No. 22-7536

**In The**
**Supreme Court of the United States**

**MARK D. SIEVERS**,

*Petitioner*,

v.

**STATE OF FLORIDA**,

*Respondent*.

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA**

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

C. SUZANNE BECHARD
Associate Deputy Attorney General
*Counsel of Record*

Christina Z. Pacheco
Senior Assistant Attorney General

Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
carlasuzanne.bechard@myfloridalegal.com
capapp@myfloridalegal.com
(813) 287-7900

COUNSEL FOR RESPONDENT

**Capital Case**

## QUESTIONS PRESENTED

Petitioner's co-defendant, Curtis Wayne Wright, testified against Petitioner during his trial for first-degree murder, and Petitioner's main defense was that Wright was not credible. *Sievers v. State*, 355 So. 3d 871, 877 (Fla. 2022). As part of Petitioner's defense, he admitted into evidence Wright's plea agreement with the State of Florida. A central theme of Petitioner's closing argument was that the State had not subjected Wright to a polygraph examination, even though Wright's plea agreement gave the State the option to do so. *Sievers*, 355 So. 3d at 878. The issues in this case arose after the trial judge and prosecutor responded to Petitioner's closing argument referencing the polygraph examination. The questions are as follows:

1. Whether the Florida Supreme Court correctly denied Petitioner's unpreserved challenge to the trial court's instruction to the jury that clarified a misleading statement made by Petitioner's attorney during closing argument.

2. Whether the Florida Supreme Court correctly rejected Petitioner's challenge to the prosecutor's rebuttal closing argument that was not preserved by a contemporaneous objection and when the allegation on appeal was not supported by the record.

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## OPINION BELOW

The opinion of the Supreme Court of Florida is reported as *Sievers v. State*, 355 So. 3d 871 (Fla. 2022).

## STATEMENT OF JURISDICTION

The Supreme Court of Florida issued its opinion in this case on November 17, 2022. Petitioner filed a motion for rehearing, which was denied on January 18, 2023. The Florida Supreme Court issued its mandate on February 3, 2023. Petitioner requested an extension of time to file the petition for writ of certiorari, and Justice Thomas extended the time to file until May 18, 2023. On May 9, 2023, Petitioner filed the instant petition with this Court. 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 submits that this case is inappropriate for the exercise of this Court's discretionary jurisdiction.

## STATEMENT OF THE CASE

Petitioner, Mark D. Sievers, was convicted of first-degree murder and sentenced to death for the murder of his wife, Doctor Teresa Sievers. Petitioner hired his longtime friend, Curtis Wayne Wright, to commit the murder, and Wright enlisted the help of Jimmy Ray Rodgers. *Sievers v. State*, 355 So. 3d 871, 875 (Fla. 2022). Wright testified for the State during Petitioner's trial and explained how Petitioner asked him to commit the murder, how they planned the murder by communicating through prepaid cell phones, and how Sievers provided pertinent information such as access codes and the timeframe that the murder should occur (while Sievers and his

children would be out of town). *Sievers*, 355 So. 3d at 875. Wright and Rodgers left their homes in Missouri on June 27, 2015, and drove to Florida to commit the murder. They arrived early the next morning and waited for Doctor Teresa Sievers to return home alone from a family vacation. *Id.* at 875. When Doctor Sievers returned home that evening, Wright and Rodgers repeatedly bludgeoned her in the head with a hammer until she died. *Id*.

Wright's testimony was corroborated by forensic evidence, cell phone evidence, GPS evidence, and video surveillance records introduced by the State as well as the testimony of Rodgers's girlfriend, Taylor Shomaker. *Sievers*, 355 So. 3d at 875. Coveralls worn by Rodgers during the murder were retrieved by law enforcement in Missouri and tested. Fibers from the coveralls matched fibers found on Doctor Sievers's deceased body as well as fibers from the rental vehicle used by Wright and Rodgers to travel to and from Florida to commit the murder. *Id*. at 877.

Sievers's trial was in December of 2019, and the jury found him guilty of first-degree premeditated murder and conspiracy to commit murder. *Sievers v. State*, 355 So. 3d 871, 877 (Fla. 2022). A penalty-phase hearing was subsequently conducted, and the jury unanimously recommended a death sentence. *Id* After conducting a *Spencer*[1] hearing, the trial judge sentenced Petitioner to death. *Id.*

Sievers appealed his convictions and sentences to the Florida Supreme Court, and the Florida Supreme Court denied relief on all claims. *Sievers v. State*, 355 So. 3d 871 (Fla. 2022). Several of Sievers's claims were related to issues surrounding

[1] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

whether the State conducted polygraph testing on Wright, which was a theme raised by Sievers's defense counsel to suggest that Wright's testimony was not reliable. At the end of the defense closing argument, Sievers's counsel asked, "When you weigh the evidence and you look at all these facts, ultimately, the one question you all have to ask yourselves: Do you trust Curtis Wayne Wright? And would you feel different if a polygraph had been administered?" *Sievers v. State*, 355 So. 3d 871, 878 (Fla. 2022). The State objected to the statement and requested a curative instruction. After discussion between the parties and the court, the court ultimately instructed the jury, "If Mr. Wright had actually taken a polygraph, those results, if they were—if he passed, would not have been admissible during this trial." *Sievers*, 355 So. 3d at 878.

Sievers raised a challenge on direct appeal related to the trial court's instruction. The Florida Supreme Court rejected the claim, finding that Sievers "forfeited any challenge to the substance of the trial court's instruction" by not specifically objecting to it. *Id.* at 878. The court further found the argument without merit, as "[t]he jury could reasonably have taken defense counsel's closing argument to imply that the jury would have known the results of any polygraph exam administered to Wright. Against that backdrop, it was not error for the trial court to issue a clarifying instruction." *Id*. The Florida Supreme Court further highlighted the fact that the trial court gave Sievers "free rein to argue to the jury that the decision not to subject Wright to a polygraph showed the State's unwillingness to find the truth." *Id*.

Sievers also raised a claim concerning the prosecutor's reference to Wright's plea agreement and the polygraph examination clause contained within the plea agreement. The challenged reference was made during rebuttal closing argument in direct response to defense counsel's closing argument. The Florida Supreme Court rejected Sievers's contention that the State "falsely suggested that Wright would be administered a polygraph exam sometime between the end of trial and Wright's sentencing." *Sievers v. State*, 355 So. 3d 871, 878–79 (Fla. 2022). Notably, the court held that the record did not support that claim. *Id.*

Petitioner now seeks this Court's review.

## REASONS FOR DENYING THE WRIT

### I. PETITIONER'S CHALLENGE TO THE TRIAL COURT'S JURY INSTRUCTION DOES NOT WARRANT REVIEW.

#### A. This Court Lacks Jurisdiction.

This Court lacks jurisdiction because an adequate and independent basis grounded in Florida state procedural law supports the Florida Supreme Court's resolution of Petitioner's jury instruction claim. When both state and federal questions are involved in a state court proceeding, this Court has no jurisdiction to review the case if the state court judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision. *Foster v. Chatman*, 578 U.S. 488, 497 (2016). This "independent and adequate state ground" rule stems from the fundamental principle that the Court lacks jurisdiction to review matters of state law. *See Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945). This Court has explained that "Our only power over state judgments

is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions" or enter advisory opinions. *Id*. "[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Id.* If a state court's decision is based on separate state law, this Court "of course, will not undertake to review the decision." *Florida v. Powell*, 559 U.S. 50, 57 (2010).

Here, the Florida Supreme Court's resolution of this claim rests on an adequate state law ground that is independent of any federal question. As Petitioner acknowledges in his petition, the Florida Supreme Court deemed this jury instruction issue unpreserved. Petition at 15. Specifically, the court determined that Petitioner "forfeited any challenge to the substance of the trial court's instruction" because defense counsel never contested the instruction's content while the instruction was being discussed. *Sievers*, 355 So. 3d at 878. Thus, the state court's ruling involves a state law determination on the issue of preservation.

In order for an argument to be cognizable in a state appeal, Florida law requires that the specific contention asserted for the legal basis of the objection below, be the exact same contention raised on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982); *Farina v. State*, 937 So. 2d 612, 628 (Fla. 2006). "To meet the objectives of any contemporaneous objection rule, an objection must be sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). A

reviewing court will generally not consider points raised for the first time on appeal. *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978) (citing *Dorminey v. State*, 314 So. 2d 134 (Fla. 1975)); *see also Cox v. State*, 966 So. 2d 337, 347 (Fla. 2007) ("[A] claim of error that is not preserved by an objection during trial is procedurally barred on appeal unless it constitutes fundamental error."). The Florida Supreme Court's determination that the issue was not preserved is based on independent and adequate state grounds. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977) (concluding that Florida procedure required the confession at issue to be "challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here."); *see also Engle v. Isaac*, 456 U.S. 107, 124-35 (1982) (finding respondents barred from raising a claim challenging jury instructions when they failed to raise contemporaneous objections to the jury instructions during trial).

This Court has repeatedly recognized that where a state court judgment rests on non-federal grounds, where the non-federal grounds are an adequate basis for the ruling independent of the federal grounds, "our jurisdiction fails." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Michigan v. Long*, 463 U.S. 1032, 1038, 1041-42 (1983); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (reaffirming that this Court has no jurisdiction to review a state court decision on certiorari review unless a federal question was raised and decided in the state court below).

While an adequate and independent state law ground serves to bar this Court's review of the case, Respondent further questions whether Petitioner truly presented a legitimate federal claim in state court. Petitioner's argument on this point to the Florida Supreme Court was mainly couched in terms of state law,[2] and Petitioner only made vague reference to a fair trial and a constitutional right to due process. Thus, Respondent questions whether the claim was adequately presented as one involving a federal question. *See, e.g., Bowe v. Scott*, 233 U.S. 658, 664–65 (1914) (finding a reference to "due process of law insufficient" to raise a federal question); *Herndon v. State of Ga.,* 295 U.S. 441, 442–43 (1935) (reference to the "Constitution to the United States" did not definitively raise a federal question).

Petitioner's claim was premised on state law and the mere reference to due process does not necessarily convert the claim to a federal one. *See Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); *Spencer v. State of Tex.*, 385 U.S. 554, 563–64 (1967) (explaining that the premise that the Due Process Clause guarantees the fundamental elements of

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[2] For example, on page 56 of Petitioner's Initial Brief to the Florida Supreme Court, he argued:

> The judge undermined Sievers' defense and violated long established Florida law that prohibits judicial comment on the evidence. "A judge may not sum up the evidence or comment to the jury upon the weight of the evidence, the credibility of the witnesses, or the guilt of the accused." § 90.106, Fla. Stat. Violations of the statute have resulted in reversals. *See, e.g., Jacques v. State*, 883 So. 2d 902 (Fla. 4th DCA 2004); *Thomas v. State*, 838 So. 2d 1192 (Fla. 2d DCA 2003); *Brown v. State*, 678 So. 2d 910 (Fla. 4th DCA 1996).

fairness in a criminal trial has never established the "Court as a rule-making organ for the promulgation of state rules of criminal procedure."); *see also* Art. I, § 9, Fla. Const. (the state constitutional right to due process in Florida). Nevertheless, given that the issue of preservation rests on adequate and independent state law grounds, this Court lacks jurisdiction and the petition for certiorari should be summarily denied on that basis.

### B. The Case Is Fact Intensive And Presents No Unsettled Federal Question.

Even if this Court had jurisdiction over the case, the question presented here is not worthy of this Court's review. This Court will generally not reexamine a state court's findings and conclusions of fact. *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland Ry. Co. v. Railroad Commission*, 229 U.S. 397, 412 (1913); *Fry Roofing Co. v. Wood,* 344 U.S. 157, 160 (1952). "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioner, however, asks this Court to grant certiorari review to correct what he alleges to be erroneous factual findings regarding whether a proper objection was made to preserve this issue. This Court should not exert its jurisdiction to merely review the Florida Supreme Court's factual decision on this point. Sup. Ct. R. 10.; *see also JI. Case Co. v. Borak*, 377 U.S. 426 (1964), abrogated in part on other grounds, *Cort v. Ash*, 422 U.S. 66, 78 (1975) (avoiding making a factual determination); *Foster v. Chatman*, 578 U.S. 488, 500 (2016) (explaining how the Court defers to the state court's factual findings).

Moreover, the question in this case is not one of widespread impact or importance. Rather, it is so fact-specific that it could only impact this very case. To the extent that Petitioner claims that the question involved is unsettled, Petitioner presents no true unsettled question of federal law. Rather, this claim can only be considered "unsettled" because this Court has not encountered the same exact factual scenario that arose at the trial below, and no court probably ever will again. The issue is entrenched in the chain of events at trial (concerning defense counsel's closing argument referencing the polygraph, the state's rebuttal, and the request for the instruction at issue and the discussion surrounding it, as well as the rebuttal argument). Given the unique factual circumstances in this case, this issue is extremely unlikely of repetition and not worthy of this Court's attention. No compelling reasons exist in this case to warrant this Court's exercise of review. The Florida Supreme Court's opinion involves no important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals. Nor has it decided an important question of federal law that has not been, but should be, settled by this Court, or decided an important federal question in a way that conflicts with relevant decisions of this Court.

### C. The Florida Supreme Court's Resolution Of This Claim Was Correct.

The Florida Supreme Court's resolution of this claim was entirely correct. As previously mentioned, the court properly deemed the issue waived under state law because Petitioner's trial counsel never objected to the content of the instruction, nor did he argue that it was incorrect or misleading or would amount to a violation of

Petitioner's due process rights. The court alternatively found the argument without merit because the trial court could issue a clarifying instruction after defense counsel implied that the jury would have known the results of the polygraph exam.

This Court has endorsed the well-established proposition that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146–47 (1973). In this case, Petitioner's main defense at trial was that Wright lacked credibility and was simply parroting a narrative that had been fed to him by the State. *Sievers v. State*, 355 So. 3d 871, 877 (Fla. 2022). To build on this, Petitioner's counsel highlighted the fact that Wright had entered into a plea agreement with the State; and the plea agreement contained a clause providing for a polygraph examination, but the State had not required Wright to submit to a polygraph examination. Petitioner's counsel implied that because the State had not conducted the polygraph examination, Wright's testimony should not be deemed credible.

At the end of the defense closing argument, Petitioner's counsel asked the jury, "When you weigh the evidence and you look at all these facts, ultimately, the one question you all have to ask yourselves: Do you trust Curtis Wayne Wright? And would you feel different if a polygraph had been administered?" *Sievers*, 355 So. 3d at 878. As a result of that statement, the judge instructed the jury, "If Mr. Wright had actually taken a polygraph, those results, if they were - - if he passed, would not have been admissible during this trial." *Id.*

Petitioner's counsel's question to the jury about trusting Wright if a polygraph had been administered left the implication that a polygraph test should have been given to show the jury that Wright's testimony was truthful. As such, the judge's instruction was properly made to clarify this point, especially considering that the polygraph evidence would not have been admissible evidence in this case. Given the wording of the trial court's instruction, the jury was not inclined to believe that the judge either credited or discredited Wright's testimony.

The judge did not relay his view of the case, nor did he indicate whether he believed that Wright's testimony was truthful. The instruction did not include any opinion on the adequacy of the State's investigation. The trial court was acting within its authority by clearing up the uncertainty created by Petitioner's counsel's argument about Wright's polygraph.

The trial court further permitted Petitioner's trial counsel to argue that the State did not give Wright the polygraph exam and, as the Florida Supreme Court highlighted, the court gave Petitioner's counsel free rein to argue to the jury that the decision not to subject Wright to a polygraph showed the State's unwillingness to find the truth." *Id*.

Under these circumstances, the Florida Supreme Court correctly found Petitioner's argument without merit. Petitioner has not established any constitutional violation to his right to due process by the trial court's instruction. For all these reasons, certiorari must be denied.

## II. PETITIONER'S CHALLENGE TO THE PROSECUTOR'S SINGLE REFERENCE TO THE PLEA AGREEMENT DURING REBUTTAL CLOSING ARGUMENT DOES NOT WARRANT REVIEW.

Petitioner next asks this Court to grant certiorari to review the prosecutor's reference (made during the rebuttal closing argument) to Wright's plea agreement and the polygraph examination. The challenged statement is as follows:

> Touch on the plea agreement that was entered into by Mr. Wright. Please feel free to read it. And when you do, read Paragraph 9 (e).
>
> Mr. Wright is subject to a polygraph up to the day he is sentenced under this plea agreement, up to the day he is sentenced, and should he fail that polygraph up to the day he is sentenced, his agreement goes away.

No other mention was made of the polygraph examination during the prosecutor's closing argument.

Notably, Petitioner did not object to the prosecutor's closing argument during his trial, so his argument is not preserved. Given the lack of preservation, the only way for Petitioner to be entitled to relief is to show that the single, unchallenged reference amounted to fundamental error. *Jordan v. State*, 176 So. 3d 920, 929 (Fla. 2015) (applying the fundamental error standard of review when the defendant failed to contemporaneously object to the prosecutor's comment). Under Florida law, statements constituting fundamental error "reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the alleged error." *Johnson v. State*, 238 So. 3d 726, 740 (Fla. 2018). Petitioner failed to establish fundamental error. While the Florida Supreme Court did not directly

address the issue of preservation, the lack of a preserved claim makes this question a bad vehicle for review.

Review is further unwarranted because this case involves no conflict, and the Florida Supreme Court's decision is correct. Petitioner specifically argues that the State improperly vouched for Wright's credibility by suggesting that a future polygraph exam could be given before Wright was sentenced. The Florida Supreme Court rejected this argument, finding that the record does not support the claim that the State falsely suggested that Wright would be administered a polygraph exam sometime between the end of Sievers's trial and Wright's sentencing. "It is true that the State's rebuttal told the jury that Wright remained obligated to take a polygraph at the State's request, but the argument did not imply that the State necessarily would avail itself of that option." *Sievers v. State*, 355 So. 3d 871, 878 (Fla. 2022).

Contrary to what Petitioner asserts, the Florida Supreme Court did not fail to recognize a violation of the constitutional right to a fair trial based on improper vouching. Rather, the court determined that no improper vouching occurred in Petitioner's case. *Id.* While Petitioner cites other cases in which federal circuit courts have found prosecutors' comments to amount to improper vouching, those cases are factually distinguishable from the instant case.

In *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994) the prosecutor's comments in closing argument far exceeded the prosecutor's mere reference to the plea agreement that occurred in this case. In *Carroll*, the prosecutor made statements such as, "I submit to you that [the witnesses] are credible witnesses. I submit to you

that no person would jeopardize themselves with this agreement to do anything but tell the truth." *Carroll*, 26 F.3d at 1383 (6th Cir. 1994) The prosecutor further implied that the witnesses did not want to spend any more time in jail than they had to, and one thing that would keep them from doing more time than necessary was telling the truth and the plea agreement represented the truth for both witnesses. *Id*.

Similarly, in *United States v. Brown*, 720 F.2d 1059, 1072 (9th Cir. 1983), the prosecutor argued "at length, vigorously and effectively, that the jury could believe the testimony given by the three main witnesses because the binding force of the plea-bargain guaranteed their veracity." And in *United States v. Smith*, 962 F.2d 923, 933-34 (9th Cir. 1992), the prosecutor made repeated comments aimed at establishing personal assurances of the witness' veracity, and the prosecutor's comments implied that the prosecutor and the judge would ensure the credibility of the witnesses.

Just because other courts have found improper vouching based on different facts, does not mean that the Florida Supreme Court should have found improper vouching based on these facts. In this case, the prosecutor never stated that the threat of a polygraph examination assured the reliability of Wright's testimony. Nor did the prosecutor urge the jury to believe Wright's testimony because of the possibility of a polygraph test being administered.

The prosecutor's challenged statements merely amount to a reiteration of the plea agreement that was entered into evidence by Petitioner's trial counsel and referenced by him throughout the trial. Another distinction between this case and the cases Petitioner relies on is that the plea agreements in those cases were admitted

into evidence by the prosecutors and over defense objections. Here, as Petitioner concedes, he "admitted Wright's plea agreement in the defense case without objection by the State." Petition at 22. Petitioner, not the State, put Wright's plea agreement and polygraph examination at issue, and Petitioner's defense theme was centered on the State not administering the polygraph examination.

This is an altogether different scenario from the cases Petitioner relies upon in which the State used the plea agreement and/or polygraph examination clause in an attempt to assure the veracity of the testifying witnesses. As such, the Florida Supreme Court's decision here in no way conflicts with any decision from a United States court of appeals or from this Court. Unlike the cases cited by Petitioner, this case does not involve improper vouching nor does it involve the prosecutor's presentation of facts not in evidence.

It is further worth noting that even if the Florida Supreme Court had found the prosecutor's statement to be improper, it would have been evaluated under the fundamental error standard, and an improper comment does not necessarily mean that fundamental error occurred. *See e.g., Jordan v. State*, 176 So. 3d 920, 929 (Fla. 2015) (finding the prosecutor's comment improper but not rising to the level of fundamental error). Further, the state court's evaluation of errors under the fundamental error standard obviously differs from a federal court's assessment of preserved errors as well as unpreserved errors under the plain error standard. Petitioner has altogether failed to show any conflict between the Florida Supreme Court and any federal court.

While Petitioner frames this question as a due process issue, this case involves no true federal question of law, much less one in which a conflict has developed among the federal circuit courts or state supreme courts. Nor is the Florida Supreme Court's decision in conflict with any of this Court's precedents. Further, this case does not squarely present an important issue of federal law with significant practical consequences. This case is not worthy of this Court's attention, as the questions raised are of little or no consequence beyond the particularized facts of this case. Based on the foregoing, this case is patently without merit for this Court's review, and certiorari review should be denied.

## CONCLUSION

Petitioner has not provided any compelling reason for this Court to grant certiorari review. The petition for writ of certiorari should be denied.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL OF FLORIDA

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C. SUZANNE BECHARD
Associate Deputy Attorney General
Florida Bar No. 147745
*Counsel of Record*

Christina Z. Pacheco
Senior Assistant Attorney General
Office of the Attorney General
3507 East Frontage Road, Suite 200
Tampa, Florida 33607
Carlasuzanne.bechard@myfloridalegal.com
capapp@myfloridalegal.com
Telephone: (813) 287-7900
COUNSEL FOR RESPONDENT