No. 25-6061

**IN THE SUPREME COURT OF THE UNITED STATES**

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**BRYAN F. JENNINGS,**
Petitioner

v.

**STATE OF FLORIDA,**
Respondent.

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*On Petition for a Writ of Certiorari to the Supreme Court of Florida*

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# REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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**THIS IS A CAPITAL CASE**
**EXECUTION SCHEDULED FOR**
**THURSDAY, NOVEMBER 13, 2025, at 6:00P.M.**

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***ERIC C. PINKARD**
FLORIDA BAR NO. 651443
**LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL**
12973 N. Telecom Parkway
Temple Terrace, Florida
33637 Phone No. (813) 558-
1600 Ext. 603
Fax No. (813) 558-1601
Email: PINKARD@CCMR.STATE.FL.US

***COUNSEL OF RECORD**

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IN THE SUPREME COURT OF THE UNITED STATES

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I. Florida's failure to ensure that a capitally-sentenced inmate had continuous state postconviction counsel and its post-warrant appointment of counsel completely unfamiliar with Mr. Jennings or his case violates the Fourteenth Amendment by depriving him of due process and meaningful access to the courts because newly appointed counsel cannot meaningfully represent him in this truncated under-warrant litigation.

### II. Florida's capital postconviction scheme created a property interest in mandating the continuing appointment of quality counsel.

In Florida, a death-sentenced defendant may receive notice of his execution several years or even decades after his initial state and federal appeals have concluded. An approximately thirty-day window for the execution to take place is the norm, despite the fact that state statute allows for a 180-day window. While numerous parties on the State's side of the ledger are prepared for the moment, the selected individual is only made aware of his impending execution when a team of officers appear at his cell front without warning. The officers read the signed death warrant to the defendant, which also doubles as notice that executive clemency has been denied, and immediately move him to death watch—a different facility where the defendant has no means of initiating communication. The Florida Supreme Court quickly issues an expedited briefing schedule as to the under-warrant state-court proceedings. The defendant's counsel is served with the warrant and the expedited briefing schedule, after their client has already been moved to death watch. In most cases, counsel immediately begins to strategize and prepare to litigate for their client's life for the last time. Each hour is of the essence, as counsel is typically

afforded a week or so to file a final successive motion for postconviction relief under Fla. R. Crim. P. 3.851.

In Mr. Jennings' case, this scenario did not play out, as there was no counsel in place to defend him in his last, and most critical, litigation. Mr. Jennings had no state-court lawyer for the three years preceding his death warrant, and the State of Florida knew this. Only after any semblance of meaningful process had been fully diminished did the State move to have counsel appointed, declaring that "Jennings, therefore, requires *state* collateral counsel." Emergency Motion to Appoint CCRC-M as Postconviction Counsel at 4 (emphasis in original).

And now, after Mr. Jennings' deprivation of counsel has been thrust to the forefront of his warrant litigation, the State has moved the proverbial goalpost even further by taking the position that an individual facing execution does not need an attorney to challenge his state conviction and sentence, so long as some attorney once did so years prior. And although Florida explicitly created a statutory right to continuous, qualified state-court counsel for the duration of a defendant's death sentence, the State argues that successive state postconviction proceedings, especially those initiated under warrant, are frivolous and cumulative.

There is a real danger in the precedent that Mr. Jennings' case will create if this Court does not intervene. So long as an attorney is standing idly by at the moment of execution, preserving the specter of due process in an otherwise illogical and unreasonable scenario, Florida is prepared to steam roll through the Constitution all the way to the execution chamber.

### A. Federal law controls Mr. Jennings' procedural due process claims because federal due process attaches to Florida's state created property right.

Respondent creates a fallacy by painting Mr. Jennings' procedural due process argument as an issue of state law. Response at 14-18. However, a legal analysis of Florida's rules and statutes does not convert a federal due process claim into an issue of state law. In fact, this Court has announced that such an examination of state law is necessary to a procedural due process inquiry because property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. *The Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Accordingly, once a property entitlement is established through state law, a deprivation of the right invokes federal procedural due process protection.[1]

When Respondent does address Mr. Jennings' procedural due process argument as a federal claim, Respondent sophistically frames the argument as one implicating the constitutional right to effective postconviction counsel. Response at 19-20 ("At the outset, the Florida Supreme Court's decision was consistent with this Court's long-settled precedents holding that '[t]here is no constitutional right to an

[1] As such, Respondent's jurisdictional bar argument falls flat on its face—whether state deprivation of a due process interest violates federal due process is a federal question often heard and resolved by this Court. *See Skinner v. Switzer*, 562 U.S. 521 (2011); *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009); *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Vitek v. Jones,* 445 U.S. 480 (1980).

attorney in state post-conviction proceedings,' and that a defendant cannot 'claim constitutionally ineffective assistance of counsel in such proceedings.' *Coleman v. Thompson*, 501 U.S. 722, 752 (1991)…"). Contrary to Respondent's assertions, Mr. Jennings does not request that this Court dictate the *form* of Florida's assistance to postconviction defendants, nor is he arguing for an expansion of a state-created right. Response at 20. Rather, Mr. Jennings is asserting his legitimate entitlement to continuous, quality postconviction counsel—a protected property interest created by Florida's own capital postconviction scheme. The Florida Supreme Court refused to recognize this entitlement, in conflict with the framework laid out by this Court's relevant decisions, as well as the ruling of the Ninth Circuit[2]: "Jennings argues that chapter 27 creates life, liberty, and property rights to continuous representation. It does not." *Jennings v. State*, No. SC2025-1642, 2025 WL 3096812, at *32 (Fla. Nov. 6, 2025).

In denying Mr. Jennings' claim to a property right, the Florida Supreme Court failed to analyze Mr. Jennings' right in accordance with this Court's jurisprudence. When properly analyzed, it is clear that Florida's capital postconviction scheme created a property right to counsel. Moreover, the scheme further defined the dimensions of this right to obligate a continuing right to quality[3] counsel. In fact,

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[2] *Redd v. Guerrero*, 84 F.4th 874, 894 (9th Cir. 2023), *cert. denied*, No. 24-948, 2025 WL 2824474 (U.S. Oct. 6, 2025) (finding that California law gives rise to a protected property interest in appointed capital habeas counsel).

[3] Respondent attempts to portray Mr. Jennings' claim as an ineffective-assistance-of-postconviction-counsel claim. Response at 19. This is wrong. Mr. Jennings' right to quality counsel is a contour of the property right already granted by the rules and understanding of Florida's scheme. *See, e.g.*, Fla. R. Crim. P. Rule 3.112(a) ("Counsel in death penalty cases should be required to perform at the level of an attorney

Respondent concedes that the language of the rules demonstrates the right to continuous counsel:

> Rule 3.851 does provide for the appointment of capital collateral counsel after the defendant's conviction and death sentence become final, Fla. R. Crim. P. 3.851(b)(1), and further states that the appointed attorney "must represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in a federal court," Fla. R. Crim. P. 3.851(b)(5). Chapter 27 contains similar language. Fla. Stat. § 27.711(2).

Response at 16 n.2. Respondent attempts to dilute the language of the rules by stating that the Florida Supreme Court held that counsel is not obligated to continue to investigate and raise claims after a defendant's initial collateral proceedings. *Id*. This merely addresses the obligations of counsel and is inapposite to the continuing right *to* counsel.

Further, Respondent inaccurately states that "there is no provision requiring the state courts to *sua sponte* appoint new counsel when there are no matters pending and the defendant has not requested it." *Id*. This is false as the Florida Supreme Court has amended the rules of procedure controlling capital collateral relief to do exactly that. The court amended the rules to reflect that "a capital defendant may waive pending postconviction proceedings but not postconviction counsel, and that a subsequent postconviction motion is allowable to raise certain specified claims after

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reasonably skilled in the specialized practice of capital representation, zealously committed to the capital case, who has had adequate time and resources for preparation"); Fla. Stat., § 27.711(12) ("…the court shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation."; Fla. R. Crim. P. 3.851(i)(11) ("For cases where counsel was discharged before May 5, 2022, collateral counsel eligible under rule 3.112 must be appointed.").

a waiver of pending postconviction proceedings." *In re Amends. to Fla. Rule of Crim. Proc. 3.851*, 351 So. 3d 574, 574 (Fla. 2022). In doing so, the court added a new subdivision to the rule, requiring judges to affirmatively appoint collateral counsel in cases where counsel was waived and discharged prior to the rule's amendment. Fla. R. Crim. P. 3.851(i)(11). Therefore, Florida courts were required to *sua sponte* appoint new counsel even in cases where no proceedings were pending—they had been waived—and where defendant had not requested counsel but attempted to discharge counsel. Between Fla. Stat. § 27.711 and Fla. R. Crim. P. 3.851, Florida's postconviction process requires that indigent capital defendants receive continuous, quality representation by counsel appointed by the state courts.

However, in Mr. Jennings' case, since Mr. Martin McClain died, Mr. Jennings was undeniably cut out from state court. Florida courts easily let a loose end unravel and left Mr. Jennings case untouched for years, only appointing the undersigned—strangers to Mr. Jennings—to litigate, i.e., review, investigate, develop, and draft a pleading in a forty-year-old case in a mere seven days after the governor had signed a warrant. Undersigned asked for simple redress: a time-limited stay to meaningfully review Mr. Jennings' case and provide quality representation.[4] This was denied on all fronts.

### B. Because Florida created a property interest in state postconviction counsel, deprivation of that right is a violation of federal due process.

Once a state creates a property interest, "it may not constitutionally authorize

[4] "Quality" representation is the term utilized in Fla. Stat. § 27.711(12).

the deprivation of such an interest, once conferred, without appropriate procedural safeguards" under the Due Process clause of the Fourteenth Amendment. *Loudermill*, 470 U.S. at 541; *see also. Roth*, 408 U.S. at 577. In *Vitek,* 445 U.S. at 491, this Court pointed out that "minimum [procedural] requirements [are] a matter of federal law, [and cannot be] diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." "[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." *Id*. at 490 n.6. Otherwise, the State may be able "to destroy at will virtually any state-created property interest." *Id*. By raising that Florida's inability to provide a remedy when government actors violate the plain language of Fla. Stat. § 27.711 and Fla. R. Crim. P. 3.851, is a violation of due process, Mr. Jennings provides that there are insufficient procedural safeguards for deprivation of a property interest.[5] *See* Response at 17.

The responsibility to provide procedural safeguards in the face of such a deprivation belongs to the State. Yet, Respondent takes a rogue view that Florida law does not "set out any procedures to be followed when [a postconviction] attorney withdraws or passes away. . . . Certainly, there is no provision requiring the state courts to *sua sponte* appoint new counsel. . . ." Response at 16 n.2. But Florida's statutes could not be clearer. Chapter 27 plainly obligates government actors to

[5] Mr. Jennings has been shut out from state court since postconviction proceedings cannot begin without a counsel's filing. This highlights the Florida Supreme Court's illogical reasoning when it held that the right to postconviction counsel only exists if a postconviction proceeding is pending.

"monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation." Fla. Stat. § 27.711(12). Indeed, "Capital Collateral Regional Counsel, Registry Counsel, or a private attorney must represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in a federal court." Fla. R. Crim. P. 3.851(b)(5). The statute's obligation is proven in practice by the Attorney General's campaign to appoint counsel to capital defendants with no postconviction pleadings in court. *State v. Grim*, No. 1998-CF-510, Dkt. 755 (Santa Rosa Cnty., Mar. 3, 2025); Stay Hearing at 23 ("[T]he attorney who was representing Mr. Jennings at that time is no longer with the Attorney General's Office. I'm not sure why that issue wasn't handled after Mr. McClain died, as it was in other cases."). The State's previous attempts to ensure that capital defendants have counsel comports logically with Florida's statutory scheme as not having counsel surely equates to not having "quality representation."

Respondent tirelessly relies on *Asay v. State*, 210 So. 3d 1 (Fla. 2016) to justify the deviation from statutory duty. But its reliance on *Asay* rings hollow and is irrelevant to Mr. Jennings' claim that the deficiencies in Florida's death penalty scheme deprived him of his property interest. In *Asay*, the initial warrant period was 69 days. Registry counsel agreed to the appointment after considering issues like conflict, workload, and that *Hurst v. Florida*, 577 U.S. 92 (2016) had issued the day before counsel agreed to be appointed, thereby providing immediate support for a viable claim for relief and a stay of execution. Ultimately, an entirely new round of

postconviction litigation was conducted—almost a year-and-a-half after counsel was initially appointed. *See Asay v. State,* 224 So. 3d 695, 698-99 (Fla. 2017). By the time *Asay* was executed, counsel had been appointed for approximately 19 months. *Asay* holds no persuasive value here as *Asay* did not need to challenge the State's deprivation of his property interest because, by the circumstances that arose in Asay's case, Florida actually redressed its violation.

Furthermore, Respondent argues that Mr. Jennings' uncontested lapse in state representation was not a deprivation of counsel under state law. Response at 11. This too is not grounded in the facts or reality. Mr. Jennings' case was left alone for three years in state court. In the seven days allotted by the warrant briefing schedule, the undersigned was unable to learn the case, investigate and develop claims, and draft a fully pleaded motion to vacate. Undersigned has been unable to raise viable claims challenging the reliability of Mr. Jennings' conviction—not because none exist, but because undersigned has been unable to adequately investigate and develop them. The opportunity to have familiar counsel during warrant proceedings is essential in ensuring all viable challenges are heard, especially those that only ripen once a death warrant is signed and require significant factual knowledge. By failing to grant counsel a limited, reasonable time to acquire adequate knowledge about Mr. Jennings' case, the State effectively thwarted his right to notice and a meaningful opportunity to be heard. Failure to remedy the deprivation of counsel by providing a stay is a violation of federal due process.

Respondent also attempts to deflect from its failures by blaming Mr. Jennings

and his federal counsel for his lack of state counsel, arguing that he could have notified the court of Mr. McClain's death, or that federal counsel could have acted as quasi-state counsel. But this finger-pointing argument is a product of willful blindness. Based on Florida statutes, it is not Mr. Jennings' burden to request counsel, nor must he do so for him to have a property interest in counsel. Also, having federal counsel is irrelevant under Florida statute. Florida clearly contemplates state court counsel in its postconviction scheme; requiring appointment of state counsel "regardless of whether another attorney represents the defendant in federal court" and placing the counsel monitoring burden solely on state actors. Fla. Stat. § 27.711(12); Fla. R. Crim. P. 3.851(b)(5). Representing Mr. Jennings through proxy is not a *fair and reasonable* opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Only state actors could have remedied Mr. Jennings' violation. Despite its responsibility, and despite its own knowledge that Mr. McClain had passed, as noted in Respondent's CIP during recent litigation before the federal courts, the State of Florida arbitrarily denied Mr. Jennings' property right, in strict violation of its statutory duty and constitutional mandate.[6]

### C. Mr. Jennings' procedural due process claim presents compelling reasons for this Court to grant certiorari.

Respondent further argues that Mr. Jennings' petition should not be granted as it does not present a "compelling reason" as contemplated by this Court's rule. Sup.

[6] As to notice, Mr. Jennings is the first defendant in Governor Ron DeSantis' tenure that has been executed without updated clemency pursuant to the Timely Justice Act signed in 2013. Thus, Mr. Jennings had no notice he was under consideration for a death warrant—Mr. Jennings expected an updated clemency interview.

Ct. R. 10. Response at 18-19. This assertion rests on erroneous conclusions. First, according to the parameters set forth by this Court's jurisprudence, Florida's statutory scheme granted Mr. Jennings a property interest in the right to continuous postconviction counsel for the purposes of the Due Process Clause. Yet, in conflict with the relevant decisions of this Court, the Florida Supreme Court refused to recognize Mr. Jennings' entitlement.

Additionally, the Florida Supreme Court's ruling that Florida's statutory scheme does not create a property interest for capital defendants conflicts directly with the Ninth Circuit's ruling in *Redd*, 84 F.4th at 894. Unlike the Florida Supreme Court's perfunctory dismissal, the Ninth Circuit properly analyzed Redd's entitlement to postconviction counsel through this Court's framework. There, the Ninth Circuit found a protected property right because "[b]y its mandatory language, California law leaves no discretion to deny habeas counsel to indigent capital prisoners who opt for appointed counsel," *id*. at 893, and representation by counsel has an "ascertainable monetary value. *Id*. at 893-94 (citing *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 766-67 (2005). Florida's scheme is no different, yet the Florida Supreme Court held, in conflict with the Ninth Circuit, that no such property right exists for capital postconviction defendants.

Finally, the question of whether capital defendants have a protected property right to continuous and quality representation during the most critical juncture of their postconviction proceedings is an important question of federal law to be settled by this Court. "Property" is a "broad and majestic term[,]" a great constitutional

concept that relates to "the whole domain of social and economic fact…" *Roth*, 408 U.S. at 571 (internal citations omitted). This Court has previously granted cert in relation to a wide variety of property interests. *See, e.g., Barry v. Barchi*, 443 U.S. 55 (1979) (horse trainer's license protected); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978) (utility service); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (disability benefits); *Goss v. Lopez,* 419 U.S. 565 (1975) (high school education); *Connell v. Higginbotham*, 403 U.S. 207 (1971) (government employment); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits). *Id*. at 431. In *Logan v. Zimmerman Brush Co.*, this Court stated that "it would require a remarkable reading of a 'broad and majestic ter[m],' *Board of Regents v. Roth*, 408 U.S., at 571, 92 S.Ct., at 2705, to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment, while a state-created right to redress discrimination is not." Likewise, in Mr. Jennings' case, it would require a remarkable reading to find that a horse trainer's license is a protected property interest under the Constitution, while a state-created right to postconviction counsel in a capital case under an active warrant is not.

## III. Florida's regression from the constitutional safeguards enumerated in *Gregg v. Georgia* violates the Eighth and Fourteenth Amendments by abandoning the evolving standards of decency and reliability necessary for the fair and consistent imposition of capital punishment.

Respondent asserts that Mr. Jennings' argument is not worthy of certiorari review because it was rejected based upon independent and adequate state law grounds. Response at 27, 29. However, Mr. Jennings' argument centers on the fact

that Florida's death penalty scheme no longer provides the safeguards to ensure that death sentences are imposed in a fair and reliable manner, risking the unconstitutional death sentences and, as in Mr. Jennings' case, executions. Rather, Florida's administration of the death penalty has now departed from the constitutional framework approved in *Gregg v. Georgia*, 428 U.S. 153 (1976), and affirmed through *Furman v. Georgia*, 408 U.S. 238 (1972).

In support of his argument, Mr. Jennings pointed to multiple aspects of Florida's death penalty scheme that have eroded over time and impact his death sentence and execution. While Respondent parses Mr. Jennings' argument, ultimately, this Court should grant certiorari to address the significant defects which have culminated in warrant procedures where Mr. Jennings' neither had meaningful, or any, opportunity to seek clemency nor meaningful representation at the most critical juncture of his litigation. Unsurprisingly, the task was impossible.

Notably, Mr. Jennings was sentenced to death under a statutory framework that this Court has since held was unconstitutional. *See Hurst v. Florida*, 577 U.S. 92, 94 (2016). Since this Court decided *Hurst*, the Florida Supreme Court has attempted to correct the constitutional error plaguing all of the death sentences in effect in 2016. However, its efforts and opinions injected severe arbitrariness into the already flawed death penalty scheme leaving death sentences intact based upon chance line drawing and unconstitutionally instructed jury recommendations. *See Hurst v. State*, 202 So. 3d 40 (Fla. 2016); *Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016); *State v. Poole*, 297 So. 3d 487 (Fla. 2020). The

result of the uncertainty is certain in one aspect—Florida's death penalty scheme, and Mr. Jennings' death sentence are not constitutionally compliant.

Additionally, Mr. Jennings cited to the eradication of proportionality review and the secretive and illusory clemency scheme as further evidence of Florida's failed death penalty experiment. As to clemency, Mr. Jennings was arbitrarily denied the process, while others were not. Thirty-six years passed between Mr. Jennings' initial clemency submission, a submission that was made on the heels of Mr. Jennings' third trial, but before the critical postconviction proceedings. It was during his postconviction appeals when exculpatory and impactful evidence surfaced relating to his significant drug and alcohol intoxication—evidence that had been suppressed by the State at his capital trial and bore on both his conviction and sentence of death. Further, it was after Mr. Jennings' premature and incomplete clemency submission that it was determined that two of the three aggravators applied to his case were flawed: one, that the crime was heinous, atrocious, and cruel was unconstitutionally vague; and another, that the crime was committed in a cold, calculated, and premeditated manner was imposed in violation of the ex post facto laws. *Jennings v. Crosby*, 392 F. Supp. 2d 1312, 1336-45 (N.D. Fla. 2005).

Most recently, Mr. Jennings asserted that further exculpatory evidence was buried by the State, this time the evidence concerned the benefits that a critical witness, jailhouse informant Clarence Muzynski, received in exchange for his testimony against Mr. Jennings. Those benefits included favorable treatment for both Muzinski and his wife. The fact that Mr. Jennings had no opportunity to supplement

or renew his clemency petition for thirty-six years and with important information and critical facts demonstrates a breakdown of the clemency process. Clemency's role as a "fail safe" is used to justify withholding equitable relief via traditional court process. *See, e.g., Herrera v. Collins*, 506 U.S. 390, 411-17 (1993) (discussing, at length, the role of clemency—as opposed to habeas—in remedying the "unalterable fact that our judicial system, like the human beings who administrate it, is fallible"). It is therefore unacceptable that Mr. Jennings did not have access to an adequate clemency proceeding—one that provided a meaningful opportunity to be heard.

Certiorari review is necessary to ensure that Florida abides by the Eighth and Fourteenth Amendments—providing a fair and reliable process in each step of the death penalty scheme—in Mr. Jennings' case.

## CONCLUSION

The petition for writ of certiorari should be granted.

/s/ ERIC C. PINKARD
ERIC C. PINKARD
FLORIDA BAR NO. 651443
LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL
12973 N. Telecom Parkway Temple
Terrace, Florida 33637
Phone No. (813) 558-1600 Ext. 603
Fax No. (813) 558-1601
Email: PINKARD@CCMR.STATE.FL.US

***COUNSEL OF RECORD FOR PETITIONER**