

IN THE SUPREME COURT OF FLORIDA

DAVID DIONNE,

Petitioner,

v.

Case No. SC02-1290

STATE OF FLORIDA,

Respondent.

_____ /

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES | iii |
| STATEMENT OF THE CASE AND FACTS | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | |
| SECTION 92.565 OF THE FLORIDA STATUTES (2000) CAN BE APPLIED RETROACTIVELY. | 3 |
| CONCLUSION | 18 |
| CERTIFICATE OF SERVICE | 19 |
| CERTIFICATE OF COMPLIANCE | 19 |

TABLE OF AUTHORITIES

Cases

| | |
|---|----------|
| <u>Blankenship v. Dugger,</u> 521 So.2d 1097 (Fla. 1988) | 4 |
| <u>Brennan v. State,</u> 754 So.2d 1 (Fla. 1999) | 13 |
| <u>Burch v. State,</u> 558 So.2d 1 (Fla. 1990) | 4 |
| <u>Calder v. Bull,</u> 3 Dall. 386, 1 L.Ed. 648 (1798) | 5,11 |
| <u>Carmell v. Texas,</u> 529 U.S. 513 (2000) | 10,11,12 |
| <u>Collins v. Youngblood,</u> 497 U.S. 37 (1990) | 5 |
| <u>Dobbert v. Florida,</u> 432 U.S. 282 (1977) | 9 |
| <u>Franqui v. State,</u> 699 So.2d 1312 (Fla. 1997) | 7 |
| <u>Glendening v. State,</u> 536 So.2d 212 (Fla. 1988) | 5,6,7,12 |
| <u>Goldstein v. Maloney,</u> 57 So. 342 (Fla. 1911) | 16 |
| <u>Hall v. State,</u> 823 So.2d 757 (Fla. 2002) | 15 |
| <u>In Re Florida Evidence Code,</u> 675 So.2d 584 (Fla. 1996) | 16,17 |
| <u>In Re Florida Evidence Code,</u> 638 So.2d 920 (Fla. 1993) | 16,17 |
| <u>Jackson v. Department of Corrections,</u> 790 So.2d 381 (Fla. 2000) | 15,17 |

| | |
|--|----------------------------|
| <u>Metropolitan Dade County v. Chase Federal Housing Corp.,</u> 737 So.2d 494 (Fla. 1999) | 4 |
| <u>Miller v. Florida,</u> 482 U.S. 423 (1987) | 4,5,9 |
| <u>Opper v. United States,</u> 348 U.S. 84 (1954) | 5,6,9 |
| <u>State v. Allen,</u> 335 So.2d 823 (Fla. 1976) | 13 |
| <u>State v. Dionne</u> 814 So.2d 1087 (Fla. 5th DCA 2002) | 2,3,5,7,8,9,10,11,12,13,16 |
| <u>State v. Hootman,</u> 709 So.2d 1357 (Fla. 1998) | 4 |
| <u>State v. Johnson,</u> 616 So.2d 1 (Fla. 1993) | 13 |
| <u>State v. McDonald,</u> 357 So.2d 405 (Fla. 1978) | 3,4 |
| <u>State v. Stalder,</u> 630 So.2d 1072 (Fla. 1994) | 3 |
| <u>United States v. Johnson,</u> 589 F.2d 716 (D.C.Cir. 1978) | 5 |
| <u>Weaver v. Graham,</u> 450 U.S. 23 (1981) | 13 |
| <u>Westerheide v. State,</u> 831 So.2d 93 (Fla. 2002) | 13 |
| <u>Windom v. State,</u> 656 So.2d 432 (Fla.), <u>cert. denied</u> , 516 U.S. 1012 (1995) | 12 |
| Other Authorities | |
| Art. V, Sec. 2, Fla. Const. | 15 |

Section 92.565, Fla. Stat. (2000) 1,2,4-8,11-13,15-17
Section 784.011, Fla. Stat. (1999) 6,8
Ch. 2000-204, Laws of Florida 9

STATEMENT OF THE CASE AND FACTS

The State generally accepts Dionne’s statement of the case and facts but adds the following:

In both his original motion to suppress his statement and his supplemental motion, Dionne did not make any argument that section 92.565 of the Florida Statutes (2000) violated the doctrine of separation of powers. (Vol. I, R. 13-15, 27-29). In his supplemental motion, Dionne attacked the constitutionality of the statute on the grounds of ex post facto, procedural and substantive due process, equal protection, and fair trial. (Vol. I, R. 27-28). Dionne did not make the separation of powers argument he now makes before this Court until a motion for rehearing filed in the Fifth District.

SUMMARY OF ARGUMENT

This Court should adopt the analysis of the Fifth District in State v. Dionne, 814 So.2d 1087 (Fla. 5th DCA 2002) and find that section 92.565 of the Florida Statutes (2000) can be retroactively applied without violating the ex post facto provisions of the United States and Florida Constitutions. This statute creates a new mechanism for the admission of confessions in sexual assault crimes, by replacing the corpus delicti rule with the trustworthiness doctrine. This change does not affect the sufficiency of the evidence but only the admissibility of confessions. Because the statute has no effect on the state's burden to gain a conviction on the underlying crime, there is no ex post facto implication.

Furthermore, Dionne's constitutional attack that the legislative enactment of this statute violates the doctrine of separation of powers has not been preserved and is waived. Notwithstanding waiver, this statute, like the provisions of the Florida Evidence Code, is a unique hybrid of both substantive and procedural law which is constitutionally permissible. As with provisions of the Florida Evidence Code created by the Legislature and deemed to be procedural, the State urges this Court to likewise adopt any such procedural aspects of this statute.

ARGUMENT

SECTION 92.565 OF THE FLORIDA STATUTES
(2000) CAN BE APPLIED RETROACTIVELY.

The State contends that the Fifth District properly found that section 92.565 of the Florida Statutes (2000) can be applied retroactively without violating the ex post facto clause of the Florida Constitution and the United States Constitution. See State v. Dionne, 814 So.2d 1087 (Fla. 5th DCA 2002). In doing so, the Fifth District rejected the trial court's conclusion that this statute affected the quantum of evidence required for a conviction. Instead, the Fifth District correctly concluded that the statute addressed the question of the admissibility of evidence and thus, could be applied retroactively without violating the ex post facto clause. Id. at 1095.

In assessing a statute's constitutionality, this Court is bound "to resolve all doubts as to the validity of [the] statute in favor of its constitutionality, provided the statute may be given a fair construction that is consistent with the federal and state constitutions as well as with the legislative intent." State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(quoting State v. Elder, 382 So. 2d 687, 690 (Fla. 1980)). Legislative enactments are presumptively valid. State v. McDonald, 357

So.2d 405, 407 (Fla. 1978). Every doubt about a statutory provision should be resolved in favor of the validity of the provision, since it must be presumed that the legislature intended to enact a valid law. Id. This Court has consistently held that wide latitude must be accorded the legislature in the enactment of laws. Burch v. State, 558 So.2d 1, 2 (Fla. 1990)(quoting State v. Lee, 356 So.2d 276, 282 (Fla. 1978)).

In determining whether a statute should be applied retroactively, the first inquiry is whether there is clear evidence of legislative intent to apply the statute retroactively, and if so, the second inquiry is whether the retroactive application is constitutionally permissible. Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494, 499 (Fla. 1999). To fall within the ex post facto prohibition, the law must be retrospective, that is, first it must apply to events occurring before its enactment and second it must disadvantage the offender affected by it." Miller v. Florida, 482 U.S. 423, 430 (1987)(quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)). See also State v. Hootman, 709 So.2d 1357, 1359 (Fla. 1998); Blankenship v. Dugger, 521 So.2d 1097, 1099 (Fla. 1988).

An evidentiary statute such as section 92.565 will violate the ex post facto clause only if it "alters the legal rules of

evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense in order to convict the offender." Miller, 482 U.S. at 429 (quoting Calder v. Bull, 3 Dall. 386, 391, 1 L.Ed. 648 (1798)). Laws which affect the legal rules of evidence and receive less, or different, testimony in order to convict an offender are those which "'change the ingredients of the offence or the ultimate facts necessary to establish guilt.'" Glendening v. State, 536 So.2d 212, 215 (1988), cert. denied, 492 U.S. 907 (1989)(quoting Miller, 482 U.S. at 433 (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884))). In other words, the law must alter the nature of the offense. Collins v. Youngblood, 497 U.S. 37, 46 (1990). It is logical to think that a constitutionally permissible change is one that refers to "changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive laws of crimes." Id. at 45.

Section 92.565 eliminates the corpus delicti requirement for the admission of a defendant's confession in sexual abuse cases where the state is unable to establish every element of the offense when the victim is either mentally or physically incapacitated. Dionne, 814 So.2d at 1091. Pursuant to this new statute, a confession in a sexual abuse case will now be

admitted under this "trustworthiness" doctrine.¹ Under this doctrine, the state must prove there is sufficient corroborating evidence that tends to establish the trustworthiness of the defendant's confession in order for that confession to be admitted. See section 92.565, Fla. Stat. (2000).² The inquiry

¹ Under the "trustworthiness" doctrine, "the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti." Opper v. United States, 348 U.S. 84, 93 (1954). Although independent evidence is not necessary to establish the whole of the corpus delicti, the State is required "to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement." Id. In other words, the adequacy of the corroborative evidence is measured not by its tendency to establish the corpus delicti, but by the extent to which it supports the trustworthiness of the defendant's statement. United States v. Johnson, 589 F.2d 716, 718-19 (D.C.Cir. 1978). Once the State presents evidence which supports the truth of the confession or tends to prove facts embraced in the confession, the confession may be considered trustworthy and the State may use the confession. Opper, 348 U.S. at 92. In this manner, both the corpus delicti and "trustworthiness" doctrines serve the same purpose by requiring the State to introduce evidence to corroborate a defendant's confession.

² Section 92.565 provides as follows:

(1) As used in this section, the term "sexual abuse" means an act of a sexual nature or sexual act that may be prosecuted under any law of this state, including those offenses specifically designated in subsection (2).

(2) In any criminal action in which the defendant is charged with a crime against a victim under s. 794.011; s. 794.05; s. 800.04; s. 826.04; s. 827.03, involving sexual abuse; s. 827.04, involving sexual abuse; or s. 827.071, or any other crime involving sexual abuse of another, or with any attempt, solicitation, or conspiracy to commit any of these crimes, the defendant's memorialized confession or admission is admissible during trial without the state having to prove a corpus delicti of the crime if the court finds in a hearing conducted outside the presence of the jury that the state is unable to show the

under this doctrine rests on the admission of a truthful confession which is evidenced by corroborating facts.

Dionne contends that this statute lessens the quantum of evidence because it relieves the State from having to prove the corpus of the crime prior to entry of a confession or admission.³ This reduction of evidence, according to Dionne, harms him and

existence of each element of the crime, and having so found, further finds that the defendant's confession or admission is trustworthy. Factors which may be relevant in determining whether the state is unable to show the existence of each element of the crime include, but are not limited to, the fact that, at the time the crime was committed, the victim was:

(a) Physically helpless, mentally incapacitated, or mentally defective, as those terms are defined in s. 794.011.

(b) Physically incapacitated due to age, infirmity, or any other cause; or

(c) Less than 12 years of age.

(3) Before the court admits the defendant's confession or admission, the state must prove by a preponderance of evidence that there is sufficient corroborating evidence that tends to establish the trustworthiness of the statement by the defendant. Hearsay evidence is admissible during the presentation of evidence at the hearing. In making its determination, the court may consider all relevant corroborating evidence, including the defendant's statements.

(4) The court shall make specific findings of fact, on the record, for the basis of its ruling.

³ The corpus delicti rule requires the prosecution to show: 1) that a crime of the type charged was committed; and 2) that the crime was committed through the criminal agency of another. Franqui v. State, 699 So. 2d 1312, 1317 (Fla. 1997), cert. denied, 523 U.S. 1040 (1998).

thus triggers the ex post facto violation. Dionne is mistaken.

An inquiry for this type of ex post facto violation looks to laws that change the ingredients of the offense or alter the evidence to prove those ingredients. Glendening, 536 So.2d at 215. This law does not reach that level. Section 92.565 affects how the state will prove its case, not what the state has to prove. As the Fifth District noted, "[R]egardless of whether Dionne's confession is admissible under section 92.565, it still must prove evidence other than Dionne's confession that he committed the alleged sexual battery beyond a reasonable doubt." Dionne, 814 So.2d at 1095. Thus, the trustworthiness doctrine does not lessen the quantum of evidence, it simply focuses on the reliability of the confession by utilizing corroborative evidence which will tend to prove or disprove the defendant's statement.

Here, Dionne was charged with sexual battery under section 794. 011(5) of the Florida Statutes (1999).⁴ Section 92.565 does

⁴ Under the crime charged, the state must prove these elements:

(h) "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

* * *

(5) A person who commits sexual battery upon a person

not alter the definition of sexual battery, and the State is still required to prove each element of that crime beyond a reasonable doubt. A confession or admission is simply offered as a piece of evidence to prove the elements of that crime. The quantity of proof required to convict Dionne has not changed and will not change under either corpus delicti or the trustworthiness doctrine. As noted by the Fifth District, "section 92.565 regulates the mode in which the facts constituting guilt may be placed before the jury. It does not reduce the quantum of evidence necessary for a conviction under section 794.011(5)..." Dionne, 814 So.2d at 1094. Furthermore, the jury still is left to assess the weight of that confession as with the rest of the evidence and the jury may in fact disregard a confession.

It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law. Dobbert v. Florida, 432 U.S. 282, 294 (1977). See also Miller, 482 U.S. at 423.

12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.

Section 794.011, Fla. Stat. (1999).

Application of section 92.565 does not leave Dionne or others similarly situated at such a disadvantage. If anything, the trustworthiness standard imposes more of an onus on the State as it now requires the State to produce evidence corroborative of the confession's reliability. The legislative history to House Bill 861, which resulted in chapter 2000-204 of the Florida Laws which added section 92.565, even states that the trustworthiness doctrine requires the government "to prove the existence of substantial independent evidence which would tend to establish the trustworthiness of the confession." H.B. 861, Final Analysis (June 13, 2000)(quoting Opper v. United States, 348 U.S. at 92).⁵ The State must now present corroborative evidence before the confession is admitted and failure to do so results in exclusion of the confession. Any notion that Dionne is at a disadvantage with the adoption of the statute, which, like corpus delicti, is a prophylactic evidentiary device, is belied by the requirements of this statute.

Dionne relies primarily upon the United States Supreme Court decision in Carmell v. Texas, 529 U.S. 513 (2000) which

⁵ Pursuant to section 92.565, before this evidence can be used against the defendant, there must be a hearing outside of the presence of the jury. At this hearing the State must prove by a preponderance of the evidence through the use of corroborative evidence the trustworthiness of a defendant's confession or admission, and the trial court must make specific findings of fact on the record to support its ruling.

addressed when a statute will violate the ex post facto clause. The Fifth District likewise relied upon Carmel to conclude there is no violation. Dionne, 814 So.2d at 1094.

In Carmel, the United States Supreme Court addressed a change in a Texas statute addressing child sex offenses. Prior to its amendment, the statute required only the victim's testimony to convict defendants for crimes against children under the age of fourteen. The statute contained an additional "outcry or corroboration" requirement for child victims under the age of eighteen. During the course of the defendant's criminal episode, the statute was amended and the "outcry or corroboration" requirement was no longer necessary for child victims under the age of eighteen. Carmell, 529 U.S. at 518-519.

The United States Supreme Court found that the statute was unquestionably a law that altered the legal rules of evidence and that law changed the quantum of evidence necessary to sustain a conviction. Id. at 530. The Court noted that under the new law the defendant could be and was convicted on the victim's testimony alone without any corroborating evidence, which was surely less testimony required to convict. Id. (quotation omitted). Because that statutory amendment authorized a conviction on less evidence than previously

required, it fell squarely into the category of ex post facto law violations which prohibit laws that "alter the legal rules of evidence, and receives less or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." Id. at 522, 533 (quoting Calder, 3 Dall. at 390).⁶

Section 92.565 is wholly different than the Texas statute at issue in Carmell because that statute, as amended, arguably lessened the elements the prosecution was required to prove for convictions of these child sex crimes. Here, the elements of the underlying offense have not changed, all that has changed is the manner in which a defendant's confession can be introduced to the jury. The burden of proof on the State is not lessened by the application of section 92.565. That was the concern and the problem with the statute in Carmell. Carmell, 529 U.S. at 532 (a law reducing the quantum of evidence which is applied retroactively allows the government to subvert the presumption of innocence by reducing the number of elements it must prove to overcome that presumption). See also Dionne, 814 So.2d at 1095

⁶ The State respectfully disagrees with the conclusion of the United States Supreme Court that the Texas statute affects the sufficiency of the evidence. Instead, the State contends that the Texas statute "is in its essence an evidentiary provision dictating the circumstances under which the jury may credit victim testimony in sexual offense prosecutions." Carmell, 529 U.S. at 543 (Ginsburg, J., dissenting).

(unlike the statute involved in Carmell, section 92.565 does not speak in terms of the evidence necessary to support a conviction, the statutory language only speaks in terms of the admissibility of the defendant's confession).

While section 92.565 does alter the circumstances in which a confession or statement is introduced, that does not result in an ex post facto problem. Carmell, 529 U.S. at 533 n. 23 ("We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the Ex Post Facto Clause"). Instead, rules which permit evidence to be admitted at trial "do not subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome that presumption." See id.; Windom v. State, 656 So.2d 432, 439 (Fla.), cert. denied, 516 U.S. 1012 (1995)(application of section 921.141(7) of the Florida Statutes (1993) regarding victim impact statements in capital sentencing only relates to admission of evidence and its retroactive application does not violate the ex post facto clause); and Glendening v. State, 536 So.2d 212, 215 (Fla. 1988)(application of section 90.803(23) which allows admission of child hearsay statements does not disturb fundamental rule that state must overcome presumption of innocence, does not affect substantial personal rights, and thus application to

defendant did not violate ex post facto clause).

Furthermore, the State notes that the purpose of an ex post facto clause is to "assure that legislative Acts give fair warning of their effect and permits individuals to rely on their meaning until explicitly changed" and "restrict[] governmental power by restraining arbitrary and potentially vindictive legislation." Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

Here, Dionne cannot assert that he did not know committing sexual battery on a child under the age of twelve was illegal and he has not asserted that he relied upon the corpus delicti rule when he gave his statement. Likewise, Dionne cannot show that the Legislature sought to single him out or others similarly situated for arbitrary and vindictive treatment. Instead, the enactment of this statute recognizes the archaic nature of the corpus delicti rule and replaces it with a more modern approach which focuses on corroborative facts surrounding a confession. Both doctrines accomplish the same goal, to ensure that no person is convicted out of derangement, mistake or official fabrication. State v. Allen, 335 So.2d 823, 825 (Fla. 1976). However, the trustworthiness doctrine is more suitable because its goal is to fortify the truth of the confession and prove the facts embraced by that confession.

In all, the Fifth District properly concluded that

retroactive application of section 92.565 does not violate the ex post facto clause because section 92.565 "changes the procedure for admission of a confession that was otherwise admissible before [the statute] was enacted." Dionne, 814 So.2d at 1095.

Alternatively, Dionne contends if this Court accepts the conclusion of the Fifth District in Dionne and finds that section 92.565 is a procedural mechanism which does not violate the ex post facto clause, then the Legislature's enactment of section 92.565 violates the constitutional doctrine of separation of powers.

To be preserved, the constitutional application of a statute to a particular set of facts must be first raised at the trial level. In contrast, a facial challenge to a statute's constitutional validity may be raised for the first time on appeal. Westerheide v. State, 831 So.2d 93, 105 (Fla. 2002); State v. Johnson, 616 So.2d 1, 3, (Fla. 1993). Cf. also Brennan v. State, 754 So.2d 1,6 n.4 (Fla. 1999)(motions for rehearing may only be used to apprise a court of "the points of law or fact that the court has overlooked or misapprehended" and court will not consider an entirely new issue neither raised nor briefed on appeal).

Dionne never challenged the application of this statute to

him in the trial court and only first raised the issue in his motion for rehearing in the Fifth District. Because Dionne is attacking the constitutionality of section 92.565 as retroactively applied to him for the first time in the appellate courts, his argument is not adequately preserved and is hereby waived.

Notwithstanding his waiver, Dionne's constitutional challenge derives from the conclusion of the Fifth District that section 92.565 was a procedural change which does not implicate the ex post fact clause. Based upon this conclusion, Dionne now argues that the Legislature was without the authority to enact it and in doing so the Legislature encroached upon this Court's constitutionally prescribed rulemaking authority as set forth in article V, section 2(a).

Substantive law describes the duties and rights under our system of government, and the responsibility to make substantive law is in the Legislature within the limits of the state and federal constitutions. Procedural law concerns the means and methods to apply and enforce those duties and rights. Hall v. State, 823 So.2d 757, 763 (Fla. 2002)(quoting Benyard v. Wainright, 322 So.2d 473, 375 (Fla. 1975)).

A statute can have both substantive provisions and procedural requirements. If the procedural requirements

conflict with or interfere with the procedural mechanisms of the court system, they are unconstitutional under both the separation of powers doctrine, and because formulating procedures is in the exclusive province of the Supreme Court under the Florida Constitution. Jackson v. Department of Corrections, 790 So.2d 381, 384 (Fla. 2000). Cf. also Goldstein v. Maloney, 57 So. 342, 344 (Fla. 1911)(rules of evidence and procedure that are prescribed by the courts and by statutes, and not by the Constitution, may be changed by statute when substantive rights secured by the Constitution are not thereby invaded).

Section 92.565 falls into a unique category as it is both substantive and procedural. While the Fifth District found the statute to be procedural for purposes of its ex post facto analysis, the inquiry differs when addressing a separation of powers analysis because this type of statute, like the provisions of the Florida Evidence Code, are purely hybrid. This dual nature however does not render it unconstitutional because the procedural component of section 92.565 does not conflict with procedural mechanisms of the court, and thus, does not encroach upon these constitutional protections. Jackson, 790 So.2d at 384.

This statute is essentially no different than the various

provisions of the Florida Evidence Code which, as enacted by the Legislature, are both substantive and procedural. See e.g., In re Florida Evidence Code, 675 So.2d 584 (Fla. 1996); In re Florida Evidence Code, 638 So.2d 920 (Fla. 1993). When presented with amendments to the Code, this Court has adopted those portions of the Florida Evidence Code which deal with procedural matters. Id. (citations omitted). Accordingly, should this Court find that section 92.565 contains procedural matters, the State urges this Court to simply adopt those provisions of the statute as this Court has similarly done with the Florida Evidence Code. See id.

CONCLUSION

Based on the foregoing argument and authority, the State respectfully requests that this Court affirm the decision of State v. Dionne, 814 So.2d (Fla. 5th DCA 2002).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing merits brief has been furnished by delivery to Assistant Public Defender Thomas J. Lukashow, counsel for Dionne, this _____ day of May, 2003.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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