determined that Petitioner could not use medical marijuana

and "perform an important requirement of the job of corrections officer, training and using firearms, without being in violation of federal law." *Id.* at 3. Accordingly, the court held his termination was lawful. *Id.*

The court did not declare any statute valid, expressly or otherwise. It surveyed the state and federal statutory landscape and applied those statutes to "decide whether [Petitioner] has a right to use medicinal marijuana while being employed as a correctional officer." *Id.* at 2 n.2. The legality of those statutes was simply not at issue.

Second, this Court may review a district court decision that "expressly construes a provision of the state or federal constitution." Art. V, § 3(b)(3), Fla. Const. To expressly construe a constitutional provision, the district court's opinion must have "explain[ed], define[d] or overtly expresse[d] a view which eliminates some existing doubt as to a constitutional provision." *Rojas v. State*, 288 So. 2d 234, 236 (Fla. 1973). The only constitutional provision conceivably relevant here is Article X, Section 29, which immunizes registered medical-marijuana users from civil or criminal liability. But that

provision did not form the basis for the First District's holding, and the court did not need to interpret it. To the contrary, the First District sidestepped the meaning of that provision, noting that Petitioner "cannot use medicinal marijuana and maintain his certification as a correctional officer *even if* Article X, section 29 of the Florida Constitution extends as far as he contends." Pet. App. 2 (emphasis added).

The court was clear on that point. It expressly disclaimed that it was "decid[ing] the extent of a qualified patient's right to use medicinal marijuana" and instead announced that it was "only decid[ing] whether [Petitioner] has a right to use medicinal marijuana while being employed as a correctional officer." *Id.* at 2 n.2.

Because the First District did not explain, define, or overtly express a view eliminating doubt as to the medical-marijuana amendment, it did not construe that state constitutional provision. *See Rojas*, 288 So. 2d at 238 ("[O]ne does not 'construe' silently or 'inherently' but only by express overt language and statements, which can offer some 'construction' for our review.").

CONCLUSION

The Court should deny review.

Dated: October 19, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.045(b) and contains 1,706 words, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2)(A).

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished via the e-Filing Portal on this 19th day of October 2023, to the following:

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