IN THE SUPREME COURT OF FLORIDA

WAYNE TREACY

Petitioner,

vs.

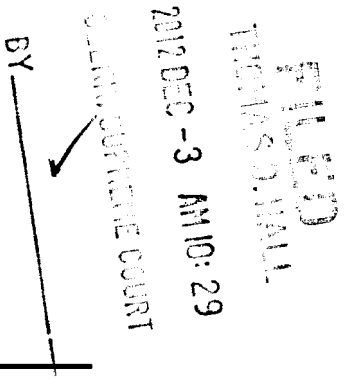
AL LAMBERTI, as Sheriff of Broward County, Florida,

Respondent.

_____/

Supreme Court Case No: SC12-647

DCA No.: 4D11-4645
Lower Tribunal No(s).: 10-6720CF10A



PETITIONER'S INITIAL BRIEF ON THE MERITS

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL, STATE OF FLORIDA

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PRELIMINARY STATEMENT

The following symbols, abbreviations, and references will be utilized throughout this initial brief on the merits of Petitioner:

The term "Petitioner" shall refer to WAYNE TREACY, the juvenile Defendant in the trial court.

The term "Respondent" shall refer to the Sheriff of Broward County, Florida.

Citations to the Appendix shall be indicated by an "App" followed by the appropriate item, such as (App: B).

STATEMENT OF THE CASE AND FACTS

This is a Petition seeking a determination of whether the juvenile petitioner, who was charged with a non-homicide life felony, was entitled to pre-trial bail as a matter of right because of the Supreme Court's decision in *Graham*, which eliminated the possibility of life imprisonment for a juvenile convicted of a non-homicide offense.

On or about March 17, 2010, the Petitioner, who was fifteen (15) years old at the time, was arrested by the Broward Sheriff's Office for the offense of attempted premeditated murder in the first degree. The Petitioner was taken to the Department of Juvenile Justice and held in custody until April 16, 2010, when the State of Florida filed an information against the Petitioner charging him as an adult with first degree premeditated murder with the use of a weapon, in violation of Fla.Stat.§777.04(4)(b); 782.04(1)(a); 775.087(1)(a). (App: A). Because the State alleged that the Petitioner used a deadly weapon, his offense was reclassified as a life felony. Id. The Petitioner was transferred to the custody of the Broward County Jail.

Shortly thereafter, on May 17, 2010, the United States Supreme Court decided *Graham v. Florida*,[1] which held that a juvenile convicted of a non-

[1] 130 S.Ct. 2011, 2034 (2010).

homicide offense could not be given a life sentence without the possibility of parole. As a result, on June 24, 2010, the Petitioner filed a Motion to Set Bond with the Broward County Circuit Court arguing that since Article I, section 14 provided for pre-trial release as a matter of right for all offenses that were not a capital offense or "an offense punishable by life imprisonment", and because *Graham* eliminated the possibility of life imprisonment for the Petitioner, then his offense was no longer deemed an offense punishable by life for pretrial release purposes. (App: B,G).

Although the trial court informed the parties that he believed that the issue of whether the Petitioner was entitled to bail as a matter of law was "close", the trial court issued a lengthy opinion denying pretrial bail as a matter of right. (App: D). The trial court also, without stating specific reasons, indicated that it was exercising its discretion to deny bail under *State v. Arthur*, 390 So.2d 717 (Fla. 1980) and Fla. Stat. §903.046. Id.

On July 16, 2010, a Petition for Writ of Habeas Corpus was filed with the Fourth District Court of Appeal, but it was denied without a written opinion. (App: I). The Fourth District also denied the Petitioner's motions for rehearing, rehearing en banc, request for a written opinion, and request to certify the issue to the Florida Supreme Court. (App: I). On August 26, 2011, jurisdiction was

sought in this Honorable Court in Case No. S10-1861, but, on September 23, 2010, it was denied based upon *Stallworth v. Moore*, 827 So. 2d 974 (Fla. 2002).

Subsequently, the petitioner learned that the Fourth District granted a petition for writ of habeas corpus for another juvenile based upon an identical argument, thereby rendering conflicting results on the same issue. As such, on November 9, 2011, the petitioner filed a second motion to set bond with the trial court. (App: E). After hearing brief argument, the trial court did not alter its previous denial of bond. (App: F at 20).

On December 16, 2011, the petitioner filed a second petition for writ of habeas corpus which was sought in order to prevent a manifest injustice caused by giving relief to one juvenile (McCray), but not another (Treacy), under virtually identical circumstances. (App: G). On January 25, 2012, the Fourth District rendered a written opinion denying the petition for writ of habeas corpus, finding that the Petitioner was not entitled to pre-trial release as a matter of right because "Article I, section 14 of the Florida Constitution focuses on the classification of the offense to determine entitlement to pre-trial release, and not the potential severity of punishment." *Treacy v. Lamberti*, 80 So.3d 153 (Fla. 4th DCA 2012).

During the pendency of this matter, the petitioner was convicted by jury and sentenced to twenty (20) years in prison followed by ten (10) years of probation.

(App: J). However, this does not render this issue moot since it is capable of repetition by other similarity situated juveniles. See *Kight v. Dugger*, 574 So.2d 1066 (Fla. 1990). As such, this timely initial brief on the merits ensues.

SUMMARY ARGUMENT

The Petitioner was entitled to pre-trial release as a matter of right because the *Graham* decision eliminated the possibility of life imprisonment for the Petitioner. Because Article I, section 14 of the Florida Constitution provided for pretrial release as a matter of right for all offenses that were not a capital offense or "an offense punishable by life imprisonment", and because *Graham* eliminated the possibility of life imprisonment for the Petitioner, then his offense was no longer deemed an offense punishable by life for pretrial release purposes. The Fourth District's order must therefore be quashed.

ARGUMENT

THE PETITIONER WAS ENTITLED TO PRE-TRIAL RELEASE AS A MATTER OF RIGHT BECAUSE HE WAS NO LONGER CHARGED WITH AN OFFENSE THAT WAS PUNISHABLE BY LIFE IMPRISONMENT.

The Fourth District Court of Appeal incorrectly utilized the classification approach when it held that the Petitioner was not entitled to pretrial release as a matter of right even though *Graham* eliminated the possibility of life imprisonment for the Petitioner. The plain and deliberate language used in Article I, section 14

of the Florida Constitution reveals that the possible penalty, and not the legislature's classification of the Petitioner's offense, controls. Thus, after reviewing this matter *de novo*, the Fourth District's opinion must respectfully be quashed. *Ford v. Browning*, 992 So.2d 132, 136 (Fla. 2008) (constitutional interpretation is performed under a *de novo* standard of review).

The Petitioner was charged with attempted first-degree premeditated murder with a deadly weapon, an offense which was reclassified as a life felony and punishable by life imprisonment. (App: A). However, because the petitioner was only fifteen years old when this offense was committed, he was prohibited from being sentenced to life in prison based upon Florida's current sentencing scheme and the Supreme Court's ruling in *Graham*.

In *Graham v.Florida*, 130 S. Ct. 2011 (2010), the Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the imposition of a life sentence without parole for a juvenile offender who commits a non-homicide offense. See also *Miller v. Alabama*,132 S.Ct 2455 (2012). As such, since the Petitioner's offense was no longer punishable by life imprisonment, he was entitled to pretrial release as a matter of right under the Florida Constitution.

Article I, section 14, of the Florida Constitution, entitled "Pretrial Release and Detention", provides as follows:

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the juridical process, the accused may be detained.

Id. (emphasis added); *see also* Fla. R.Crim.P. 3.131(a).

The plain language of this constitutional provision demonstrates that the Petitioner was entitled to pretrial release with reasonable conditions because the *Graham* decision eliminated a life sentence for any non-homicide offense for juvenile offenders. As correctly recognized in *Graham*, Florida's current sentencing scheme abolished parole and thus, a sentence of life in prison means life in prison without parole. *Graham*, 130 S. Ct. at 202; *see also* Fla. Stat.§ 921.002(1)(e) (2010).

Due to the recency of the Supreme Court's decision in *Graham*, it appears that this is a matter of first impression in this Honorable Court. However, the situation presented to this Court is analogous to the situation that arose throughout

the Country when the United States Supreme Court deemed the death penalty to be unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972).[2]

"As forecasted by Chief Justice Burger in *Furman*, the temporary abolishment of the death penalty caused confusion regarding bail, indictment, jury selection and trial procedure." *Edinger v. Metzger*, 290 N.E. 577, 579 (Ohio Ct. App. 1972) citing *Furman* at 208 U.S. at 399. Courts were divided as to whether or not judicial invalidation of the death penalty destroyed the "capital" character of offenses previously punishable by death for purposes relating to pre-trial bail, where limitation upon the right to bail was constitutionally reserved for capital offenses where proof of guilt was evident or the presumption was great.

Some jurisdictions adopted the "classification" approach, which, despite the prohibition against imposing death as a sentence, made no distinction for purposes of entitlement to pre-trial bail, as it was the gravity of the offense, and not the penalty which could be imposed, that controlled. See, *e.g.*, *Roll v. Larson*, 516 P.2d 1392 (Utah 1973); *Ex parte Dennis*, 334 So.2d 369 (Miss. 1976); *People ex rel. Dunbar v. District Court*, 500 P.2d 358 (Colo. 1972); *People v. Anderson*, 6 Cal. 3d 628 (Cal. 1972), *superseded* by Article I, §27, *Cal. Const.*

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[2] It is also analogous to the fallout from the abolition of the death penalty for capital sexual battery. See *Coker v. Georgia*, 433 U.S. 584 (1977); *Buford v. State*, 403 So.2d 943 (Fla. 1981).

Other jurisdictions adopted the "punishment" approach in determining the entitlement to pre-trial bail, recognizing that the phrase "capital offense" is a definition of a penalty, i.e. the death penalty, rather than a definition or classification of a crime. See, e.g., *State v. Johnson*,[3] 294 A.2d 245 (N. J. 1972); *Commonwealth v. Truesdale*, 296 A.2d 829 (Pa. 1972); *Edinger v. Metzger*, 290 N.E.2d 577 (Ohio Ct. App. 1972); *Ex parte Contella*, 485 S.W. 2d 910 (Tex.Crim.App. 1972); *Baumgarner v. Hall*, 506 S.W. 2d 834 (Ark. 1972); In re *Tarr*, 508 P.2d 728 (Ariz. 1973).

However, this Honorable Court was not required to decide this issue because Article I, section 14 of the Florida Constitution treated those offenses punishable by life imprisonment the same as a capital offense for purposes of bail. *Donaldson v. Sack*, 265 So.2d 499, 504 (Fla. 1972) (constitutional and statutory provisions for bail do not change because of elimination of death penalty because constitution also limits right to bail to those offenses punishable by life).

In the State of Florida, both theories have been used in determining the effect on procedural and substantive rights as it related to other capital offenses that were no longer punishable by death. However, it appears that the intent or

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[3] Procedurally, *Johnson* and *Truesdale* are similar to the Petitioner's case. All three Defendant's were arrested and charged prior to the change of the law removing the possibility of the punishment – the death penalty, or in the Petitioner's case, life imprisonment.

purpose of the substantive or procedural right dictates the approach taken. This has resulted in confusing and sometimes inconsistent results.

This Honorable Court was last presented with this issue in *Huffman v. State*, 813 So.2d 10 (Fla. 2000), where this Court held that the punishment approach was the appropriate approach to use in determining whether capital sexual battery was a non-capital case for purposes of determining time limitations under rule 3.850.

In *Huffman*, this Court relied on its previous holding in *Rusaw v. State*, 451 So.2d 469, 470 (Fla. 1984), which held that "a capital crime is one which the death sentence is possible." *Huffman*, 813 So.2d at 12. Under this holding, this Court expressly recognized that "even if a felony is classified in the Florida Statutes as a capital offense, it is not 'capital' under case law unless it is subject to the death penalty." *Id.* at 12.

Thus, this Court used the punishment approach and determined that Huffman and "all other defendant's convicted of crimes that may be classified as capital in the Florida Statutes, but who were not actually sentenced to death, qualify as noncapital defendants under Florida Rule of Criminal Procedure 3.850". *Id.* at 12.

Florida courts have utilized conflicting approaches in determining whether certain offenses lose their capital character. These conflicting approaches were

both used by this Honorable Court in *State v. Hogan*, 451 So.2d 844, 845 (Fla. 1984). In *Hogan*, this Court held that the defendant, on trial for capital sexual battery, was not entitled to a trial by twelve jurors because his crime was no longer a capital offense – one where death is a possible penalty. Thus, the "punishment" approach was used to determine this pretrial right.

Interestingly, in the same *Hogan* case, this Court held that sexual battery was still a "capital offense" for purposes of determining Hogan's sentence after the jury found him guilty of attempted sexual battery. *Id.* at 845. Thus, the "classification" approach was used for this post-conviction determination. This Honorable Court utilized this conflicting classification approach despite acknowledging "that in doing so we present a chameleon-like appearance". *Hogan* at 845.

In the case *sub judice*, the Fourth District applied the classification approach when determining the Petitioner's right to pretrial release even though numerous courts in Florida have utilized the punishment approach in determining whether certain rights and procedures remained intact despite the inability to impose the death penalty upon certain capital crimes. See *Huffman*; *Hogan* (number of jurors); *Donaldson v. Sack*, 265 So.2d 499, 504 (Fla. 1972) (indictment by grand jury does not apply to capital first degree murder offense because the punishment –

the possibility of death, is prohibited); *Hall v. State*, 853 So.2d 546 (Fla. 1st DCA 2003) (first degree murder was not "capital" offense for purposes of requiring a twelve person jury because death was not a possible penalty as a matter of law); *Generazio v. State*, 727 So.2d 333 (Fla. 4th DCA 1999) (since capital sexual battery is not a "capital" offense in which the death penalty can be given, the failure to instruct on a necessarily lesser-included offense is not fundamental error); *Carter v. State*, 483 So.2d 740 (Fla. 5th DCA 1986) (because death was no longer a possible penalty for the offense of sexual battery, the Defendant may be charged with a crime via information rather than an indictment); *State v. Wells*, 466 So.2d 291 (Fla. 2d DCA 1985) (capital offense of sexual battery can be charged via information as opposed to indictment since his death is no longer a possible penalty).

Despite the aforementioned cases, the Fourth District relied upon *Batie v. State*, 534 So.2d 694 (Fla. 1988), *State v. Hogan*, *supra*, and *Florida Parole Comm'n v. Criner*, 642 So.2d 51 (Fla. 1st DCA 1994) and applied the classification approach to determine that there was no entitlement to pretrial release even though the Petitioner could not be sentenced to life imprisonment.

Critically, all of these cases involve matters relating to rights after conviction, not to pre-trial rights, such as entitlement to pre-trial bond.[4]

In *Batie*, this Court determined that the offense of capital sexual battery did not lose its "capital" nature for purposes of determining that Batie was not eligible for post-conviction bond – a right which was created by rule or statute – *Batie*, 534 So.2d at 694-95. In determining this non-constitutional right, this Court held that the prohibition against the death penalty for capital sexual battery did not alter its meaning for purposes of this rule, thereby using the classification approach.

In *Florida Parole Comm'n v. Criner*, the First District relied upon the statutory definition of capital sexual battery for the purposes of calculating Criner's parole release date. Again, this classification approach was used to determine the rights of a defendant after sentencing.

Likewise, in *Hogan*, this Court determined that the offense of capital sexual battery was still a capital offense for sentencing purposes after the Defendant was found guilty of attempted sexual battery. Again, this classification approach in *Hogan* was used when analyzing Hogan's rights after conviction, whereas the

[4] See also *Jones v. State*, 861 So.2d 1261 (Fla. 4th DCA 2003) (utilizing classification approach for issue involving sentencing the defendant as PRR qualified).

Hogan court utilized the punishment approach when determining the right to trial before twelve jurors.

The cases relied upon by the Fourth District are contrary to the intent of Article I, section 14. Bail is not intended to be punitive, nor is it intended to hold the defendant responsible for his crime without adjudication on the merits. As recognized in *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951), "the function of bail is limited . . . to the purpose of assuring the presence of that Defendant" at trial.

It is understood that a person charged with the possibility of being put to death or the possibility of spending the rest of his or her life in prison is more likely to flee than an individual charged with an offense that carries a lesser sentence. See *Id.* at 4-5 (admission to bail always involves a risk that the accused will take flight, but it is "a calculated risk which the law takes as the price of our system of justice"). Based upon this understanding, the drafters of Art. I, section 14 utilized specific language to limit pre-trial release as a matter of right for those offenses punishable by death and by life imprisonment.

The plain language of this constitutional provision supports a finding that it is based upon the possible punishment and not the classification of the offense. It is axiomatic that when reviewing constitutional provisions, this Court "follows principles parallel to those of statutory interpretation." *Ford v. Browning*, 992

So.2d 132, 136 (Fla. 2008) *quoting* Zingale v. Powell, 885 So.2d 277, 282 (Fla. 2004). "Any question regarding the meaning of a constitutional provision must begin with examining that provision's explicit language." *Id.* at 136 (citing Soc'y Ophthalmology v. Fla. Optometric Ass'n, 489 So.2d 1118, 1119 (Fla. 1986).

"If the constitutional language is clear, unambiguous, and addresses the matter at issue, it must be enforced as written, and courts do not turn to rules of constitutional construction." *Ford*, 992 So.2d at 136. "If the explicit language is ambiguous or does not address the exact issue before the court, the court must endeavor to construe the constitutional provision in a manner consistent with the intent of the framers and the voters." *Ford, Id.* (citing- Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc., 978 So.2d 134, 140 (Fla. 2008).

Thus, this Court's analysis begins with an examination of the explicit language of Article I, section 14 of the Florida Constitution. Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n, 489 So.2d 1118, 1119 (Fla. 1986). However, when doing so, "[l]ess latitude is permitted ... because it is presumed that [constitutional provisions] have been more carefully and deliberately framed than statutes." Lawnwood Medical Center, Inc. v. Seeger, M.D., 990 So.2d 503, 510, 511 (Fla. 2008) (emphasis added) (quoting Dep't of Envtl. Prot. v. Millender, 666 So.2d 882, 88) (Fla.1996).

The drafters of this Article looked at the punishment, and not the classification of the offense, in determining which offenses were bailable as a matter of right under Florida's Constitution. This is illustrated by the plain and concise language chosen to describe the applicable offense as one "punishable by life imprisonment." Indeed, if the drafters intended to restrict bail based upon the classification of the offense, and not the punishment, then they would have deliberately used the phrase "classified as an offense punishable by life" – a presumption that must be made because the language is from a constitutional provision. See *Lawnwood Medical Center*, 990 So.2d at 511.

This conclusion is particularly true in light of the confusion that took place throughout the country after the abolition of the death penalty in *Furman*. The current version of Article I, section 14, was amended effective January 1, 1983, well after the "dust settled" from the *Furman* case. Presumably, the drafters of the amendment knew that there was a legal debate between jurisdictions regarding conflicting interpretations of the phrase "capital offense"- interpretations which were dependent on whether the classification or the punishment approach was used.

As such, the concise language used by the framers, "punishable by life imprisonment", was drafted with the knowledge that any ambiguity regarding the

phrase could cause confusion. The language deliberately chosen focused on its possible punishment, not its classification, as evidenced by the omission of the phrase "classified as" punishable by life imprisonment. The plain language used eliminates the need to resort to other tools of statutory construction. *Ford*, 992 So.2d at 136.

As stated by this Court in *Ervin v. Collins*, 85 So.2d 852 (Fla.1956):

> ...[I]t must be presumed that those who drafted the Constitution had a clear conception of the principles they intended to express, that they knew the English language and that they knew how to use it, that they gave careful consideration to the practical application of the Constitution and arranged its provisions in the order that would most accurately express their intention.

Id. at 855; *Lawnwod Medical Center, Inc* at 510.

Thus, if the offense which the Petitioner is charged in no longer "punishable by life imprisonment" because of his juvenile status and in light of Florida's current sentencing scheme, then the plain language used must be interpreted so that the Petitioner is entitled to pretrial release as a matter of right.

The issue before this Honorable Court is analogous to the issue presented to the Mississippi Supreme Court in 2007, when it utilized the punishment approach in determining the right to pretrial bail of a juvenile under a similar constitutional provision as Article I, section 14 of the Florida Constitution.[5] In *Edmonds*, the

[5] *Edmonds v. State*, 955 So.2d 787 (Miss. 2007).

Court ordered a new trial for a juvenile charged with capital murder – an offense which, because of his age, he was precluded from being given the death penalty under *Roper v. Simmons*, 543 U.S. 551, 568 (2005). *Edmonds*, 955 So.2d at 809.

Since the case was being remanded, Justices Diaz and Graves, in a specially concurring opinion, wanted to ensure that the issue of entitlement to pre-trial bail was addressed because Edmonds was previously denied pre-trial bail on three occasions based upon the nature of the offense. Id. at 808. As stated in *Edmonds*, "the issue raised in Tyler's case is whether he has been charged with a 'capital offense' despite the fact that as a juvenile he cannot be given the death penalty" under *Roper*. *Edmonds* at 809.

The *Edmonds* court utilized a punishment approach and determined that the juvenile was not charged with a capital offense for pretrial bail purposes under Mississippi's constitutional provision, which was similar to Art. I, sect. 14 of the Florida Constitution. The plain language of the constitutional provision, as well as prior precedent interpreting the phrase "capital offense" when the death penalty was abolished, dictated the result. *Ex parte Dennis*, 334 So.2d 369 (Miss. 1976).

As in *Edmonds*, the Petitioner's constitutional right to pretrial release must be examined under the "punishment" approach. Utilizing a classification approach would be contrary to the intent behind pretrial bail because it would be punishing a

defendant based upon the seriousness of the crime and by not looking at the penalty.

As such, if a capital offense is no longer a capital offense for purposes of requiring an indictment, a twelve member jury, or any other pre-trial right because death is not a possible penalty, than a defendant who cannot be sentenced to life in prison must be entitled to pretrial release as a matter of right under Article I, section 14. Any other conclusion would be conceptually inconsistent – a sentiment once shared by this Honorable Court in Reino v. State, 352 So.2d 853 (Fla. 1977) *receded from on other grounds*, Perez v. State 545 So.2d 1357 (Fla. 1989):

> It is apparent that all incidents of capital crimes, substantive as well as procedural, become inapplicable upon abolition of the death penalty. It would be conceptually inconsistent to conclude that the procedural advantages inuring to a Defendant in a capital case fall with abolition of the death penalty and then conclude that the substantive disadvantages (limitation of entitlement to bail and unlimited statute of limitations) remain viable.

Reino, 352 So.2d at 858.

Nevertheless, if this Court's analysis fails to reveal a single, clear, and unambiguous meaning, the rule of lenity should be applied, thereby requiring this Honorable Court to adopt a reasonable construction most favorable to the Petitioner. See Kasischke v. State, 991 So.2d 803 (Fla. 2008). Although the rule of lenity generally applies to penal statutes, its application is warranted since it

involves the deprivation of liberty prior to adjudication on the merits of a criminal offense.

CONCLUSION

Based upon Florida's current sentencing scheme which prohibits the possibility of parole for a sentence of life imprisonment, as well as the Supreme Court's express holding in *Graham* that a trial court is prohibited from imposing a life sentence upon a juvenile who committed a non-homicide offense, the Petitioner was entitled to pretrial release with reasonable conditions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the Petitioner's Initial Brief on the Merits has been furnished by Federal Express Mail - 8000 6079 7694 and sent via email e-file@flcourts.org, to the Supreme Court of Florida, 500 Duval Street,

Tallahassee, Florida 32399 and emailed to crimappwpb@myfloridalegal.com to the Office of the Attorney General on this 30th day of November, 2012.

CERTIFICATE OF TYPEFACE COMPLIANCE

Counsel for Petitioner, WAYNE TREACY, hereby certifies this Initial Brief is printed in 14-point Times New Roman font, as required by the Florida Rule of Appellate Procedure 9.210(a)(2).

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