IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC12-303

JERRY MICHAEL WICKHAM,

Petitioner,

vs.

KENNETH S. TUCKER,
Secretary, Florida Department of Corrections

Respondent.

_____/

ON PETITION FOR A WRIT OF HABEAS CORPUS

REPLY BRIEF OF PETITIONER

Frederick T. Davis
Kristin D. Kiehn
Corey S. Whiting
Elizabeth A. Kostrzewa
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Martin J. McClain
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334
(305) 984-8344

Counsel for Jerry Michael Wickham

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATE STATUTES AND RULES

I. INTRODUCTION

There were clear grounds—based in the record on appeal—on which appellate counsel could have appealed Wickham's sentence, but did not. These grounds were either preserved on appeal or were so egregious that they constituted fundamental error. Appellate counsel's failure to raise them before this Court was error; at a minimum, when considered in their totality, they prejudiced Wickham.

The State cannot cite support for its claim to the contrary. As a result, it is left with unfounded arguments that Wickham's claims were either not prejudicial to him, not fundamental, or both. But the State's assertions about fundamental error lack credible support, and as in its brief in response to Wickham's 3.850 appeal, the State's arguments against prejudice are premised on a house of cards, with its discussion of each purportedly non-prejudicial error built on the State's fundamentally flawed premise that all of the constitutional errors are equally harmless. A constitutionally valid death sentence cannot be predicated on such circular logic. Once even one of these errors is acknowledged, support for the other grounds falters. In the aggregate, these errors clearly render Wickham's death sentence, and his representation in his appeal thereof, constitutionally deficient.

II. ARGUMENT

A. The Trial Court's Sentencing Procedure Was Fundamental Error

It was fundamental error for the trial court to hastily sentence Wickham to

death without first considering the aggravating and mitigating factors to determine the appropriateness of the death penalty in light of the totality of the circumstances. As this Court stated almost forty years ago, the capital sentencing procedure, "to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973); *cf. Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (decision to impose death must "be guided by standards so that the sentencing authority [will] focus on the particularized circumstances of the crime and the defendant"). The procedure is so fundamental that, *prior to Wickham's trial*, this Court took the extraordinary step of establishing a rule *sua sponte* that "all written orders imposing a death sentence be prepared prior to the oral pronouncement of sentence for filing concurrent with the pronouncement." *Grossman v. State*, 525 So. 2d 833, 841 (Fla. Feb. 18, 1988).

The State does not dispute that this procedure was not followed and that the trial court orally sentenced Wickham to death moments after the jury announced its split recommendation that Wickham be executed, without even orally announcing the court's reasoning, let alone issuing the mandatory written sentencing findings. Instead, the State argues that this error was not fundamental pursuant to *Happ v.*

Moore, 784 So. 2d 1091 (Fla. 2001), and thus not appealable by appellate counsel. (HR 14-15.)[1] But *Happ* is inapposite. There is no indication that the petition in that case argued that the failure to abide by *Grossman* constituted fundamental error. It was also clear that the trial judge in *Happ* had at least engaged in a weighing process prior to sentencing, having "read from a preliminary draft of a sentencing order," and indicated at sentencing that it "would be reduced to a final draft within the next few minutes." *Id.* at 1103. Although the *Happ* Court did not approve of this procedure, it was forced to conclude that appellate counsel could not be deemed ineffective for failing to raise the issue on appeal in the absence of an objection by trial counsel in such circumstances. *Id.*

The other cases the State cites on this point are similarly unavailing. (HR 13.) In *Ray v. State*, "the trial judge *immediately submitted his written and oral pronouncement of death*," 755 So. 2d 604, 611 (Fla. 2000) (emphasis added), and in *Blackwelder v. State*, this Court found that the trial court "independently weighed the aggravating and mitigating factors and personally evaluated the case." 851 So. 2d 650, 653 (Fla. 2003). Thus, in each of *Happ*, *Ray*, and *Blackwelder*, the record reflects that the trial court "made the requisite findings at the sentencing

[1] Abbreviations as used herein are as follows: **HP** – Petition for Writ of Habeas Corpus, served on Feb. 17, 2012; **HR** – Response Opposing Petition for Writ of Habeas Corpus, served on May 22, 2012; **IB –** Initial Brief of Appellant, served on Feb. 17, 2012; **AB –** Answer Brief of Appellee, served on May 22, 2012. All other abbreviations are as used in Petitioner's Habeas Petition.

hearing." *Nibert v. State*, 508 So. 2d 1, 4 (Fla. 1987).

By contrast, in Wickham's case, the trial court did not make *any* findings or engage in *any* weighing process at the sentencing hearing, in blatant disregard of this Court's repeated directives regarding the constitutionally mandated capital sentencing procedure. *See Patterson v. State*, 513 So. 2d 1257, 1263 (Fla. 1987); *see also, e.g., Layman v. State*, 652 So. 2d 373, 375 (Fla. 1995). As a result, its belated sentencing findings amounted to an "after-the-fact rationalization" for its hastily announced and unsupported "decision imposing death." *Perez v. State*, 648 So. 2d 715, 720 (Fla. 1995).

To make matters worse, the trial court's request that the State "set[] forth the aggravating and mitigating circumstances," (R 2045), and its adoption of every one of the State's arguments in its Findings in Support of Sentence of Death, leaves no doubt that Wickham never received an impartial judicial consideration of the appropriate sentence in his case. "[T]his Court has held that the trial court may not request that the parties submit proposed orders and adopt one of the proposals verbatim without a showing that the trial court independently weighed the aggravating and mitigating circumstances." *Valle v. State*, 778 So. 2d 960, 965 n.9 (Fla. 2001) (citing *Spencer v. State*, 615 So. 2d 688, 690-91 (Fla. 1993)); *see also Patterson*, 513 So. 2d at 1263. The State's reliance on *Walton v. State*, 847 So. 2d 438 (Fla. 2003), is therefore misplaced. (HR 16.) Rather than address the long

line of cases establishing this fundamental principle, the *Walton* Court relied on *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000), "for the proposition that 'even when the trial court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous.'" 847 So. 2d at 447. But that is not the rule for proposed sentencing findings, and unsurprisingly, *Patton* did not involve copying of proposed sentencing findings, but rather a proposed order denying post-conviction relief. 784 So. 2d at 385, 388.[2]

Ironically, the *Patton* Court specifically acknowledged the *Patterson* line of cases, but did not apply them since capital sentencing orders are unique and necessarily different in kind from post-conviction (and other court) orders:

> [A] sentencing order is a statutorily required personal evaluation by the trial judge of aggravating and mitigating factors. The evaluation done in the sentencing order is the basis for a sentence of life or death. . . . On the other hand . . . . [t]he order on post-conviction is not a sentencing order; it is a recitation of the facts, law, and reasons for the granting or denial of requested relief. *Id.* at 388-89.

In addition, in *Walton*, the allegation that the trial court improperly relied on the State's sentencing memorandum was based on "the use of identical language in somewhat substantial portions of the final sentencing order and the sentencing memoranda . . . ." 847 So. 2d at 447. In marked contrast, the trial court here

[2] *Anderson v. City of Bessemer City*, quoted by *Patton*, also concerned a situation in which a trial judge had adopted a prevailing party's findings of fact in a civil suit. 470 U.S. 564, 572 (1985).

adopted the State's memorandum in its entirety, making only the changes necessary to render the document an order rather than a memorandum. (*See* HP 11; IB 79.) Indeed, extensive effort by the State to demonstrate otherwise merely proves this point. Its several pages of quotations from the sentencing memorandum and order reveal merely minor structural and wording changes (HR 18-19)—hardly sufficient to demonstrate that the judge "performed an independent weighing and personal evaluation of the case."[3] *Morton v. State*, 789 So. 2d 324, 334 (Fla. 2001); *compare Blackwelder*, 851 So. 2d at 653 (noting differences between court order and State memorandum such as finding three mitigating circumstances rather than none and fewer felonies in support of prior violent felony aggravator, demonstrating judge was not a mere "rubber-stamp").

A superficial review of the final six pages of Wickham's trial transcript, (R 2044-49), would have made clear that a reasoned consideration of Wickham's case was never conducted before the death penalty was imposed. Appellate counsel was deficient for failing to recognize this and raise on direct appeal the procedural and constitutional errors in the sentencing process, thereby prejudicing Wickham. *See, e.g.*, *Perez*, 648 So. 2d at 720 ("[B]ecause the trial judge failed to issue separate contemporaneous written reasons supporting the death sentence, we are

[3] The *Walton* Court also did not address a fundamental error claim, and its procedural bar ruling only applied to claims of the trial counsel's deficient performance, not that of appellate counsel. *See* 847 So. 2d at 446-47.

bound to vacate Perez's death sentence and remand for imposition of a life sentence.").

B. It Was Improper for the Trial Court To Rely On Wickham's 1969 and 1983 Convictions To Support the Prior Violent Felony Aggravator

Appellate counsel was deficient in failing to challenge the two prior convictions which formed the basis for Wickham's prior violent felony aggravator. The inclusion of just one invalid prior conviction alone may render a death sentence invalid; the inclusion of multiple invalid prior convictions which render the aggravating factor itself invalid would almost certainly have done so. (HP 25-27.) Appellate counsel's failure therefore prejudiced Wickham.

1. 1969 Michigan Conviction

Wickham's 1969 conviction in Michigan was invalid, and its admission to support the prior violent felony aggravator was error. In 1972, the Michigan Court of Appeals held that, under *Boykin v. Alabama*, 395 U.S. 238 (1969), Wickham's armed robbery conviction was constitutionally invalid because it resulted from a guilty plea Wickham rendered without being advised of his rights against self-incrimination, to a jury trial, or to confront witnesses. *People v. Wickham*, 200 N.W.2d 339, 340 (Mich. Ct. App. 1972). The Michigan court recognized that, in light of those circumstances, Wickham would "ordinarily be entitled to a reversal of his conviction," but that the court's hands were tied because this remedy for *Boykin* violations was not retroactive in Michigan. *Id.* at 340-41; (HP 16-17).

While Wickham was not entitled to a reversal of his conviction because the deprivation of his rights occurred pre-*Boykin*, that does not—indeed, it *cannot*—mean he is entitled to no remedy going forward for this *established* wrong. To use an invalid conviction to support a death sentence would permit Wickham to "suffer[] anew" from the deprivation of his constitutional rights. *Burgett v. Texas*, 389 U.S. 109, 114-15 (1967); (HP 18-19).

The State objects, making the illogical argument that to give meaning and effect to the Michigan decision would require this Court to "speculate on all the Michigan record foundation of the 1972 decision and the application of Michigan and federal case law to that record over time," so instead "this Court should defer to the result of the Michigan case." (HR 25-26.) But deferring to the result of the Michigan case is all that Wickham asks this Court to do.

The Michigan Court of Appeals found that Wickham's conviction was constitutionally infirm: "We have examined the plea-taking transcript in the light of *People v. Jaworski*, 387 Mich. 21 (1972) . . . and under *Jaworski* he would, therefore, ordinarily be entitled to a reversal of his conviction." *Wickham*, 200 N.W.2d at 340. This Court should respect that decision. Doing so would not, as the State argues, involve massive speculation and intrusion into the province of the Michigan courts. All it requires is that this Court determine the impact of a sister state court's finding that a conviction was obtained in violation of the U.S.

Constitution on the use of that conviction in Florida, as a prior violent felony conviction. Rather than defer to the Michigan court decision and simply decide what effect it should have on these proceedings, the State effectively asks *this* Court to "examine[] the plea-taking transcript" and *this* Court to determine whether the constitutional error in Wickham's Michigan conviction was harmless.[4] (*See e.g.*, HR 24–25 (discussing the transcript of Wickham's plea bargain).) Deference should not require such intrusive examination or second-guessing.

An invalid conviction does not provide "legitimate support" for a death sentence. *Johnson v. Mississippi*, 486 U.S. 578, 586 (1988); (HP 17). This Court has held that, in presenting evidence of a prior violent felony conviction under section 921.141(5)(b) to support a death sentence, the State is limited to evidence of "a violent crime for which the defendant is *actually convicted*"—mere arrests or accusations cannot be considered. *Donaldson v. State*, 722 So. 2d 177, 184 (Fla. 1998) (emphasis added) (citing *Dougan v. State*, 470 So. 2d 697, 701 (Fla. 1985)). Thus, the State's argument that the language "previously convicted of . . . a felony," in Section 921.141(5)(b), can be reasonably interpreted to encompass

[4] Moreover, it is not Wickham's contention, as the State puts it, that it matters whether the *Boykin* violation was fundamental and meriting of non-retroactive treatment. That is the province of the Michigan courts. What matters is that the Michigan Court of Appeals determined that Wickham "would . . . be entitled to a reversal" of his conviction. *Wickham*, 200 N.W. 2d at 340. The question for this Court is how a conviction determined to be constitutionally infirm by another state should be treated here.

situations in which a prior conviction was vacated, when the circumstances of the crime are sufficient to establish the prior violent felony aggravator, (*see* HR 26-27), is unreasonable.[5] Such an interpretation would undermine the reliability demanded in capital cases, *i.e.*, the assurance that a death sentence is based on reason rather than caprice or emotion. *Johnson*, 486 U.S. at 585 (citing *Zant v. Stephens*, 462 U.S. 862, 884-85 (1983)). None of the cases the State cites is to the contrary—each considered whether a *valid* conviction constituted a prior violent felony pursuant to section 921.141(5)(b). (*See* HR 27 (citing *Williams v. State*, 967 So. 2d 735, 762 (Fla. 2007); *Hess v. State*, 794 So. 2d 1249, 1264 (Fla. 2001); *Bevel v. State*, 983 So. 2d 505, 518 (Fla. 2008)).

The State appears to argue that *Daugherty v. State*, 533 So. 2d 287, 289 (Fla. 1988), stands for the proposition that the "underlying facts of a prior felony when those facts are reliable" may be used to support the prior violent felony aggravator, even if the prior felony was reversed. (*See* HR 28.) In *Daugherty*, however, use of the prior violent felony aggravator was upheld (and *Johnson v. Mississippi* was found inapposite) because Daugherty had *other* prior convictions to support the prior violent felony aggravator, 533 So. 2d at 289, *not* because the facts underlying

[5] *See Duest v. Singletary*, 997 F.2d 1336, 1337, 1339-40 (11th Cir. 1993) (vacating death sentence due to vacatur of prior conviction); *see also Armstrong v. State*, 862 So. 2d 705, 715-18 (Fla. 2003); *Preston v. State*, 564 So. 2d 120, 121-23 (Fla. 1990); *State v. Bowman*, 337 S.W.3d 679, 692 (Mo. 2011); *State v. McFadden*, 216 S.W.3d 673, 678 (Mo. 2007); *State v. Shepherd*, 902 S.W.2d 895, 906-07 (Tenn. 1995); *Greene v. State*, 878 S.W.2d 384, 389 (Ark. 1994).

Daugherty's reversed murder conviction were "reliable." Moreover, unlike *Daugherty*, absent the 1969 armed robbery conviction there is insufficient support in this case for the prior violent felony aggravator. The only remaining alleged prior violent felony is Wickham's 1983 conviction for aggravated motor vehicle theft, but for the reasons set forth in Wickham's Habeas Petition and below, that conviction also cannot form the basis for this aggravator.[6] (*See* HP 20-27; *infra* § II.B.2.)

2. 1983 Colorado Conviction

The trial court improperly instructed the jury that Wickham's 1983 conviction for aggravated motor vehicle theft involved the use or threat of violence and therefore supported the prior violent felony aggravator, stating: "I am finding that the two crimes, or that the crime of first degree aggravated motor vehicle [theft] involved a crime of violence and that is why I'm giving the instruction." (R 1997-98, 2037; *see also* HP 20-25; R 217, ¶ 2(a).) Although, as the State notes, this statement occurred outside the presence of the jury, defense counsel and the prosecutor both objected to the specific language in the jury instruction, agreeing

[6] The inclusion of even a single invalid aggravator in the jury's deliberation should weigh against assuming harmless error. *See Armstrong*, 862 So. 2d at 718 (vacating death sentence where "nature of the crime underlying the vacated conviction—a sexual offense upon a child" and "detailed testimony given by the young victim" were prejudicial); *see also Bowman*, 337 S.W.3d at 692 (refraining from "assum[ing] that the jury's weighing process and sense of responsibility were unaffected by its knowledge" of invalid factors); *McFadden*, 216 S.W.3d at 678 ("When the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.") (quotation marks omitted).

that because aggravated motor vehicle theft is not a *per se* violent felony, the question of whether the facts of this particular conviction supported the prior violent felony aggravator was for the jury to decide. (R 1995–97.) The parties agreed to revise the jury instruction, (*see* R 1995–96), but ultimately, the trial judge gave the instruction "as it is" because he "fe[lt] that the statute mandates" it. (R 1997.)

That was clear error. Where a crime is not *per se* violent, a trial court must instruct the jury to evaluate, for itself, based upon the facts of the crime, whether it involved the use or threat of violence, for purposes of applying the prior violent felony aggravator. (*See* HP 21 (citing cases).) Judge McClure failed to do so, (*see* R 2035-39), merely informing the jury once, at the beginning of the instruction, that it "may consider" the listed aggravating factors. (R 2036.) The jury was never informed that the 1983 conviction was not *per se* violent and that characterizing it as such was the jury's province.

Moreover, the crime for which Wickham ultimately was convicted was not in fact violent, and none of the cases cited by the State, (HR 31-32), suggests otherwise. The State offers four cases with fact patterns involving car chases and cars striking each other in an attempt to show that Wickham's crime was in fact violent. (HR at 31-32.) However, the State cannot on the one hand agree that the determination of violence should be made case-by-case by the jury, and on the other hand argue that car chases are always violent. That is a factual question to be

addressed by the jury—the very opportunity denied in Wickham's case.

More importantly, the State has not cited, and a search could not find, a single case in which aggravated motor vehicle theft has served as a prior violent felony aggravator. This is likely because it is not the type of crime that merits application of the aggravator to support a death sentence, *i.e.*, a "life-threatening crime[] in which the perpetrator comes in direct contact with a human victim." [7] *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998) (citing *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981)). The State's cases do not even address whether a previous felony conviction that is not *per se* violent can support the prior violent felony aggravator, as they all involved violent crimes *per se*; [8] none is even a capital case.

The purpose of the prior violent felony aggravator in capital cases is "'to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case.'" *Miller v. State*, 42 So. 3d 204, 225 (Fla. 2010) (quoting *Elledge v. State*, 346 So. 2d 998, 1001 (Fla. 1977)). That Wickham engaged in a car chase to elude police, which resulted in no serious injury, does not and should not support an application of the "ultimate penalty."

---

[7] Indeed, the crime is not classified as one that can serve as a prior violent felony in support of a death sentence in Colorado. §§ 18–1.4–102(5), 18–4–409(3)–(4), Colo. Rev. Stat.

[8] *Clark v. State*, 783 So. 2d 967 (Fla. 2001) (aggravated battery); *Wingfield v. State*, 816 So. 2d 675 (Fla. 2d DCA 2002) (same); *State v. Rivera*, 719 So. 2d 335 (Fla. 5th DCA 1998) (aggravated manslaughter and aggravated battery); *Pacheco v. State*, 784 So. 2d 459 (Fla. 3d DCA 2000) (vehicular assault)). (*See* HR at 31-32.)

C. Failure To Hold a Competency Hearing Was Fundamental Error

Wickham's defense counsel's failure to request a competency hearing has no bearing on the ineffectiveness of Wickham's appellate counsel in not appealing the trial court's failure to *sua sponte* order a competency hearing. *See* Fla. R. Crim. P. 3.210(b) (1988); (HR 33-34). Moreover, the State ignores all the clear signals in the record on direct appeal that would have alerted a reasonably diligent and effective lawyer that the court should have ordered a competency hearing. These included the pretrial motions discussing a need to investigate a history of mental illness; the fact that several attorneys withdrew from representing Wickham before Padovano agreed to represent him; Dr. Carbonell's testimony; and Wickham's disruptive behavior at trial, which demonstrated his inability to properly assist in his defense and should have prompted the court to order a competency hearing. (*See generally* HP 29-32; IB 4, 6-7, 10-13.) It was fundamental error not to hold a competency hearing in such circumstances.[9]

D. The Prejudicial Atmosphere of the Trial Was Fundamental Error

By any measure, Wickham's trial was held in an atmosphere that rendered

[9] "[F]or error to be . . . fundamental . . . [it] must amount to a denial of due process," and "due process demands that a criminal defendant be psychiatrically evaluated if there is reason to doubt his competency." *D'Oleo-Valdez v. State*, 531 So. 2d 1347, 1348 (Fla. 1988) (quotation marks omitted). *Cf. Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) ("It has long been accepted that a person . . . lack[ing] the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial. . . . [T]he prohibition is fundamental to an adversary system of justice.").

basic fairness unattainable. Although Padovano's motion for change of venue cited only pre-trial publicity, the trial court was also on notice of the open discussion of the case by and among potential jurors (R 434), and the contact between potential jurors and Philip Fleming, the father of the victim, (R 527). The trial court's failure to act, when confronted with additional indications of prejudice both before and after its denial of the motion,[10] (see HP 34-38), constituted fundamental error. *See Rideau v. State,* 373 U.S. 723, 726 (1963) (allowing trial to take place in obviously prejudicial atmosphere is a denial of due process).

III. CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, and those set forth in Wickham's Habeas Petition, Wickham respectfully requests that this Court grant *habeas corpus* relief. At a minimum, a new direct appeal should be permitted at which the claims presented herein seeking, at the very least, a new sentencing hearing, if not a new trial, can be properly briefed and addressed by this Court.

---

[10] Contrary to the State's assertion, Wickham is not required to demonstrate the partiality of the jurors actually empanelled. (HR 44 (citing *Copeland v. State*, 457 So. 2d 1012, 1016 (Fla. 1984)). Wickham need only show that a significant portion of venire persons—not jurors—were exposed to sources of prejudice. *Copeland*, 457 So. 2d at 1017. In Wickham's case, roughly half of the venire persons subjected to *voir dire* admitted exposure to pre-trial publicity. (HP 36-37.) That suffices under *Copeland*. 457 So. 2d at 1017 (citing *Irvin v. Dowd,* 366 U.S. 717 (1961), where 268 of 430 venire persons had to be excused).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to:

Stephen R. White, Esq.
Office of the Attorney General
107 W. Gaines Street
Tallahassee, Florida 32399-1050

Eddie Evans, Esq.
Assistant State Attorney
301 S. Monroe Street
Tallahassee, Florida 32399-2550

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document was computer-generated using Microsoft Word, in Times New Roman 14-point font, and is in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Dated: August 9, 2012
New York, New York

Respectfully submitted and served,

By: _____

Martin J. McClain
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334
(305) 984-8344

Frederick T. Davis
Kristin D. Kiehn
Corey S. Whiting
Elizabeth A. Kostrzewa
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

COUNSEL FOR PETITIONER