IN THE SUPREME COURT OF THE STATE OF FLORIDA

ADAM DAVIS, :

Appellant :

v. : Case No.: SC00-313

STATE OF FLORIDA :

Appellee. :

_____:

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Table of Authorities

Authorities Cited: Page No.

SUMMARY OF THE ARGUMENT

The trial court erred in denying the Appellant's motion to suppress. In support of the trial court's ruling, the State argued that Appellant's confession was not the product of an illegal arrest or detention and, if there was error, the admission of the statements would be harmless error. The State's position fails to adequately apply the standard outlined in Ramirez v. State, 739 So.2d 568 (Fla. 1999). In the instant matter, the Defendant's waiver of rights and subsequent confession were not voluntarily obtained.

The State also argued that the jury selection conducted by the trial court did not involve reversible error. However, the record cites by the Appellant contained sufficient indicia that the various jurors not excused for cause did, in fact, make equivocal statements of their inability to be fair and impartial when deciding the recommendation of the death sentence. Such equivocation resulted in error when the trial court refused to excuse these equivocating jurors for cause.

Appellant Davis raised the issue that the trial court committed reversible error by denying the testimony from law enforcement that co-defendant Robinson confessed to the murder of the victim. In its answer brief, the State erroneously argued that the Appellant's trial counsel did not

adequately preserve this issue. However, trial counsel properly sought to admit the statements of co-defendant Robinson and the court improperly denied the admission. Furthermore, the State argued that even if the issue was adequately preserved the denial of the admission of the statements does not constitute an abuse of discretion by the trial court's refusal to admit the confession of a co-defendant to the crime for which the Appellant faces death is clear error meriting reversal.

The bare majority recommendation for the death sentence clearly demonstrated that the death sentence in the instant case was subject to dispute amongst the jurors. Although the State properly argued that unanimity in the jury's recommendation is not required under Florida's death sentencing scheme, the recommendation of death carried by one vote is clear evidence that the facts of the instant case cast a clear doubt on the trial court's sentence of death. In other words, the aggravating factors were not found beyond a reasonable doubt nor did they outweigh the mitigating factors.

Subsequent to the filing of Appellant's initial brief, the United States Supreme Court decided Ring v. Arizona *citation omitted*, which held that Apprendi v. New Jersey, *citation omitted,* applied to death penalty cases. Although

this issue was not fully raised in the Appellant's initial brief, due to this Court's numerous rulings that Apprendi did not apply to Florida's death penalty scheme, the subsequent decision in Ring clearly demands that this issue be readdressed in the Appellant's case.

Each of these errors, standing alone or in total, merits a reversal of the Appellant's conviction and subsequent death sentence.

ARGUMENT

I. WHETHER THE TRIAL COURT REVERSIBLY ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS.

The trial court improperly denied the Appellant's motion to suppress the Appellant's statements to law enforcement allegedly admitting his alleged involvement in the death of Vicki Robinson. In its answer brief, the State argued that Appellant's alleged confession was properly admitted on two grounds:

1. Appellant's waiver of his constitutional right against self-incrimination was valid;

2. Appellant raised no allegation that Appellant's statements were coerced.

(Appellee's Brief p. 15)

As to the issue of a valid waiver of his right against self-incrimination, the State argued that the initial interrogation of Appellant, prior to the reading of Miranda

warnings, was simply to try and ascertain the location of a missing Vicki Robinson. (Appellee's Brief p. 14). Such an argument involved an erroneous interpretation of the record. When the detectives first interrogated the Appellant, they informed him they were investigating a missing person case. However, law enforcement had already spoken to co-defendants Jon Whispel and Valessa Robinson prior to speaking with Appellant. Both the co-defendants had already informed law enforcement that Ms. Vicki Robinson was dead and admitted their involvement in her killing. (XV 1460). In fact, Valessa had already confessed to law enforcement that she had stabbed her mother in the kitchen of the Robinson household. She also provided exculpatory information that while she was hard at work butchering her mother in the kitchen, the Appellant and co-defendant Whispel were in a bedroom (SR 1,3,5). Therefore, at the time law enforcement interrogated the Appellant, the detectives clearly knew that the case was no longer a missing person case, but a case of homicide. Nevertheless, the detectives crafted this deceptive interrogation technique prior to reading the Appellant his rights.

In order for a statement by the accused to be admitted, the statement must first be obtained by a waiver of a right against self-incrimination and that said waiver was a voluntary. In State v. Sawyer, 561 So.2d 278, 281 (Fla. 2d

DCA 1990) the court outlined the factors to be applied in determining whether a confession is involuntary:

> In order to find a confession involuntary within the meaning of the Fourteenth Amendment, there must be a finding that there was coercive police conduct. (citation omitted). Police coercion can be not only physical but also psychological. (citation omitted). The test of determining whether there was police coercion is determined by reviewing the totality of the circumstances under which the confession was obtained. (citation omitted).
>
> As part of the totality of circumstances analysis, many factors have been considered by courts, including; whether the confession was given in a coercive atmosphere of a station house setting. (citation omitted); whether police suggested the details of the crime to the suspect; (citation omitted); whether the suspect was subjected to a barrage of questions during pre-dawn hours and not given an opportunity to sleep or eat. (citation omitted); whether the police made threats, promise of leniency, or make a statement calculated to delude the suspect as to his or her true position, (citation omitted); whether the police made threats of harm, (citation omitted); and whether the police utilized undue influence or made direct or implied benefits of promises. Although particular statements or actions considered on an individual basis may not vitiate a confession, *when two or more statements or courses of statements are employed against a suspect, courts have readily found confessions to be involuntary.* [emphasis added] Id.

The statement and, more importantly, the waiver of rights, obtained from the Appellant, contrary to the argument of the State, were clearly obtained in a coercive

environment. First, during the motion to suppress, the Appellant testified as to his contact with law enforcement when he was arrested on the instant charges. Appellant claimed that law enforcement violently placed him on the ground where an officer repeatedly hit and kicked him, including a kick to the face. (XV 1512). This was known to the Hillsborough County law enforcement officers (Detective Iverson admitted that he was aware that the Texas law enforcement officers had scuffled with the three youths). (XV 1463). Second, when Appellant was interrogated by detectives from Hillsborough County, Florida, he had been awakened from sleep in the early morning hours. (XV 1521). The Appellant and the co-defendants had also consumed narcotics, specifically LSD, and Detective Iverson was aware of this fact. (XV 1462). However, Detective Iverson did not inquire of the Defendant whether he was injured or had consumed narcotics. (XV 1462). The Appellant was then questioned, prior to any reading of Miranda, regarding the disappearance of Vicki Robinson. (XV 1465-66). However, it was clear that law enforcement was acting disingenuously, because they were already aware of Ms. Robinson's alleged fate due to the statements of the co-defendants.

> Mr. Traina: Nevertheless, though, you were at that point, prior to interview of Mr. Davis, you

were fairly certain that you had a murder on your hands instead of just a disappearing person?

Det. Iverson: Yes.

Mr. Traina: And I take it, at this point, prior to going into the interview with Mr. Davis, you had a feeling that he was involved just as Jon Whispel and Valessa Robinson had been involved? Is that correct?

Det. Iverson: Yes, sir.

(XV 1456). Furthermore, law enforcement told the Appellant that he had better admit to what happened because it would be "worse for him" when he got to Tampa. (XV 1515). Then, according to law enforcement, the Appellant admitted to Ms. Robinson's disappearance. It was only after the Appellant had made this allegedly incriminatory statement that the detectives saw fit to have the Appellant sign a written waiver of his rights against self-incrimination.

Pursuant to Colorodo v. Connelly, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed. 2d 473 (1986), the improper police actions in the instant case render this subsequent confession involuntary. The State cited Oregon v. Elstad, 470 U.S. 298, 310-11, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985), to support the subsequent admission of the Appellant's statements. In essence, the State argued that if a "careful and thorough administration of the warnings is later given, and the constitutional rights are thereafter waived, any further

statements may be properly used against the Defendant." (Appellee's Brief p. 16). However, this analysis failed to take into account the improper police action mentioned in Connelly, specifically the clear coercion of the interview, the absurd hour when the interview took place, the violent manner in which Appellant was arrested, and the disingenuous techniques used by law enforcement. Moreover, in Sawyer, *supra*, the court held that the presence of two or more of the factors outlined above would render the admission involuntary. Id. at 281. Therefore, the trial court reversibly erred in denying Appellant's motion to suppress.

II. WHETHER THE TRIAL COURT REVERSIBLY ERRED DURING THE JURY SELECTION PROCESS.

The State argued in its answer brief that "slight" equivocation by a juror on the issue of the death penalty is insufficient to sustain a challenge for cause. This is a clear misstatement of the applicable standard outlined in Franqui v. State, 804 So.2d 1185 (Fla. 2001). Equivocation by a potential juror is sufficient to sustain an excuse for cause. Id. at 1192.

Potential juror Whitman was equivocal in his discussion as to the manner of death. (VI 160). Potential juror Lopez gave equivocal answers as to how he felt about the death; e.g. "could probably sit as a juror" and "probably could

sentence someone to death). (VII 324). Furthermore, Lopez's equivocation is most troublesome in light of the Ring v. Arizona decision, *infra.* Lopez equivocated on whether he could vote for the death penalty when he said it "depends on the circumstances." (VII 324-26). Since Ring would require that the juror make the actual factual findings of death or life rather than just recommendation, such a circumstance could clearly alter the decision by Lopez. The State even conceded that Lopez equivocated on this issue. (Appellee's Brief p. 24). In sum, this equivocation on the part of jurors should have resulted in a excusal for cause by the trial court. Failure to have done so resulted in reversible error.

ISSUE III WHETHER THE TRIAL COURT ERRED BY PROHIBITING THE INTRODUCTION OF CO-DEFENDANT VALESSA ROBINSON'S CONFESSION.

In its answer brief, the State argued that the trial counsel did not properly preserve the issue of co-defendant Robinson's confession since the actual statement was not presented during the trial. However, this argument fails to adequately review the record during the course of trial counsel's attempt to get these statements admitted.

Trial counsel was clearly aware of the importance of this issue. During the cross-examination of Detective Iverson, he asked the court to make a ruling on the

admissibility of the statements co-defendant Robinson gave to the detective. (XII 1027, 1031). Trial counsel requested a ruling from the court prior to the asking of any questions regarding these statements because he did not want to do anything "improper" (XII 1027-33). He, therefore, sought to present his questioning and raise any objections at an early stage in order to avoid error or judicial admonishment. *See* Franqui v. State, 804 So.2d 1182, 1192 (Fla. 2001) (purpose of contemporaneous objection rule is to place trial judge on notice that error occurred and to allow court to control error at an early stage in the proceeding).

In his initial brief, the Appellant clearly outlined the procedure used by trial counsel to preserve this issue. The State also tracked this language in its answer brief. (Appellee's Brief pp. 28-31). First, trial counsel told the court that he wanted to elicit testimony from the detective regarding co-defendant Robinson's confession. (XII 1027). The trial court indicated its awareness of these statements. (XII 1031). The trial court then ruled that said statements were hearsay and ordered that trial counsel not get into those statements. (XII 1031).

The State cited Castor v. State, 365 So.2d 701 (Fla. 1978) and Steinhorst v. State, 412 So.2d 332 (Fla. 1982) to support its position that the co-defendant's confession was

not properly preserved. By arguing Castor, which required trial counsel to ask a question of the witness and then have a State objection sustained, the State is requiring that trial counsel directly disregard the trial court's order that it would not allow questioning sought to elicit the hearsay statements of the co-defendant. (XII 1031.) Under this unsustainable reasoning, the Appellant would be denied appellate argument on this issue because trial counsel complied with the trial court's ruling that "in this case it is hearsay and *it's not coming in*." (XII 1031) (emphasis added). The State's reliance on Steinhorst is clearly misplaced. In essence, Steinhorst holds that for an argument to be cognizable on appeal, there must be a specific contention asserted as legal ground for the objection, exception or motion below." Id. at 338. Trial counsel did, in fact, raise the issue of co-defendant hearsay admissibility to the trial court. (XII 1031). Specifically, trial counsel informed the trial court that Valessa Robinson, clearly the co-defendant, made a confession to the crime. (XII 1031). The Court stated it "understood that," but refused to admit it as an exception to the hearsay rule under co-defendant testimony.

The State further argued that under Jones v. State, 678 So.2d 309, 314 (Fla. 1996), *cert denied*, 519 U.S. 1152 (1997)

and Voorhees v. State, 699 So.2d 602 (Fla. 1997) failure to admit the co-defendant's confession would be harmless error. Jones is clearly distinguishable because it involved alleged statements made to lay witnesses , rather than statements made to sworn law enforcement officers. Id. at 312. Second, the State properly cited the Voorhees case's applicability to this issue, but misinterpreted its holding to support the position that the confession was unreliable. (Appellee's Brief p. 33). Voorhees clearly stated that the statement made to law enforcement should have been admitted, but was harmless error due to the overwhelming evidence under a felony murder rule. Vorhees v. State, 699 So. 2d at 613. This is clearly inapplicable in the instant case because the Appellant was not charged with felony murder nor was there any alternative theory of prosecution that could have rendered the exclusion of this testimony as harmless.

Furthermore, the disingenuousness behind this argument is glaring. The State, in its brief, argued that Appellant's statements to law enforcement were reliable and should have been admitted, *supra.* Yet, when it came to co-defendant Robinson's statements to the same officers, the State argued that her statements are not entitled to the same level of credibility and should be excluded. If Detective Iverson's testimony regarding the trustworthiness of the Appellant's

statements are to be believed, then his testimony regarding co-defendant Robinson's would be equally credible. Therefore, the trial court reversibly erred by denying the admission of the co-defendant statement.

Finally, the State's argument that co-defendant's Robinson's confession did not exonerate Defendant is a clear misrepresentation of the record. Co-defendant Robinson clearly placed the Appellant in the bedroom while she stabbed her mother in the kitchen. (SR 1, 3, 5).

Finally, if there is any possibility of a tendency of evidence to create reasonable doubt, the rules of evidence are construed to allow for its admissibility. *See* Vannier v. State, 714 So.2d 470, 471. (Fla. 4th DCA 1998).

In the alternative, as trial counsel argued, the prosecution opened the door to the admissibility of co-defendant testimony under §90.806, Florida Statutes. This section of the evidence code states

> When a hearsay statement has been admitted into evidence, the credibility of the declarant maybe attacked and, if attacked, may be supported by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time inconsistent with the declarant's hearsay statement is admissible, regardless of whether or not the declarant has been afforded an opportunity to deny or explain it.

At trial, counsel argued the State opened the door to co-defendant Robinson's hearsay statements when the State presented hearsay statements by co-defendant Whispel regarding Appellant's alleged statements about the death of Ms. Robinson. (XII 1027).[1] Therefore, under §90.806, Fla. Stat., trial counsel could admit the testimony of Valessa Robinson to impeach Whispel's assertion that the Appellant and co-defendant Robinson made incriminatory statements about the Appellant's alleged role in Ms. Robinson's death.

In sum, the refusal of the trial court to admit the confession of co-defendant Robinson and her exculpatory placement of the Appellent away from the scene of the murder are errors requiring reversal.

ISSUES VIII & IX THE FLORIDA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL

While the instant case has been pending on direct appeal, the U.S. Supreme Court decided Ring v. Arizona, _____ U.S. _____, 122 S.Ct. 2428, 153 L.Ed. 2d 556 (2002). In Ring, the U.S. Supreme Court held that the Arizona death penalty statute is irreconcilable under the Sixth Amendment and with the holding in Apprendi v. New Jersey, 530 U.S. 466,

[1] The State elicited hearsay testimony from co-defendant Whispel as to the Appellant's assertion that the "bitch won't die" (VII 853), in order to corroborate its theory that Appellant, and not Robinson, was the killer. Furthermore, the State used Whispel to introduce hearsay testimony regarding Valessa Robinson's hearsay statements that she looked for a needle to give to the Appellant to further bolster its contention that Appellant committed the murder. (VI 849-50)

120 S.Ct. 2348, 147 L.Ed. 2d (2000). In essence, Ring held that the factual findings supporting a sentence of death, the most severe penalty under the law, must be delivered by the jury, not a judge. Id. Moreover, Ring held that the findings of the jury must be specific as to the aggravators finding that the sentence of death is appropriate. Id.

Contrary to the assertion of the State, the Ring decision is applicable to the instant case. *See* Smith v. State, 598 So.2d 1063 (Fla. 1992) (decisions in a non-final criminal case must be given retrospective application in every case pending on direct review or not yet final). *See also* Fla. Const. Art. I §§ 9, 16. Moreover, the Appellant entered numerous objections to the death sentence at the trial level to preserve issue for appellate review. Smith v. State, 598 So.2d at 1066.

The State also seeks to deny the Appellant relief under Ring v. Arizona due to his failure to raise the Apprendi issue in his initial brief, which was filed prior to the U.S. Supreme Court's decision in Ring v. Arizona. However, such argument is groundless because, at the time the Appellant filed his initial brief, this Court had ruled that Apprendi did not apply to Florida's death penalty scheme. *See* Mills v. Moore, 786 So.2d 532, 537 (Fla. 2001). Thus, under the State's argument, death penalty appellants would be required

to raise all issues previously held to be without merit by the Florida Supreme Court. This effort would be in the desperate hope that the U.S. Supreme Court would eventually rule differently than this state's highest court and find that one of these grasps at straws would hold merit. Under such a scheme proposed by the State, this Court would be flooded with frivolous appellate issues requiring an exhaustive waste of judicial resources and result in the complete disregard of the principle of *stare decisis.*

The Appellant, however, raised the unconstitutionality of death penalty on grounds also addressed by the Apprendi and Ring decisions: the unconstitutionality of the death penalty imposed with a bare majority (7-5) jury recommendation; the need for special verdicts requiring factual findings by the jury pursuant to the Sixth Amendment; and the objection to any mention of the jury's advisory role at sentencing where the trial court gave the standard jury instruction; (II 193-5, 217-219, XIV 1381, XV 1411, 1428). Therefore, contrary to the State's assertion, Appellant adequately preserved this issue on appeal.

As for the substantive issues, the Ring decision analyzed the Arizona death penalty statute.[2] In Arizona, the

[2] In previous decisions, the Court has held that Arizona's death penalty statutes bear relevant similarities to Florida's scheme. *See* Walton v. Arizona, 497 U.S. 639, 648,

trial court must make factual findings that any aggravating factors are present beyond a reasonable doubt and that these factors are not outweighed by any mitigating factors. Id. at 2435. In other words, the Court bears sole decision-making power as to the application of the death penalty to a particular defendant. This scheme is directly contrary to the holding in Apprendi, which held that the jury, not the Court, must make the specific factual findings in order to enhance a sentence. Apprendi v. New Jersey, 530 U.S. at 477.

Although the State may argue that Florida's scheme differs from Arizona's in that the jury does have a role in recommending a death sentence, it nevertheless does not make factual findings with regard to the existence of mitigating and aggravating circumstances. Moreover, its recommendation is not binding on the trial judge. Therefore, in Florida, as in Arizona, the Court has the sole power to impose the death penalty. In Ring, Justice Scalia's concurring opinion addressed the dangers of such a scheme

> We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it. Ring v. Arizona, 120 S.Ct. at 2445.

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110 S.Ct. 3047, 111 L.Ed. 511 (1990).

Because the responsibility for finding the facts supporting a life or death sentence rests strictly with the court and not the jury, the Florida death penalty scheme is equally as unconstitutional as the Arizona scheme found to be impermissible in Ring.[3]

A framework for the application of Ring to the Florida death penalty statute can be found in Justice Pariente's concurring opinion in the Order granting a stay in Bottoson v. Moore, 824 So.2d 115 (Fla. 2002). In the Order granting Bottoson's stay of execution, the Court held that a majority

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[3] The principle that the jury, and not the court, is entrusted with making the factual determination is well-established in American jurisprudence. Of the 38 States with capital punishment, 29 generally commit sentencing decisions to juries. See Ark.Code Ann. § 5-4-602 (1993); Cal.Penal Code Ann. § 190.3 (West 1999); Conn. Gen.Stat. § 53a-46a (2001); Ga.Code Ann. § 17-10-31.1 (Supp.1996); Ill. Comp. Stat. Ann., ch. 720, § 5/9-1(d) (West 1993); Kan. Stat. Ann. § 21-4624(b) (1995); Ky.Rev.Stat. Ann. § 532.025(1)(b) (1993); La.Code Crim. Proc. Ann., Art. § 905.1 (West 1997); Md. Ann.Code, Art. 27, § 413(b) (1996); Miss.Code Ann. § 99-19-101 (1973-2000); Mo.Rev.Stat. §§ 565.030, 565.032 (1999 and Supp.2002); Nev.Rev.Stat. Ann. § 175.552 (Michie 2001); N.H.Rev.Stat. Ann. § 630:5(II) (1996); N.J. Stat. Ann. § 2C:11-3(c) (Supp.2001); N.M. Stat. Ann. § 31-20A-1 (2000); N.Y.Crim. Proc. Law § 400.27 (McKinney Supp.2001-2002); N.C. Gen.Stat. § 15A-2000 (1999); Ohio Rev.Code Ann. § 2929.03 (West 1997); Okla. Stat., Tit. 21, § 701.10(A) (Supp.2001); Ore.Rev.Stat. Ann. § 163.150 (1997); 42 Pa. Cons.Stat. § 9711 (Supp.2001); S.C.Code Ann. § 16-3-20(B) (1985); S.D. Codified Laws § 23A-27A-2 (1998); Tenn.Code Ann. § 39-13-204 (Supp.2000); Tex.Code Crim. Proc. Ann., Art. 37.071 (Vernon Supp.2001); Utah Code Ann. § 76-3-207 (Supp.2001); Va.Code Ann. § 19.2-264.3 (2000); Wash. Rev.Code § 10.95.050 (1990); Wyo. Stat. Ann. § 6-2-102 (2001).

of the U.S. Supreme Court is seriously concerned about the implications for the Sixth Amendment trial by jury when a judge, and not a jury, makes the factual determinations that are prerequisites for an increased penalty. Id. at 117. The majority of the Florida Supreme Court went on to say that "we were mistaken as a matter of law...in holding that Apprendi did not apply to capital proceedings." Id.

The Court further addressed the far-reaching effects of the Ring decision on Florida death penalty jurisprudence. First, Florida law permits that the recommendation of death be made by a bare majority of the jury, whereas the finding of guilt must be made unanimously. This relaxed standard caused members of this Court concern in that "it could be argued that the fact-finding of the essential element necessary to subject the defendant to the ultimate punishment should be afforded no less constitutional dignity than the jury's finding of guilt." Id. at 12. In the instant case, this particular concern is of grave import since the recommendation to sentence the appellant to death was made by a bare majority of seven votes to five (7 – 5). XIV 1387.

Secondly, the Bottoson order raised the problematic issue of a trial court's ability to override a recommendation by the jury. Id. at 121. Such an ability to override would directly contradict the holding and spirit of Ring and

Apprendi, since the trial court not only receives a recommendation without any factual findings, but also is free to patently ignore it.

In the instant case, the trial court bore the sole responsibility for determining the aggravating factors and weighing those against the mitigating factors. Therefore, the trial court impermissibly invaded the province of the jury. Absent the factual findings by the jury requested by the Appellant and required by Ring, the death sentence in this case is in clear violation of Apprendi and must be overturned.

CONCLUSION

Based on the foregoing rebuttal arguments to the Appellee's brief, the Appellant's conviction and death sentence should be overturned and his case should be remanded to the trial court for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail: Office of the Attorney General, Suite 700, 2002 N. Lois Avenue, Tampa, FL 33607 on this ____ day of _____, 2002.

_____

Guillermo E. Gomez, Jr.

CERTIFICATE OF FONT REQUIREMENT, RULE 9.210 Fla.R.App.P.

I hereby certify that the size and style of type used in this computer generated brief is Courier New 12 point font.

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Guillermo E. Gomez, Jr.