IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 100718-3
	)	
vs.	)	ANSWER TO MOTION
	)	FOR DISCRETIONARY
LEONEL GONZALEZ,	)	REVIEW
	)	
Appellant.	)	
	)	
	)	

1. IDENTITY OF MOVING PARTY

Appellant Gonzalez has moved to for discretionary review and the State of Washington files this answer to the motion.

2. STATEMENT OF RELIEF SOUGHT

The State of Washington opposes Gonzalez's motion.

3. FACTS RELEVANT TO MOTION

Leonel Gonzalez was released from prison in June, 2021. His sentence for attempted robbery in the first degree had been cut nearly in half after the Blake decision required vacation of multiple convictions, including several convictions for unlawful possession of a firearm. Less than one month after release, Gonzalez was charged with rape in the third degree in Pierce County and released on bail. He failed to report as required to his community corrections officer for supervision on the attempted robbery conviction. Motion for Discretionary Review, App. at 6-7.

In December 2021, about six months after his release from prison, while still on release pending bail in the Pierce County case, and having never complied with the terms of his community custody, Gonzalez walked up to Ruvim Stukov, a

20-year-old man eating food in his car in a parking lot. Stukov was a complete stranger to the defendant. Gonzalez shot Stukov from close range in the chest and the top of the head, killing him. Gonzalez dragged Stukov's body from the car, got in the car, then drove away, leaving Stukov to die on asphalt. The shooting was captured on a video surveillance camera. App. at 8-9. Investigation led to the arrest of the defendant. He possessed properly belonging to the victim

Gonzalez was charged on January 21, 2022 with felony murder in the first degree predicated on robbery. App. at 4. The State asked the court to deny bail because Gonzalez was charged with an offense that carried the possibility of a life term and because he posed a danger to the community. App. at 8-9. That request was granted upon the filing of charges. Gonzalez asked the court to revisit the issue at arraignment. App. at 22-22 (hearing), 30-37 (brief). After considering argument of the

parties, the court ruled that because a life sentence was possible, bail *could* be denied. App. at 27-28. The court also ruled that Gonzalez's pattern of offenses and failure to comply with community custody showed that he presented a danger to the community, so bail *should* be denied. App. at 28.

4. THE TRIAL COURT DID NOT CLEARLY ERR IN DENYING BAIL BECAUSE THE OFFENSE OF MURDER IN THE FIRST DEGREE CARRIES THE POSSIBILITY OF A LIFE SENTENCE.

RAP 2.3(b) provides in relevant part that discretionary review "may be accepted in the following circumstances: (1) The superior court has committed an obvious error which would render further proceedings useless; [or] (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act..."

Interlocutory review is disfavored. Maybury v. City of Seattle, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). "Piecemeal

appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business." Id.

> [M]any []trial errors can prejudice, and thus in a sense render useless, further trial court proceedings. Yet the appellate courts want nothing to do with the great majority of those cases until a final judgment is rendered. The appellate system operates with a plain and intentional bias against interlocutory review.

Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1547 (1986).

Gonzalez argues that bail may be denied only if he is charged with aggravated murder or faces sentencing under the Persistent Offender Act. This argument must be rejected. The trial court's ruling is not error at all, much less obvious error.

The Washington Constitution allows that bail be denied when a life sentence is possible, not simply when a life sentence is mandated. A life sentence is possible in this case because Gonzalez is charged with murder in the first degree, a

crime punishable with a sentence up to life in prison.

Article 1, Section 20 of the Washington Constitution, provides:

> All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great. Bail may be denied for offenses *punishable by the possibility of life in prison* upon a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature.

This provision was enacted in 2010 in response to the killings of four police officers by an offender released on bail in Pierce County. State v. Barton, 181 Wn2d 148, 152-53, 331 P.3d 50 (2014). Before the amendment, bail could be denied only in capital cases. The amendment added a second sentence granting courts the authority to deny bail for offenses punishable by the possibility of life in prison, as long as that person was shown to present a danger. It broadens a court's

authority to deny bail. Barton, 181 Wn.2d at 153.

Gonzalez argues that bail can be refused under this provision only where a person is charged with aggravated murder or as a persistent offender. He argues that such a sentence is not possible as to a person charged with murder in the first degree because that offense does not carry the possibility of a life sentence. This argument was properly rejected.

In In re Pers. Restraint of Sargent, 20 Wn. App. 2d 186, 499 P.3d 241 (2021) (petition for review pending), the Court of Appeals carefully analyzed the identical argument and rejected it. The Sargent court reasoned that because a life sentence is authorized by law for all class A felonies, that possible maximum sentence, rather than the top of the presumptive standard range, was the proper measure of whether life was possible for an offender charged with a class A felony. Sargent,

499 P.3d at 245-48. The court concluded that the plain language of the phrase "punishable by the possibility of life in prison" refers to the possibility that an offender charged with a class A felony could face a sentence of life in prison under RCW 9A.20.21. Sargent, at 248. The court made clear that "punishable" modifies "offenses" and, thus, focuses on the class of crime charged rather than the circumstances of the particular individual. Id. See also In re Pers. Restraint of Diggins, No. 55987-1-II, 2022 WL 168093, at *1 (Wash. Ct. App. Jan. 19, 2022) (unpublished). The trial court in this case expressly relied upon and adopted the reasoning in Sargent. App. at 28.

A similar argument was rejected over 80 years ago by this Court in Ex parte Berry, 198 Wash. 317, 88 P.2d 427 (1939), where this Court held that the correct metric for purposes of assessing the constitutional right to bail was the

statutory maximum for the offense, not the likely, or possible, or imposed sentence. The defendant in Berry had been charged with kidnapping, which was punishable by either death or life imprisonment, but the jury refused to impose a life sentence. Berry petitioned the court for bail pending appeal since, he argued, the case was no longer a capital case because the jury did not impose death. This Court rejected that argument.

> The term 'capital offense,' as used in the constitution, means an offense for which a sentence of death may be imposed. … The test to be applied in determining whether an offense is a capital one, within the meaning of the constitution or a statute, is not whether the death penalty must necessarily be imposed, but whether it may be imposed. ….
>
> The crime of kidnapping in the first degree is punishable either by death or by life imprisonment in the state penitentiary. … It is therefore a capital offense.

Ex parte Berry, 198 Wash. at 319 (citations omitted). The court reasoned that a capital offense was "one in which the death penalty *may* be enforced, regardless of whether it finally is or

not." Berry, at 330 (italics in original). "[A] capital case does not lose its character merely from the fact that the jury did not inflict the penalty that it might have inflicted within the law." Id. The court concluded by saying, "the nature of the crime is the first consideration, and the gravity of the offense is characterized by the statutory penalty prescribed against its commission." Id.

This focus on the "nature" or "character" of the crime is consistent with the approach taken in Sargent. If bail may be denied where the law authorizes punishment of a certain kind, regardless of whether that punishment is actually imposed, then it likewise may be denied where the nature of the offense is such that a life sentence is possible under the law, even if it will not be imposed given the way the case is charged. The focus is on the category of offense rather than the particular circumstances of the offender. Gonzales essentially wants this

Court to re-write the constitutional provision so that bail is denied only where a life sentence is mandatory in a given circumstance rather than simply possible as to a category of offense.

Enacted at the same time as the constitutional amendment was a statute that created a procedure to implement the constitutional provision.

> If, after a hearing on offenses prescribed in Article I, section 20 of the state Constitution, the judicial officer finds, by clear and convincing evidence, that a person shows a propensity for violence that creates a substantial likelihood of danger to the community or any persons, and finds that no condition or combination of conditions will reasonably assure the safety of any other person and the community, such judicial officer must order the detention of the person before trial. The detainee is entitled to expedited review of the detention order by the court of appeals under the writ provided in RCW 7.36.160.

RCW 10.21.040. Unlike the constitutional provision, this statute focuses on the individualized circumstances of a particular "person" rather than the category of crime charged.

This is consistent with inquiry called for by the statute, i.e. whether a particular person shows a propensity for violence, rather than whether the category of offense should make the person ineligible for bail, at all. The statute is also consistent with the requirement that bail determinations be individualized. See RCW 10.19.055.

Gonzalez argues that the Sargent court's interpretation is absurd because class B felonies might also give rise to a life sentence, meaning the constitutional provision cannot have intended to apply to all class A felonies. Motion, at 13-15. This argument misstates the holding of Sargent and proceeds from a false premise.

The court in Sargent did not hold that bail could be denied in only class A felonies. Rather, the court held that bail could be denied whenever the charged offense could possibly give rise to a life sentence. This includes, of course, class A

felonies, but it also includes class B felonies where the law authorizes a life sentence for persistent offenders. The Sargent court's holding is proper, not absurd.

Gonzalez's counter argument seems rooted in the false premise that punishment is defined solely by the statutory definition of the offense. But, of course, the possible punishment for an offense is known by looking at both the statute defining the offense and also statutes defining punishment for that offense. The maximum possible sentence for assault in the second degree is ten years. RCW 9A.20.010-.020. But conviction for assault in the second degree may result in a life sentence if the offender has twice before been convicted of most serious offenses, because the Persistent Offender Act overrides the statutory maximum statute in those circumstances. See RCW 9.94A.570 ("Notwithstanding the statutory maximum sentence or any other provision of this

chapter, a persistent offender shall be sentences to a term of total confinement for life without the possibility of release…"). Thus, where it is alleged that a defendant has two prior strike convictions, he faces the "possibility" of a life sentence, even though "by itself" the crime of assault in the second degree does not permit a life sentence.

Similarly, Gonzalez is mistaken to assert that he does not face the "possibility of a life sentence in this case" when charged with murder in the first degree. First degree murder is a Class A felony and, as such, carries the possibility of a life sentence. RCW 9A.20.010 (felonies are classified as A, B, or C); RCW 9A.20.021(1)(b) ("…no person … shall be punished by confinement or fine exceeding… for a Class A felony… confinement in a state correctional term of life imprisonment."). Thus, Gonzalez is charged with a crime which carries a penalty of up to life imprisonment if convicted.

The trial court properly understood the purpose behind the constitutional amendment, that offenders charged with this category of offense have little to lose by committing additional crimes or fleeing the jurisdiction of the court. Voters who approved the amendment surely intended that judges be permitted to deny bail to offenders like Gonzalez who commit the most serious class of crimes and who are shown to be a danger. The lower court's ruling here is entirely supported by the sound reasoning in Berry and Sargent. Gonzalez has not shown obvious error, so discretionary review should be denied.

Were this Court to grant review in Sargent, however, it also has the ability to grant review in this matter, too. Should the court do so, the State respectfully asks that the order granting review expressly authorize the parties and the trial court to continue proceed with trial preparations, hearings, and trial during the pendency of review.

This document contains 2,289 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Submitted this 27th day of April, 2022.

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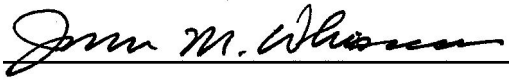
By: 

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