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IN THE

SUPREME COURT OF FLORIDA

GABRIEL A. HERNANDEZ, Petitioner, v. STATE OF FLORIDA, Respondent.	Case Nos. SC11-941 & SC11-1357

AMICUS BRIEF OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE MIAMI CHAPTER OF THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE PETITIONER

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C. PRELIMINARY STATEMENT.

This brief is being filed by the Florida Association of Criminal Defense Lawyers ("FACDL") in support of the Petitioner, Gabriel A. Hernandez. FACDL is a statewide organization representing over 2,000 members, all of whom are criminal defense practitioners. The Miami Chapter of FACDL was founded in 1963 and has a membership of over 400 criminal defense lawyers. FACDL and the Miami Chapter of FACDL (hereinafter collectively referred to as "FACDL") have an interest in this case because the case concerns an issue that will have an impact on numerous criminal defendants in this state.

In the opinion below, the Third District certified the following two questions of great public importance:

> 1. DOES THE IMMIGRATION WARNING IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(c)(8) BAR IMMIGRATION–BASED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON THE U.S. SUPREME COURT'S DECISION IN *PADILLA v. KENTUCKY*, – U.S. –, 130 S. Ct. 1473 (2010)?
>
> 2. IF THE PRECEDING QUESTION IS ANSWERED IN THE NEGATIVE, SHOULD THE RULING IN *PADILLA* BE APPLIED RETROACTIVELY?

Hernandez v. State, 61 So. 3d 1144, 1145-46 (Fla. 3d DCA 2011). FACDL will address the first question in the instant brief. Regarding the second question, FACDL supports the position taken by the Petitioner in his principal brief. FACDL contends

that the Court should allow a two-year window for affected defendants to raise *Padilla* claims – similar to the two-year window that the Court permitted in *State v. Green*, 944 So. 2d 208, 219 (Fla. 2006) ("Therefore, in the interest of fairness, defendants whose cases are already final will have two years from the date of this opinion in which to file a motion comporting with the standards adopted today.").

D. SUMMARY OF ARGUMENT.

FACDL submits that an attorney's misadvice/failure to advise regarding the deportation consequences of a defendant's guilty/no contest plea that renders deportation "practically inevitable" is not cured by a trial court's admonition (based on Florida Rule of Criminal Procedure 3.172(c)(8)) that the defendant "may" be deported as a result of the plea. In *Padilla v. Kentucky*, 599 U.S. –, 130 S. Ct. 1473 (2010), the United States Supreme Court explained that since 1996, if a noncitizen commits a removable offense, his or her removal is "practically inevitable." The Court further explained that a controlled substance offense is deportable. FACDL contends that informing a defendant that s/he *may* be deported is insufficient to meet the requirements of *Padilla*. There is a substantial difference between informing a defendant that his or her plea *may* result in deportation versus informing the defendant that his or her plea *will* result in deportation. Accordingly, FACDL prays the Court to hold that a trial court's compliance with rule 3.172(c)(8) does not cure defense counsel's misadvice/failure to advise about the deportation consequences of a guilty/no contest plea.

E. ARGUMENT AND CITATIONS OF AUTHORITY.

An attorney's misadvice/failure to advise regarding the deportation consequences of a defendant's guilty/no contest plea is not cured by a trial court's admonition (based on Florida Rule of Criminal Procedure 3.172(c)(8)) that the defendant "may" be deported as a result of the plea.

In the opinion below, the Third District certified the following question of great public importance:

> DOES THE IMMIGRATION WARNING IN FLORIDA RULE OF CRIMINAL PROCEDURE 3.172(c)(8) BAR IMMIGRATION–BASED INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BASED ON THE U.S. SUPREME COURT'S DECISION IN *PADILLA v. KENTUCKY*, – U.S. –, 130 S. Ct. 1473 (2010)?

Hernandez v. State, 61 So. 3d 1144, 1145-46 (Fla. 3d DCA 2011). For the reasons expressed below, FACDL requests the Court to answer this question in the negative.

1. *Padilla*.

In *Padilla v. Kentucky*, 599 U.S. –, 130 S. Ct. 1473 (2010), defendant Jose Padilla faced deportation proceedings after he entered a guilty plea to transporting a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. Mr. Padilla subsequently filed a state postconviction motion asserting that his trial counsel not only failed to advise him of the immigration consequences before he entered his plea, but also told him he "'did not have to worry about immigration status since he had been in the country so long.'" *Padilla*, 599 U.S. at –, 130 S. Ct. at 1478. The Kentucky Supreme Court denied Mr. Padilla relief, concluding that the right to

effective assistance of counsel under the Sixth Amendment did not protect a criminal defendant from erroneous advice about immigration consequences that flowed from his guilty plea. *See Commonwealth v. Padilla*, 253 S.W. 3d 482, 484 (Ky. 2008). The United States Supreme Court granted Mr. Padilla's petition for writ of certiorari "to decide whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." *Padilla*, 599 U.S. at –, 130 S. Ct. at 1478.

On March 31, 2010, the United States Supreme Court issued its opinion in *Padilla*. In a 7-2 opinion written by Justice Stevens,[1] the United States Supreme Court confirmed that the constitutional right to counsel set forth in the Sixth Amendment to the United States Constitution requires that defense counsel give proper advice regarding the deportation consequences of a criminal conviction. *See id.* at –, 130 S. Ct. at 1493. The Court traced the dramatic "changes to our immigration law" over the last half century, *id.* at –, 130 S. Ct. at 1480, concluding that there remains very little discretion in immigration removal statutes today:

> Under contemporary law, if a noncitizen has committed a removable offense after [1996], his removal is *practically inevitable* but for the possible exercise of limited remnants of equitable discretion vested in

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[1] Justice Alito concurred in a separate opinion, joined by Chief Justice Roberts. Justice Scalia wrote a dissenting opinion that was joined by Justice Thomas.

> the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.

Id. at –, 130 S. Ct. at 1480 (emphasis added).

Applying the facts of Mr. Padilla's case, the Court then proceeded to explain that a defendant convicted of a controlled substance offense is deportable. *See id.* at –, 130 S. Ct. at 1483 (citing 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.")). Put another way, the Court concluded that removal is "specifically command[ed] . . . for all controlled substances convictions except for the most trivial of marijuana possession offenses." *Id.* Because Padilla pled to a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)(i), the Court held, defense counsel had a duty to accurately advise him of this consequence. *See id.* The Court added:

> When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may* carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.*

Id. at –, 130 S. Ct. at 1483 (emphasis added) (footnote omitted).

2. *Flores*, rule 3.172(c)(8), and "may" versus "shall"

In *Flores v. State*, 57 So. 3d 218 (Fla. 4th DCA 2010), the Fourth District held that an attorney's misadvice regarding the deportation consequences of a defendant's guilty/no contest plea is cured by a trial court's admonition (based on Florida Rule of Criminal Procedure 3.172(c)(8)) that the defendant "may" be deported. *See Flores*, 57 So. 3d at 220-21 ("The court's warning that Flores may be deported based on his plea cured any prejudice that might have flowed from counsel's alleged misadvice."). In *Hernandez*, the Third District rejected the Fourth District's holding in *Flores:*

> . . . *Flores* holds that the trial court's warning to Flores that he may be deported based on his plea "cured any prejudice that might have flowed from counsel's alleged misadvice." 57 So. 3d at 220–21. While this may have been an accurate statement of federal and Florida law before *Padilla*, we respectfully conclude that it is no longer accurate.
>
> As noted, the record in *Padilla* did not even include a "may subject you" warning as part of the plea colloquy. But the holding in that case does not depend on a distinction between defense counsel's mere failure to warn versus his or her affirmative misadvice. Instead, *Padilla* goes to the very heart of a defendant's Sixth Amendment right to effective assistance of counsel when the defendant is entering a plea to a criminal charge as to which the plea and sentence, as here, will subject the defendant to deportation (and with no basis to apply for discretionary relief from that result). The majority opinion in *Padilla* focuses on counsel's duty, not on the "fair notice" warning that such a plea might (and therefore, inferentially, might not) result in deportation:
>
> > There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is

> not succinct and straightforward (as it is in many of the scenarios posted by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges *may carry a risk* of adverse immigration consequences. *But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.*

Padilla, 130 S. Ct. at 1483 (footnote omitted; emphasis provided).

The majority opinion thus differentiated between those cases involving a mere "risk of adverse immigration consequences," and those with a "truly clear" deportation consequence. The concurring opinion by Justice Alito in *Padilla*, joined by Chief Justice Roberts, recognized the consequence of such a distinction in the many cases in which deportability is clear but only the "risk of adverse immigration consequences" warning is given. The concurring opinion argued that defense counsel must only "(1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney." *Id.* at 1484.

We are obligated to follow and apply the majority's distinction and holding in *Padilla*. Applying this new Sixth Amendment analysis to the present case, neither the plea colloquy nor Hernandez's counsel's advice (accepting the sworn allegation of Hernandez's motion as true for this purpose) conveyed the warning that deportability was a non-discretionary and "truly clear" consequence of his plea.

The Supreme Court also explained in *Padilla* why this seemingly simple distinction between a "will subject you" warning versus a "may subject you" warning has a constitutional dimension:

> We too have previously recognized that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" [*INS v.*] *St. Cyr*, 533 U.S. [289,] 323 [(2001)] (quoting 3 Criminal Defense Techniques §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving

> the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S. at 323.
>
> *Padilla*, 130 S. Ct. at 1483.
>
> In *Flores*, the Fourth District further noted that Padilla's plea resulted in a conviction for an "aggravated felony" under 8 U.S.C. § 1227(a)(2)(A)(iii), while Flores' conviction did not. The opinion reported, however, that Flores nonetheless became deportable under 8 U.S.C. § 1227(a)(2)(B). Under our reading of *Padilla*, constitutionally effective defense counsel is required under either scenario to furnish a "will subject you," not a "may subject you" warning to his or her client.

Hernandez, 61 So. 3d at 1147-48 (footnotes omitted).

FACDL requests the Court to approve the Third District's holding in *Hernandez* on this point. "A criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011) (citing *Padilla*, 599 U.S. at –, 130 S. Ct. at 1483) (emphasis in original).

In support of its argument, FACDL notes that a similar issue was recently litigated in a federal case in Tallahassee (misadvice as to whether the defendant would be deported as a result of a plea). *See United States v. Choi*, case number 4:08cr5-RH-WCS (N.D. Fla.). At the postconviction hearing in *Choi*, the prosecutor

argued that there was no misadvice because the defendant had been informed that his plea *could* result in deportation. The judge (the Honorable Robert L. Hinkle) rejected this argument, noting when a plea makes deportation "presumptively mandatory," there is a substantial difference between telling a defendant that a plea *could* result in deportation versus telling the defendant that a plea *will* result in deportation. Judge Hinkle then used the analogy of flying on an airplane:

> MS. NeSMITH: But, Your Honor, I still believe that, just him knowing that he could face, that he could be deported, is adequate – that's adequate knowledge for him to know and understand the consequences of his plea.
>
> THE COURT: Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on.

(Doc 96 - Pg 52) (available on PACER). *See also Scales v. Miss. State Parole Bd.*, 831 F.2d 565, 566 (5th Cir. 1987) ("The distinction between whether a prisoner *shall* or *may* be given parole critically differentiates his expectation of release . . . .").

FACDL further notes that courts in other jurisdictions have rejected the argument that a trial court's warning during a plea colloquy that a defendant *may* be deported is sufficient to cure defense counsel's affirmative misadvice on the matter. For example, in *In re Resendiz*, 19 P.3d 1171, 1177-79 (Cal. 2001), the California Supreme Court held that compliance with a statutory advisement that informs a defendant that a guilty/no contest plea "may have the consequences of deportation"

did not cure counsel's misadvice:

> The Attorney General argues, as does Justice Brown in her concurring and dissenting opinion, that a trial court's having provided a [Cal. Penal Code §] 1016.5 advisement "should shield pleas from collateral attack" (conc. & dis. opn. of Brown, J., *post*, at p. 453, 19 P.3d at p. 1192) based on immigration consequences. We disagree.
>
> That defendants have a right to counsel when they undertake the plea evaluation and negotiation specifically provided for in section 1016.5, subdivisions (b) and (d) is not disputed. And that right to counsel "is the right to the effective assistance of counsel." We recognize that it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain. Thus, whether or not the court faithfully delivers section 1016.5's mandated advisements, the defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.
>
> Under the Sixth Amendment, defendants are entitled so to rely and to expect representation within the range of competence demanded of attorneys in criminal cases. The existence of a state statute requiring courts to deliver a specified immigration advisement cannot deprive defendants of these federal constitutional rights. Efforts to mine section 1016.5's history for hints the Legislature meant that statute to foreclose some kinds of ineffectiveness claims are misplaced. What constitutes ineffective assistance of counsel is a question of constitutional law, not of legislative intent. Thus, that a defendant may have received valid section 1016.5 advisements from the court does not entail that he has received effective assistance of counsel in evaluating or responding to such advisements.
>
> The Attorney General's suggestion that we construe section 1016.5 as a categorical bar to immigration-based ineffective assistance claims would deny defendants who prove incompetence and prejudice a remedy for the specific constitutional deprivation suffered, viz., the Sixth Amendment right to effective counsel. Any construction that might engender such constitutional infirmity is to be avoided.
>
> Nothing, moreover, suggests that the drafters of section 1016.5 intended either to narrow defendants' relationships with their attorneys

> or to shield incompetent legal advisers. If anything, the statutory scheme contemplates an enhanced, not a diminished, role for counsel.
>
> For the foregoing reasons, section 1016.5 does not bar petitioner's claim.

(Citations omitted) (footnotes omitted).[2] *See also Ex parte Tanklevskaya*, No. 01–10–00627–CR, 2011 WL 2132722 at *11 (Tex. App. May 26, 2011) ("[W]e hold that, under these facts, the trial court's statutory admonishment [i.e., that the plea 'may' result in deportation] prior to accepting applicant's guilty plea does not cure the prejudice arising from plea counsel's failure to inform applicant that, upon pleading guilty, she would be presumptively inadmissible."); *People v. Garcia*, 907 N.Y.S. 2d 398, 407 (N.Y. Sup. Ct. 2010) ("I hold that where, as here, defendant is found in fact to have been misled by bad advice from a so-called retained specialist and by a lack of advice from his defense attorney, the Court's general warning will not automatically cure counsel's failure nor erase the consequent prejudice.") (footnote omitted); *State v. Creary*, 2004 WL 351878 (Ohio Ct. App. 2004) (finding that a trial court's warning during a plea colloquy that the conviction "could" result

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[2] The California Supreme Court added that "the Legislature cannot have intended, when enacting section 1016.5, to burden pleading defendants (on pain of waiving subsequent Sixth Amendment claims) with an obligation to raise before the judge at the plea proceeding any concerns they might have about advice they receive from counsel regarding the court's section 1016.5 advisement." *Resendiz*, 19 P.3d at 1178 n.4.

in deportation did not cure defense counsel's alleged misadvice).[3]

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[3] Similarly, other courts in this country have concluded that *an attorney's* advice that deportation is a "possibility" is insufficient under *Padilla* if the correct advice is that deportation is mandatory. In particular, in *Ex Parte Romero*, 351 S.W.3d 127, 131 (Tex. App. 2011), the Texas appellate court stated:

> Based on trial counsel's affidavit, the trial court could have found that trial counsel reviewed the written immigration admonition with Romero including the "possible" immigration consequences; however, reviewing the written admonition did not satisfy trial counsel's duty under these circumstances. Because the deportation consequence was truly clear, trial counsel had a duty to inform Romero of the specific consequences of his plea. In his affidavit, Romero stated that trial counsel never advised him that he would be deported. *Because trial counsel only informed Romero about "possible" immigration consequences where the law made deportation a virtual certainty, counsel's performance was deficient.*

(Emphasis added) (citations omitted). *See also Simonovich v. State*, No. A11–821, 2011 WL 6141661 (Minn. Ct. App. Dec. 12, 2011) (holding that counsel was ineffective for merely telling defendant that he "might" be deported as a result of his plea, when the correct advice was that deportation was presumptively mandatory); *Ex Parte Carpio-Cruz*, No. 08–10–00240–CR, 2011 WL 5460848 at *7 (Tex. App. Nov. 9, 2011) ("Counsel testified that she was aware of and understood all of these statutes, yet she only advised Carpio that his guilty plea 'could' result in removal and he 'could' face immigration consequences. Because Carpio's deportation was 'practically inevitable,' this advice was deficient.") (citations omitted); *Salazar v. State*, No. 11–11–00029–CR, 2011 WL 4056283 at *3 (Tex. App. Aug. 31, 2011) ("[T]he trial court inferentially found that Salazar failed to establish the first prong of *Strickland* because his counsel told him that there was a likelihood he would be deported. The trial court characterized that the attorney did not make an inaccurate representation. As we have previously noted, Salazar's trial counsel also admonished him that there was a possibility that he would be deported. In any event, the correct advice, which was that the plea of guilty would result in certain deportation, was not given. Both the terms 'likelihood' and 'possibility' leave open the hope that deportation might not occur. Consequently, these admonishments were inaccurate

Finally, FACDL submits that the fact that a state requires court advisals regarding potential immigration consequences of a guilty/no contest plea does not obviate the need for defense counsel to investigate and advise the defendant. *See* Immigrant Defense Project, "Duty of Criminal Defense Counsel Representing An Immigrant Defendant after *Padilla V. Kentucky*," April 6, 2010. The American Bar Association's ("ABA") commentary to the ABA Standards for Criminal Justice: Pleas of Guilty states that the court's "inquiry is not, of course, any substitute for advice by counsel" because:

> The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

ABA Standards for Criminal Justice: Pleas of Guilty, cmt. to Standard 14-3.2 at 118 (3d. ed. 1999). *See also* ABA Standards for Criminal Justice: Pleas of Guilty, cmt. to Standard 14-3.2(f) at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her

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and did not convey to Salazar the certainty that the guilty plea would lead to his deportation.").

case.").[4] Consistent with these standards and commentary, FACDL requests the Court to reject the Fourth District's holding in *Flores*.

Accordingly, based on the foregoing, FACDL submits that a trial court's compliance with rule 3.172(c)(8) does not cure the prejudice caused by counsel's

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[4] The ABA recommends that "[d]efense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-4.1(a) (3d. ed. 1993). "Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position . . . to conduct plea discussions effectively." ABA Standards for Criminal Justice: Prosecution Function and Defense Function, cmt. to Standard 4-4.1 at 183. A judge, however, is prohibited from independent investigation. Florida's Code of Judicial Conduct states that a "judge must not independently investigate facts in a case and must consider only the evidence presented." Fla. Code of Judicial Conduct, Canon 3. "What makes a system adversarial rather than inquisitorial is not the presence of counsel, much less the presence of counsel where the defendant has not requested it; but rather, the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991). The stark contrast between a defense lawyer's duty to investigate and a judicial prohibition against investigation further underscores the duties of a defense counsel when compared to the responsibilities of a judge.

Additionally, "[t]he key to plea bargaining is not the plea colloquy, but the bargaining and advice that precede it[; p]articularly because judges are absent from that bargaining, defense lawyers must actively negotiate and competently advise their clients on whether a bargain is substantively desirable." Stephanos Bibas, *Regulating the Plea–Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Cal. L. Rev. 1117, 1142 (2011). Any additional warning deemed to "cure" counsel's ineffectiveness eliminates the requirement of defense counsel to advise of the immigration penalties and prevents the lawyer from competently advising her client on the desirability of a plea bargain.

misadvice/failure to advise regarding deportation consequences. When a plea renders deportation "practically inevitable," it is insufficient to merely inform a defendant that s/he *may* be deported.

F. CONCLUSION.

For all of the foregoing reasons, FACDL requests the Court to (1) answer the first certified question in the negative and (2) approve the Third District's holding in *Hernandez* on this point.

G. CERTIFICATE OF SERVICE

Undersigned counsel HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Sui Chung (counsel for the Petitioner), Grove Place, 2964 Aviation Avenue, Third Floor, Miami, Florida 33133; Michael Vastine (counsel for the Petitioner), St. Thomas University School of Law, 16401 NW 37th Avenue, Miami Gardens, Florida 33054; Assistant Attorney General Kristen L. Davenport (counsel for the Respondent), 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118; and Assistant Attorney General Timothy R.M. Thomas (counsel for the Respondent), Rivergate Plaza, Suite 650, 444 Brickell Avenue, Miami, Florida 33131 by U.S. mail this 21st day of February, 2012.

Respectfully submitted,

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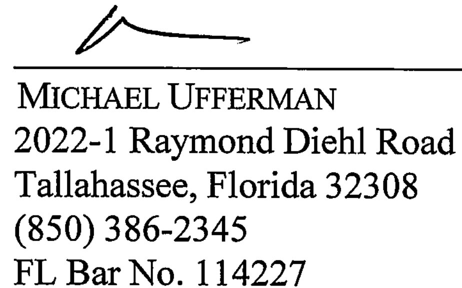

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H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certify pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that this brief complies with the type-font limitation.

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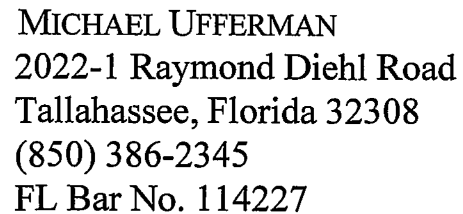

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