No. 21-1226

In the Supreme Court of the United States

MICHAEL WASHINGTON, PETITIONER

v.

FLORIDA DEPARTMENT OF TRANSPORTATION

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

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QUESTION PRESENTED

This Court has held that a waiver of constitutional rights must be knowing and intelligent. Specifically, "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Additionally, in *Johnson v. Zerbst*, the Court opined that it is a duty of trial court to protect the right of the accused to counsel, and, if he has no counsel, to determine whether he has intelligently and competently waived the right. If the accused is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty. P. 468. 5.

The question is: Whether the reasoning in *Olano* applies in a civil context where the failure of a party's counsel to object to closing argument due to misconduct or negligence is an "intentional relinquishment or abandonment of a known right" by the party himself that affirmatively waives the fundamental right to a new trial, or is instead a forfeiture, which does not wholly foreclose appellate review by the State's highest court?

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The Opinion and Order of the Trial Court denying Petitioner's Motion for a New Trial (App. 1a-2a) is unreported. The per curiam affirmed ("PCA") order of the Florida Second District Court of Appeals (App. 3a) is unreported as it is an unelaborated, unwritten opinion. The order of the Florida Second District Court of Appeals denying rehearing is (App. 4a). The Florida Supreme Court lacks jurisdiction to review a PCA.[1] Thus, the State's highest reviewing court was the Florida Second District Court of Appeals.

JURISDICTION

The most important provisions respecting the Supreme Court's appellate jurisdiction are 28 U.S.C.A. §§ 1254 (federal courts of appeals) and 1257 (state courts). The Supreme Court is authorized to review state court decisions holding state laws violative of the Constitution. Specifically, under 1257(a), final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by writ of certiorari. The Supreme Court decides

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[1] *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988 (Fla. 2004).

only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. Individual rights for which Congress has provided a private right of action—specifically the protections and liberties guaranteed to the people by the U. S. Constitution, as outlined in the Bill of Rights and United States Declaration of Independence, including the rights to life, liberty, and the pursuit of happiness.

2. The Seventh Amendment extends the right to a jury trial to federal civil cases such as personal injury accidents. The Seventh Amendment protects the jury's fact-finding by providing a forum for all the facts to be presented, evaluated impartially and judged according to the law.

3. The Privileges or Immunities Clause of the Fourteenth Amendment operates with respect to the civil rights

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[2] Vinson, C.J., 69 S.Ct. vi (1949).

associated with both state and national citizenship. ... It requires that whatever those rights are, all citizens shall have them alike: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Due process under the Fourteenth Amendment can be broken down into two categories: procedural due process and substantive due process. Procedural due process, based on principles of "fundamental fairness," addresses which legal procedures are required to be followed in state proceedings: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND FACTS

Petitioner Michael Washington (hereinafter "Mr. Washington"), a lawful pedestrian, was injured on October 2, 2012 at approximately 8:30 p.m. while jogging on the sidewalk. Mr. Washington tripped and fell over a 2 x 4 wood stud lying across the sidewalk that had been placed there by the State, specifically Respondent, Florida Department of

Transportation (hereinafter "FDOT"), to bear large concrete pipes on top of it in an area near the sidewalk. Mr. Washington saw the large concrete stormwater drainage pipes but did not see and had no reason to believe that a 2 x 4 was across the sidewalk. The sidewalk area was very dark and there was no lighting, signs, or barricades blocking the sidewalk. Consequently, while jogging, Mr. Washington tripped over the 2 x 4 wood stud and fell hard to the ground. Mr. Washington was diagnosed with an acute post-traumatic cervical, thoracic, and lumbar acceleration/ deceleration sprain/strain injury; acute post-traumatic cephalgia secondary to the cervical acceleration/deceleration syndrome; and acute post-traumatic left-hand pain. Mr. Washington, through his attorney, filed suit against FDOT for its failure to inspect, maintain, or supervise the area of construction where the incident occurred in a reasonable manner. Petitioner contended that Respondent owed two distinct duties to business invitees: (1) the duty to warn of latent, dangerous conditions, and (2) the duty to maintain the premises in a reasonably safe condition. Petitioner contended that

Respondent breached its duty to exercise ordinary care in maintaining the sidewalk in a reasonably safe condition for its intended or regular uses, particularly over two days of construction at the accident site; that Petitioner was not aware of the condition of the sidewalk as a matter of law; and that the condition was not so open, obvious, and ordinary to absolve Respondent of liability. At summary judgment, Petitioner proved that FDOT possessed or controlled the land and therefore had knowledge of the condition of the sidewalk and if it was safe for use by pedestrians; FDOT did not place any barricades, barriers, lights, and signals as required by its own rules and regulations to warn Mr. Washington of any latent dangers in the area of construction; and FDOT knew or had the opportunity to discover the negligent conditions and that they created a foreseeable zone of risk, posing a threat to Mr. Washington. At trial, the performance of Petitioner's counsel, was noticeably deficient. Specifically, Petitioner's counsel made no objections and failed to provide any advocacy. The errors were so serious that Petitioner's counsel was not functioning as "counsel" expected for a jury trial

under the Seventh Amendment, and thus prejudiced Mr. Washington by depriving him of a fair trial and reliable result by the jury. There were agreements and stipulations by the attorneys to unobjected-to improper closing argument, improper statements, improper evidence, and opinion testimony by defense counsel. There were informal agreements for a lack of advocacy or abandonment at trial. FDOT presented only its Designated Corporate Representative. There was an undisclosed conflict of interest known by both attorneys of the dual representation of Mr. Washington and FDOT's only witness, its Designated Corporate Representative. On November 14, 2019, the jury returned a verdict in favor of Respondent FDOT and against Mr. Washington, with the trial court entering Final Judgment on November 23, 2019. On November 27, 2019, Mr. Washington's counsel filed a Motion for New Trial that the (1) improper, but unobjected-to, closing argument and (2) the unpreserved improper remarks of Respondent's counsel were so pervasive, inflammatory, and prejudicial as to preclude the jury's rational consideration of the case, and that both

constitute fundamental error. The Respondent argued that the Petitioner did not preserve the errors at trial. The trial court denied Mr. Washington's motion for new trial. On September 1, 2020, Petitioner timely filed notice of his appeal to the Second District Court. Following oral arguments requested by Respondent but objected to by Petitioner Pro Se, the Second District Court of Florida issued a *per curiam affirmed* ("PCA") order, immunizing the State agency from liability and foreclosing Mr. Washington from appealing to the Florida Supreme Court. Petitioner filed a motion for rehearing on June 9, 2021 and requested to certify a question of great public importance to the Florida Supreme Court. The motion for Rehearing was denied on July 2, 2021.

INTRODUCTION

Mr. Washington moved for a new trial, contending that defendant's counsel committed reversible fundamental error in closing argument by making inflammatory, prejudicial comments. The Respondent contended that the comments were not objected to and consequently any error was not preserved. On appeal to the Florida Second District Court of

Appeals, Mr. Washington argued that the trial court abused its discretion by not applying the 4-part test set out in the seminal or precedential case, *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010 (Fla. 2000) and that if the *Murphy* test was appropriately applied, the trial court would have found a strong showing that (1) the unobjected-to closing argument was indeed improper, harmful, and incurable, and that it "so damaged the fairness of the trial that the public's interest in our system of justice [to] require a new trial." *Id.* at 1030. Furthermore, (2) the Petitioner did not knowingly or intelligently "waive" the right to argue fundamental error on appeal because the misconduct or negligence of counsel(s) should stand as a bar to a valid jury verdict.

In Florida, a District Court may refuse to issue a written opinion for any reason or for no reason at all. However, it is "fundamental black letter law" that a District Court *should* write an opinion unless "the points of law raised are so well settled that a further writing would serve no useful purpose." *Elliot v. Elliot*, 648 So. 2d 137, 138 (Fla. 4th DCA 1994). The Florida Supreme Court has noted, "one of the best procedural

protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." *Roberson v. Florida Parole and Probation Commission*, 444 So. 2d 917, 921 (Fla. 1983). Importantly, the Florida Supreme Court has held "a large word like justice . . . compels an appellate court to concern itself not alone with a particular result but also with the very integrity of the judicial process." *Special v. W. Boca Med. Ctr.*, 160 So. 3d 1251, 1257 (Fla. 2014). It would be fundamentally improper to issue a PCA on unsettled issues to avoid further appellate review or when the PCA is contrary to other decisions. *See Foley v. Wearer Drugs, Incorporated*, 177 S.2d 221, 225 (Fla. 1965)(holding that the Florida Supreme Court may review PCAs when the PCA was in conflict with the Florida Supreme Court or another DCA). In the PCA Committee report, the Judicial Management Council suggested that certain types of cases warrant a written opinion. These include cases in which the decision conflicts with another district; the issue decided may arise in future

cases; or there is a written opinion or dissent identifying an issue that may be a basis for Florida Supreme Court review.

A written opinion was requested pursuant to Florida Rule of Appellate Procedure 9.330, which provides that "[w]hen a decision is entered without opinion, and party believes that a written opinion would provide a legitimate basis for supreme court review, the party may request that the court issue a written opinion." *Amendments to Florida Rules of Appellate Procedure, R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 988 (Fla. 2004). The PCA precludes further review, as the Florida Supreme Court lacks jurisdiction to review a PCA. *R.J. Reynolds Tobacco Co.*, 882 So. 2d at 989-90; *Beaty v. State*, 684 So. 2d 206, 207 (Fla. 2d DCA 1996) (citing Fla. Const. art. V, §3(b); Fla. R. App. P. 9.030(a); *Jenkins v. State*, 385 So. 2d 1356 (Fla. 1980)).

Although rarely exercised, this Court, the U.S. Supreme Court, may review a PCA rendered by a Florida district court of appeal. *Davis v. State*, 953 So. 2d 612, 614 (Fla. 2d DCA 2007). The trial court opinion and order and the Second DCA's PCA is contrary to other decisions and the issues

decided may arise in future cases. The unsettled questions, whose resolution will have immediate importance, are far beyond the particular facts and parties involved in the instant petition. Thus, this Court's review is important and necessary. The fact is that because Mr. Washington was represented by counsel, his silence cannot be equated with the intentional relinquishment of the right to a new trial or to raise the unobjected-to closing argument on appeal. The Second PCA decision provides no protection to a fundamental right of a fair trial that promotes accountability for judges and attorneys while enhancing public confidence in the justice system. Review is critically important because the inflammatory closing argument that occurred in this case is not an isolated incident but a "widespread" trend of theatrics found in local courthouses, both urban and rural, across the country. Judge Chris W. Altenbernd stated in *Hagan v. Sun Bank of Mid-Florida, N.A.*, 666 So. 2d 580, 584 (Fla. 2d DCA 1996) the following:

> **"Relief is granted for a fundamental error not because the party has preserved a right to relief from a harmful error, but because the public's**

confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace ... for serious mistakes."

REASONS FOR GRANTING THE PETITION

Petitioner's reasons for new trial are on point with *Murphy v. International Robotic Systems, Inc.*, 766 So.2d 1010, 1031 (Fla.2000). In *Murphy,* the Plaintiffs argued that they were entitled to a new trial against the Defendants because counsel allegedly made numerous improper comments during closing argument, even though counsel for the Plaintiffs made no objections during such argument. The court held that remarks that have no basis in the record, should never be indulged in trial courts, and *would ordinarily be ground for reversal.* Specifically held that closing arguments that appeal to racial, ethnic, or religious prejudices are the types of arguments that traditionally require a new trial. The standard applied for civil unobjected-to closing argument in *Murphy* by the Florida Supreme Court sets forth a four-part test that trial courts must apply when determining whether a new trial should be granted based on unpreserved error in closing argument: (1) improper; (2) harmful as "be[ing] of such

a nature that it reaches into the validity of the trial itself to the extent that the verdict reached could not have been obtained but for such comments"; (3) incurable; and (4) such that it "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial."

In *United States v. Olano*, 507 U.S. 725 (1993), this Court held that plain error review requires a reviewing court to refrain from correcting an error unless it is plain and affects "substantial rights," such that the error "seriously affect the fairness, integrity or public reputation of judicial proceedings". Applying criteria or a standard very similar to that later adopted in Murphy, the Supreme Court noted in *Olano* that there is a difference between forfeiting a claim (e.g., where the defendant simply fails to raise it, and thus must overcome the plain error standard of review) and affirmative waiver of an issue, which forecloses appellate review. Here, in the instant appeal, the Respondent argued that the Petitioner failed to object to inflammatory, prejudicial comments during closing argument at trial and thus forfeited or failed to preserve the error for the new trial

motion and on appeal.[3] The Respondent argued that the Petitioner did not overcome the plain/harmful error standard of review.

The Supreme Court applies a four-factor analysis for plain-error review: (1) there must be an error that has "not been intentionally relinquished or abandoned, i.e., affirmatively waived"; (2) "the legal error must be clear or obvious, rather than subject to reasonable dispute"; (3) "the error must have affected the appellant's substantial rights"; and (4) "if the above three prongs are satisfied, the [appellate court] has the discretion to remedy the error—discretion which ought to be exercised only if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" 415 Md. 567, 578-79 (2010) (Internal citations omitted) (quoting Puckett, 566 U.S. at 135). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett*, 566 U.S. at 135 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). We

[3] The Respondent used the term "waived" but intended "forfeited" in this context.

may consider the prongs in any order, and failing to satisfy a single prong ends the plain error inquiry.

While the above demonstrates that unpreserved errors are not exactly the same in state and federal court, it is nonetheless true that to preserve an error for review and correction on appeal, a party must make a specific, contemporaneous objection to the perceived error. *See* Federal Rule of Evidence 103(a); Florida Statute § 90.104(1)(a). Under federal law, unobjected-to error is reviewed for plain error. *United States v. Olano*, 507 U.S. 725 (1993). Under Florida law, the sole exception to the contemporaneous-objection rule is where the unobjected-to error is fundamental in nature. *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003). These rules serve three goals: 1) It gives the trial court the opportunity to correct the error; 2) it prevents delay and an unnecessary appeal that may result from the failure to cure the error early; and 3) it prevents counsel from allowing errors to go unchallenged by objection as a tactical advantage to benefit a particular client. *See United States v.*

Rodriguez, 627 F.3d 1372, 1379 (11th Cir. 2010); *F.B. v. State*, 852 So. 2d 226, 229 (Fla. 2003).

1. The trial court abused its discretion and did not conduct a Plain Error Review nor protect the integrity of the judicial process; therefore, a PCA of the final judgment entered by the trial court was not authorized because reversible error exists.

Federal courts utilize a doctrine of "plain error, an extremely stringent form of review. *See Olano*, 507 U.S. at 732; *see also* Fed. R. Crim. P. 52(b); *Farley v. Nationwide Mutual Ins.*, 197 F.3d 1322, 1329-30 (11th Cir. 1999). The U.S. Supreme Court has instructed that the fourth prong of the plain error analysis (i.e., *not correcting the error would seriously affect the fairness of the judicial proceeding*) is meant to be applied on a case-specific and fact-intensive basis. In the 11th Circuit, the courts define an "error" as a "[d]eviation from a legal rule." *United States v. Madden*, 733 F.3d 1314, 1322-23 (11th Cir. 2013) (citations omitted). To find that the error is "plain," the "error must be one that is obvious and clear under current law." *Id.*; *see also United States v. Saenz*,

134 F.3d 697, 701 (5th Cir. 1998). However, the error need not be plain at the time of the trial so long as the error was rendered plain and obvious by the time of the appellate review. *Henderson v. United States*, 568 U.S. 266 (2013). In addition, a plain error affects a party's substantial rights when the error is "prejudicial." *Madden*, 733 F.3d at 1322-23 (citations omitted). Finally, the error must seriously undermine the fairness, integrity, and public reputation of the judicial proceedings. *Id.*

It is a duty of a federal court at trial to protect the rights of the parties, especially the accused's right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938). This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent forfeiture or waiver. *Id.* In the Petitioner's case, the trial court did not protect Mr. Washington's rights either at trial or in the review of his motion for new trial. In the review, the trial court did not conduct any plain error (or fundamental error analysis). Therefore, in the hearing on Petitioner's motion for a new trial, the trial court denied the

motion without determining whether Mr. Washington met this burden to convince the court by a preponderance of evidence that he did not, neither individually or through his counsel who abandoned him at trial, forfeited or waived his right to raise the matter of unpreserved plain error. It was the duty of the trial court to grant the motion. The district court also erred because affirmance of the final judgment entered by the trial court was only authorized when no reversible error exists. Here, there was unobjected-to improper, harmful, and incurable closing argument in the record to justify a new trial.

2. The trial court abused its discretion and did not conduct a Fundamental Error Review; therefore, a PCA of the final judgment entered by the trial court was not authorized because reversible error exists.

In general, the fundamental error doctrine is the same in both criminal and civil cases under Florida law. To be fundamental in nature, the error must also be harmful. If the error is not harmful, it cannot meet the requirement of being fundamental and, therefore, it cannot be corrected if it was

not preserved for appeal by a contemporaneous objection. *Reed v. State*, 837 So. 2d 366, 369-70 (Fla. 2002) ("Furthermore, we take this occasion to clarify that fundamental error is not subject to harmless error review. its very nature, fundamental error has to be considered harmful. If the error was not harmful, it would not meet our requirement for being fundamental."). For an error to meet this narrow standard of fundamentality, it must be error that prejudiced the party. *Id.* As the Florida Supreme Court observed in *Jackson v. State*, 983 So. 2d 562, 576 (Fla. 2008), the U.S. Supreme Court has "recognized a limited class of fundamental constitutional errors that 'defy analysis by the "harmless error" standards.'" *See id.* at 576 (citing *Neder v. United States*, 527 U.S. 1, 7 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991)). "These errors are so 'intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome.'" *Id.*

In Mr. Washington's case, the trial court did not correct these errors. Instead, the errors were left uncorrected and

prejudiced Mr. Washington. In *Baggett v. Davis*, 169 So. 372 (Fla. 1936), counsel for plaintiff made the following statement in his closing argument to the jury: *"Gentlemen of the Jury, in considering the amount of your verdict you need not stop to consider what it will cost Mr. Baggett, the defendant, because he will not be out anything, and that same will not cost him a cent, and that he will not be one cent richer or poorer".* The trial court immediately cautioned the jury to disregard the statements. *Id.* The court thus corrected any error or irregularity or prejudicial influence of this remark of counsel for plaintiff. *Id.* In Mr. Washington's case, the following errors or false, inflammatory statements were made during Respondent's closing argument, were left uncorrected, and prejudiced Mr. Washington:

a. **Have you seen him squirm. Have you seen him grab his back? Have you seen him look uncomfortable? When he took the witness stand, did he stutter? Did he go (indicating)? Did he look uncomfortable at all over the last two days?**

b. **And the only person asking you for a lot of money in this case is Mr. Washington.**

c. **Would it make a difference if you would have known Michael Washington had been in an accident in 1986?**

d. **It has been 7 years and Mr. Washington has not had back surgery or spoken to a surgeon.**

e. **Would it make a difference if Mr. Washington jogged 10 miles a day, 7 days a week?**

f. **The "stars aligned," "Mr. Washington did not think inspectors would be out."**

g. **Well, you heard Mr. Curley, the project administrator... testified that he was on site personally a thousand times. That's a lot. That seems beyond reasonable for me, for the actual landowner to come check up on the work, not a hundred times, a thousand times. That's a lot. That means he's there every day, more than once a day. 365 days a year, that means he's there two, three, four times a day bouncing around between projects.**

h. **Mr. Washington drove by the site on his way to work every day.**

i. **Mr. Washington can walk out of his house and see the construction site where the accident occurred.**

The effect of the error was to permit the jury to return a verdict in favor of the Respondent State agency and against Mr. Washington. The Petitioner had the great weight of the evidence. The errors were obvious and plain. The errors were harmful and fundamental. Under the contemporaneous objection rule, and, absent an objection at trial, these errors can be raised on appeal only if fundamental error occurred. *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Brown v. State*, 124 So.2d 481 (Fla. 1960). To justify not imposing the contemporaneous objection rule, "the error must reach down into the validity of the trial itself to the extent that the verdict ... could not have been obtained without the assistance of the alleged error." *Brown*, 124 So.2d at 484. In other words, "fundamental error occurs only when the omission is pertinent or material to what the jury must consider ..." *Stewart v. State*, 420 So.2d 862, 863 (Fla. 1982), *cert. denied*, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 366 (1983). Thus, for error to meet this standard, it must follow that the error prejudiced the Petitioner. All fundamental error is

harmful error that extends beyond the parties to undermine the public's confidence in our system of justice.

3. The decision below is wrong and this case is an ideal vehicle for resolving a recurring federal question of substantial importance.

The decision below misapplied this Court's precedent by holding that the failure of Mr. Washington's counsel to object to the opposing counsel's inflammatory closing argument at trial forfeited or waived his right to raise it in a new trial motion on appeal. Under *Olano*, "waiver" of a constitutional right is the "intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733. Because inadvertent failure to object is not an intentional relinquishment of a known right, it is not a waiver. Forfeiture is the failure to make the timely assertion of a right. Mr. Washington did not forfeit; the trial court failed to consider his objection because he was represented by counsel, who did not object due to misconduct or negligence. This Court should consider this violation of *Olano*'s and/or *Murphy*'s instructions particularly troubling given the fundamental importance of the right to a

fair trial to the parties and the general public. Though the claims made by the Petitioner concerns "Individual Rights" and "Life, Liberty, and the Pursuit of Happiness" not explicitly defined procedural safeguards of the Constitution but the Bill of Rights and the Declaration of Independence, this is a fair trial claim originating from the Seventh Amendment. The decision below should be reversed. This is not merely about Mr. Washington. This affects the public and confidence in the judiciary. There is a general belief that courts are reliable guardians of individual rights, but history does not support that claim. Progress in protecting the rights of the people came mainly from public pressure and the elected branches, not from the courts. Eloquent ideas or fancy new theories should not take precedence over the people. These words still are relevant and ring true today: *"Injustice anywhere is a threat to justice everywhere."*[4]

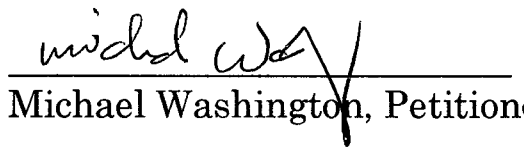
[4] MLK– Letter from a Birmingham Jail, April 16, 1963.

CONCLUSION

The petition for a writ of certiorari should be granted.

Submitted 03/04/2022.

Respectfully submitted.



Michael Washington, Petitioner Pro Se