CASE NO. 18-6882

IN THE SUPREME COURT OF THE UNITED STATES

WILLIE SETH CRAIN, JR.,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

PAMELA JO BONDI
ATTORNEY GENERAL OF FLORIDA

CAROLYN SNURKOWSKI*
Associate Deputy Attorney General
***Counsel of Record**

Lisa Martin
Assistant Attorney General
Office of the Attorney General
3507 East Frontage Road
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
carolyn.snurkowski@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT

[Capital Case]

QUESTION PRESENTED FOR REVIEW

Whether this Court should grant review of the Florida Supreme Court's determination that Crain's jury was not misled nor was its responsibility minimized, as discussed in this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), by an instruction that accurately reflected Florida law at the time of sentencing?

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The opinion of the Florida Supreme Court is reported at *Crain v. State*, 246 So. 3d 206 (Fla. 2018).

JURISDICTION

The judgment of the Florida Supreme Court was entered on April 5, 2018 and the mandate issued July 23, 2018. Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1257(a). Respondent agrees that this statutory provision sets out the scope of this Court's certiorari jurisdiction, but asserts that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's statement regarding the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

Petitioner, Willie Seth Crain, was convicted of the first-degree murder and kidnapping of seven-year-old Amanda Brown. At the conclusion of the penalty phase, the jury unanimously recommended the death sentence. The trial court found three aggravators, all of which were given great weight: (1) prior violent felonies; (2) the murder was committed during the course of a kidnapping and (3) the victim was under the age of twelve. The court found no statutory mitigators and eight nonstatutory mitigators[1], and imposed the death sentence. *Crain v. State*, 894 So. 2d 59,

[1] (1) nonstatutory mental health impairment (some weight); (2) mental problems exacerbated by the use of alcohol and drugs, both legal and illegal (some weight); (3) Crain was an uncured pedophile (some weight); (4) Crain had a history of abuse and an unstable home life (modest weight); (5) Crain was deprived of the educational benefits and social learning that one would normally obtain from public education (modest weight); (6) Crain had a history of hard, productive work (some weight); (7) Crain had a good prison record (modest weight); and (8) Crain had the

66-67 (Fla. 2004), *cert. denied*, 546 U.S. 829 (2005).

On appeal, the Florida Supreme Court affirmed a conviction for first degree murder but reduced the kidnapping with the intent to commit murder charge to false imprisonment. The court found the sentence proportionate and affirmed the sentence of death. *Crain v. State*, 894 So. 2d 59, 78 (Fla. 2004), *cert. denied*, 546 U.S. 829 (2005).

On or about September 8, 2006, Crain filed a Motion to Vacate Judgment of Conviction and Sentence pursuant to Fla. R. Crim. P. 3.851, raising nine claims for relief. (PCR V2, 229-95). Following an evidentiary hearing, the Honorable Anthony K. Black issued an Order on September 10, 2009 denying Crain's post-conviction motion.[2] (PCR V5, 903-51). The Florida Supreme Court entered its opinion affirming the denial of post-conviction relief on October 13, 2011. *Crain v. State*, 78 So. 3d 1025 (Fla. 2011).

Crain filed a successive motion for post-conviction relief on January 5, 2017 seeking relief from his sentence based upon *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). After reviewing the State's response and conducting a case management conference, the trial court issued an order on June 14, 2017, denying Crain's motion based on a finding that any *Hurst* error was harmless beyond a reasonable doubt. Following the filing of a notice of appeal, the Florida Supreme Court issued an order directing the parties to "file briefs addressing why the lower court's order should not be affirmed based on this Court's precedent in *Hurst v. State* (*Hurst*), 202 So. 3d 40 (Fla. 2016), *cert. denied*, No. 16-998 (U.S. May 22, 2017), *Davis v. State*, 207 So. 3d 142 (Fla. 2016), and *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016)." The

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capacity to form loving relationships (modest weight).

[2] Crain, through counsel, filed a Petition for Writ of Habeas Corpus in the Middle District of Florida on February 15, 2012. The State has filed a response and the district court has stayed the case pending final resolution of Crain's state court proceedings.

Florida Supreme Court affirmed the lower court's denial of relief, rejecting Crain's arguments and finding that "the *Hurst* error was harmless beyond a reasonable doubt." *Crain*, 246 So. 3d at 210.

Crain now seeks certiorari review of the Florida Supreme Court's decision.

REASONS FOR DENYING THE WRIT

This Court should decline to grant review of the Florida Supreme Court's finding that Crain's penalty phase jury instructions, which accurately reflected Florida law at the time of the sentencing, did not violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Following his conviction for first degree premeditated murder, Crain's penalty phase jury was instructed, without contemporaneous objection from the defense, and consistent with then-existing Florida law, that its role was to advise the court as to an appropriate sentence. Crain's jury was told to assess whether sufficient aggravating factors existed, whether any mitigating circumstances outweighed the aggravators, and that their sentencing recommendation would be given great weight by the court in deciding what sentence to impose. (Respondent's Appendix A, p. 3661). This was the law in effect at the time of Crain's sentence, and it is significant here that the parties are in complete agreement regarding this important fact.

Crain's primary argument before this Court is his claim, raised for the first time in a state postconviction motion filed years after his conviction became final, that his penalty phase proceedings violated this Court's decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Setting aside the clear procedural default caused by Crain's failure to raise this claim at the time of trial, it is nevertheless clear that no such violation occurred. This is because Crain's jury was not misled regarding their role in the sentencing process, nor was their role diminished as they were accurately instructed in conformity with contemporaneous Florida law, and (perhaps most significant of all) they were told that their sentencing recommendation would be given great weight, and that only under rare circumstances would the court impose a sentence other than that recommended. (Respondent's Appendix A, p. 3661). Under these circumstances, Crain cannot establish that a *Caldwell* violation occurred, which is exactly what the Florida courts concluded. *See Romano v.*

Oklahoma, 512 U.S. 1, 9 (1994), and *Reynolds v. State*, 251 So. 3d 811 (Fla. 2018) (explaining that under *Romano*, the Florida standard jury instruction at issue "cannot be invalidated retroactively prior to *Ring* simply because a trial court failed to employ its divining rod successfully to guess at completely unforeseen changes in the law by later appellate courts").

Moreover, Petitioner became eligible for a sentence of death due to his previous violent felony convictions, and since a judge is permitted to enhance a sentence based on prior convictions without a jury finding, there was no constitutional error in sentencing Crain to death based on this aggravator.[3] *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring*. *See also James v. United States*, 550 U.S. 192, 214 n.8 (2007) (noting that prior convictions need not be treated as an element of the offense for Sixth Amendment purposes.); *Cunningham v. California*, 549 U.S. 270 (2007) (noting *Apprendi's* recidivism exception); *Jones v. United States*, 526 U.S. 227, 249 (1999) (explaining that "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). The prior violent felony aggravator

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[3] In affirming Crain's death sentence on direct appeal for proportionality, the Florida Supreme Court recognized the particular gravity of the prior violent felony conviction aggravator in this case:

> During the penalty phase in this case, the State submitted copies of judgments and sentences for five counts of sexual battery and one count of aggravated child abuse. The State also offered the testimony of three child victims of Crain's previous sexual assaults. The three female victims all testified that Crain began abusing them when they were between the ages of seven and nine years of age. One of the victims endured Crain's repetitive abuse on a monthly basis for five years. The victims also testified that Crain threatened them with extensive bodily harm or death should they reveal his abuse to anyone. Thus, as we found in *Lukehart*, the prior felony aggravator is an exceptionally weighty aggravating factor under the circumstances of the present case, and as we concluded in *Stephens*, Crain's history of victimization of children similar in age to the victim in this case increases the magnitude of the prior violent felony aggravator.

Crain, 894 So. 2d at 77–78.

is well-established Florida law, and was clearly sufficient to meet the Sixth Amendment's fact-finding requirement. *See Alleyne v. United States*, 133 S. Ct. 2151, 2160 n.1 (2013) (recognizing the "narrow exception . . . for the fact of a prior conviction" set forth in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)); *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (rejecting a claim that the constitution requires a burden of proof on whether or not mitigating circumstances outweigh aggravating circumstances, noting that such a 894question is "mostly a question of mercy."). Therefore, there was no underlying Sixth Amendment violation in this case.

As stated in Rule 10 of the Rules of the Supreme Court of the United States certiorari review "will be granted only for compelling reasons." Additionally, consideration of a decision by a state court of last resort should involve an "important question of federal law that has not been, but should be, resolved by this Court" or should involve cases that decide a federal question in a way that conflicts with other state high courts or federal courts of appeal. Cases that do not divide the federal or state courts or that do not present important, unsettled questions of federal law usually do not merit certiorari review. *Rockford Life Insurance Co. v. Illinois Dept. of Revenue*, 482 U.S. 182, 184, n. 3 (1987); *Braxton v. United States*, 500 U.S. 344, 348 (1991). Crain fails to present a compelling reason for this Court to grant certiorari review.[4]

Federal versus State retroactivity standards

This case is inappropriate for certiorari for several reasons. First, this is a postconviction case, and this Court would have to address retroactivity before even reaching the underlying jury instruction issue. Before this Court could hold that *Hurst v. Florida*, 136 S. Ct. 616 (2016) is

[4] The State observes that this Court has repeatedly denied review of similar *Hurst*-related *Caldwell* claims. *See e.g. Reynolds v. Florida*, 139 S. Ct. 27, 32 (2018); *Kaczmar v. Florida*, 138 S. Ct. 1973 (2018)

retroactive, it would necessarily have to overturn extensive precedent establishing that *Ring v. Arizona*, 536 U.S. 584, 612 (2002) is not. Indeed, federal courts have had little trouble determining that *Hurst*, like *Ring*, is not retroactive under the test announced in *Teague v. Lane*, 489 U.S. 288 (1989).[5]

Hurst v. Florida is only applicable to Petitioner through Florida's more expansive state law test for retroactivity. And Florida has determined that *Hurst v. Florida* (along with those state law cases that followed) applies retroactively to the date this Court decided *Ring* in 2002. Federal courts, however, have declined to find that *Ring* is retroactive under federal law, and have, as noted above, similarly declined to grant retroactivity to *Hurst v. Florida.*

Florida's retroactivity test, announced in *Witt v. State*, 387 So. 2d 922, 926 (Fla. 1980), provides relief to a broader class of individuals than does *Teague*, and Florida has, as a matter of state law, granted limited retroactivity to this Court's decision in *Hurst v. Florida.* Consequently, in granting certiorari review, this Court would find itself addressing retroactivity of *Hurst v. Florida* and the possibility of overruling *Schriro v. Summerlin*, 542 U.S. 348 (2004), before reaching the underlying question of harmlessness. *See also Blakely v. Washington*, 542 U.S. 296, 323 (2004) (stating "*Ring* (and *a fortiori Apprendi*) does not apply retroactively . . . .").

Therefore, pursuant to this Court's jurisprudence, there can be no federally based "*Hurst*-induced *Caldwell* claims." The fact that a state court has held, as a matter of state law, that a decision of this Court and a later related state supreme court decision are partially retroactive,[6]

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[5] *See Lambrix v. Sec'y, Fla. Dept. of Corr.*, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("under federal law *Hurst,* like *Ring*, is not retroactively applicable on collateral review"), *cert. denied*, 138 S. Ct. 217 (2017); *Ybarra v. Filson*, 869 F.3d 1016, 1032-33 (9th Cir. 2017) (denying permission to file a successive habeas petition raising a *Hurst v. Florida* claim concluding that *Hurst v. Florida* did not apply retroactively).

[6] This Court has held that, generally, a state court's retroactivity determinations are matters of state

does not provide a basis for this Court to address tangentially related constitutional claims. This Court has repeatedly recognized that where a state court judgment rests on adequate and independent state law grounds, the Court's jurisdiction fails. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). *Florida v. Powell*, 559 U.S. 50, 57 (2010) (stating that if a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision.")

Crain's *Caldwell* claim

Putting the question of retroactivity aside, Crain's present complaint appears to arise out of the fact that his penalty phase jury's determination was merely a *recommendation*, and nothing more. His argument improperly conflates this Court's decision in *Hurst v. Florida*, which addressed Sixth Amendment infirmities in Florida's previous sentencing procedure, and Florida's decision in *Hurst v. State*. In the latter case, the Florida Supreme Court went far beyond this Court's criticism of Florida's procedure that authorized the sentencing judge, as opposed to the jury, to make critical factual findings necessary to imposing a death sentence under Florida law. The Florida Supreme Court's ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017), stands as a matter of state law, and fails to provide grounds for certiorari review.

Crain's criticism aside, a Florida jury's decision regarding a death sentence was, and still remains, an advisory recommendation. *See Dugger v. Adams*, 489 U.S. 410 (1989). *See also* § 921.141(2)(c), Fla. Stat. (2017) (providing that "[i]f a unanimous jury determines that the defendant should be sentenced to death, the jury's **recommendation** to the court shall be a sentence of death") (emphasis added). What Crain seeks, even if he fails to say it precisely, is a

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law, not federal constitutional law. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

procedure where the jury itself imposes the sentence.

Consider the essence of Crain's *Caldwell* claim, which effectively condemns any jury instruction that grants the trial judge discretion to disregard the jury's sentencing decision. Crain's version of a *Caldwell* violation would apply in any case where such discretion is permitted and can only be resolved by requiring that a jury's sentencing recommendation be binding on the trial court, thus effectively shifting all responsibility for sentencing to the jury. There has never been a federal mandate requiring jury sentencing, however, and certainly no decisions impose such a requirement on the states. *See Ring v. Arizona*, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) ("[T]oday's judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed.") (emphasis in original); *Harris v. Alabama*, 513 U.S. 504, 515 (1995) (holding that the Constitution does not prohibit the trial judge from "impos[ing] a capital sentence"). This Court has never required jury sentencing in a capital case, and such a holding would require a strained and tortuous reading of the Constitution, which, after all, provides a right to **trial** by jury, not to **sentencing** by jury.

Nonetheless, Crain claims that the Florida Supreme Court's decision violates the federal constitution because it rejected his argument that the Eighth Amendment and this Court's *Caldwell* decision require what effectively amounts to jury sentencing. In Crain's view, a mere recommendation fails to meet constitutional muster where the trial judge has *any* discretion to accept or reject it. Crain's argument is fundamentally flawed. First, nothing in *Caldwell* mandates relief merely because, after a trial in which the jury was properly instructed, the law has changed. However, Crain conveniently omits any discussion of the fact that he failed to preserve his present claim by contemporaneous objection at trial. Even if preserved, however, this Court has made clear that *Caldwell* violations occur only when remarks to the jury improperly describe the role assigned

to the jury by local law and does so in a way that undermines the jury's sense of responsibility. *See Romano v. Oklahoma*, 512 U.S. 1, 9 (1994). Therefore, the Florida Supreme Court's decision is not in conflict with this Court's *Caldwell* decision; rather, it is in conformity with it.

As already noted, Crain's jury was properly instructed. Additionally, this Court has never held (as the Florida Supreme Court did in *Hurst v. State*) that the constitution requires a jury to determine the relative weight of aggravating circumstances and mitigating factors, let alone that it must do so unanimously. This requirement is not mandated by federal law, but was imposed by the Florida Supreme Court, and his argument erroneously conflates what the state court requires with this Court's ruling in *Hurst v. Florida*. Significantly, this Court has expressly stated that such findings by a jury are *not* necessary. *See Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) (noting, "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy . . .").[7] Similarly, this Court has stated that jury sentencing is not a prerequisite to the constitutionality of a death sentence. *See Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (this Court "has never suggested that jury sentencing is constitutionally required."). Finally, this Court has expressly found the type of error Crain claims to be structural is, instead, subject to harmless error analysis. *Neder v. United States,* 527 U.S. 1, 18-19 (1999) (concluding that the lack of a jury

[7] *State v. Mason*, 153 Ohio St.3d 476, 483, 485 (Oh. 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principal offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment.") (string citations omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *United States v. Purkey*, 428 F.3d 738, 750 (8th Cir. 2005) (characterizing the weighing process as "the lens through which the jury must focus the facts that it has found" to reach its individualized determination); *State v. Gales*, 658 N.W.2d 604, 628–29 (Neb. 2003) ("[W]e do not read either *Apprendi* or *Ring* to require that the determination of mitigating circumstances, the balancing function, or proportionality review be undertaken by a jury").

determination on an element of the offense is subject to harmless error analysis.)

The Florida Supreme Court's decision does not conflict with *Caldwell*.

This Court's decision in *Caldwell* is straightforward. A capital penalty phase jury should not be *misled* regarding the role it plays in the sentencing process, *and* the jury's responsibility in determining an appropriate sentence should not be *diminished*. A *Caldwell* error, therefore, has two interrelated components. First, a jury must be misled by jury instructions, prosecutor argument, or judicial comments. Second, they must be misled in a way that diminished their role in the process. Examination of what took place in Crain's penalty phase demonstrates that no *Caldwell* violation occurred.

As the state postconviction court found, Crain's jury was properly instructed regarding its role in the sentencing process according to contemporaneous state law. Interestingly, Crain does not contest the State's position in this regard. Instead, Crain argues that the Florida Supreme Court incorrectly evaluated whether the *Hurst* error in his case was harmless because the "advisory nature of the panel's role carries less weight than a binding verdict." (Petitioner's Brief, p. 13) However, Crain fails to recognize that *Caldwell* focuses on the legal accuracy of the jury instructions and the effect any erroneous information may have had on its sense of responsibility. A *Caldwell* error does not arise out of what an appellate court does or does not do.

Crain correctly notes that his jury was told that their recommendation was advisory and that the court was responsible for sentencing. That was true then and, with regard to a death recommendation, true now.[8] Still, Florida juries are hardly led to believe that their role in the

[8] Under Florida's new statute, only life recommendations can be characterized as "binding." § 921.141(2)(c), Fla. Stat. (2017). Even under the previous versions of the statute, a jury's finding of no aggravating factors was, for all practical purposes, binding. *Evans v. Sec'y, Fla. Dept. Corr.*, 699 F.3d 1249, 1256 (11th Cir. 2012) (noting the Florida Supreme Court's "stringent application"

proceedings is insignificant – even post-*Ring*, pre-*Hurst* juries. *See Darden v. Wainwright*, 477 U.S. 168, 183 n. 15 (1986) ("*Caldwell* is relevant only to certain types of comment-those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.").

Crain asserts, in a wholly conclusory manner, that "[t]he jury's belief that it was not ultimately responsible for Petitioner's death sentence is a violation of the principles annunciated in *Caldwell*". (Petitioner's Brief, p. 10) However, Crain's jury was informed of their grave responsibility: Crain's penalty phase jury was instructed that "[y]our advisory sentence is entitled by law and will be given great weight by this court in determining the sentence to impose in this case. It is only under rare circumstances that this court could impose a sentence other than what you recommend." (Respondent's Appendix A, p. 3661). And, to reinforce the significance of the jury's undertaking, Crain's jury was told that "[t]he fact that the determination of whether you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot should not influence you to act hastily or without due regard to the... gravity of these proceedings. Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake and bring to bear your best judgment in reaching your advisory sentence." (Respondent's Appendix A, p. 3666).

Because Crain's jury was properly instructed, and nothing was said to diminish the gravity of the task they were undertaking, there is no *Caldwell* error. As such, there is no basis for this Court to exercise its certiorari jurisdiction because the Florida Supreme Court is not in conflict with any decision of this Court and the state court's decision does not present a question of

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of the *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) standard under which the last override of a life recommendation affirmed on appeal was in 1994).

important, unsettled federal law.

The Florida Supreme Court's decision does not conflict with that of any federal appellate court or state supreme court.

The Eleventh Circuit has consistently rejected *Caldwell* challenges to Florida's jury instructions in capital cases in the years since *Romano*. As the Eleventh Circuit has explained, the infirmity identified in *Caldwell* is "simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Davis v. Singletary*, 119 F.3d 1471, 1481-82 (11th Cir. 1997) *see also Johnston v. Singletary*, 162 F.3d 630, 642-44 (11th Cir. 1998); *Belcher v. Sec'y, Fla. Dept. of Corr.*, 427 Fed. Appx. 692, 695 (11th Cir. 2011).

Other federal circuit courts have also held that the use of the words "advisory" or "recommendation" does not violate *Caldwell* when it accurately reflects state law. *Lorraine v. Coyle*, 291 F.3d 416, 446 (6th Cir. 2002); *Bowling v. Parker*, 344 F.3d 487, 514-15 (6th Cir. 2003); *Fleenor v. Anderson*, 171 F.3d 1096, 1098-99 (7th Cir. 1999); *Wilson v. Sirmons*, 536 F.3d 1064, 1121 (10th Cir. 2008).

Crain cites to no federal circuit court case or state supreme court case holding to the contrary. There is no conflict between the Florida Supreme Court's decision and that of any federal circuit court of appeals or that of any state supreme court. Therefore, this Court should deny review of this issue.

The Florida Supreme Court properly found that the error in Crain's case was harmless beyond a reasonable doubt. This state-law finding neither contravenes this Court's precedent, nor violates federal law. This case presents no important, unsettled, or conflicting application of constitutional law. Thus, certiorari review should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court DENY the petition for writ of certiorari.

CAROLYN SNURKOWSKI*
Associate Deputy Attorney General
Florida Bar No. 15854
*Counsel of Record

LISA MARTIN
Assistant Attorney General
Florida Bar No. 72138

Office of the Attorney General
3507 East Frontage Road
Tampa, Florida 33607-7013
Telephone: (813) 287-7910
Facsimile: (813) 281-5500
carolyn.snurkowski@myfloridalegal.com
lisa.martin@myfloridalegal.com
capapp@myfloridalegal.com

COUNSEL FOR RESPONDENT