IN THE SUPREME COURT OF FLORIDA

Case No. 03-642
Lower Case No. 4D02-3566

STATE OF FLORIDA,

Petitioner,

-vs-

SOLOMON WILLIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FOURTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

CHARLES J. CRIST, JR.,
Attorney General
Tallahassee, Florida

JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar Number 0094757
Office of the Attorney General

Department of Legal Affairs
1515 Flagler Avenue, Suite 900
West Palm Beach, Florida

33401

(561) 837-5000

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PRELIMINARY STATEMENT

The Petitioner, THE STATE OF FLORIDA, was the PROSECUTION below, and the Respondent, SOLOMON WILLIS was the DEFENDANT below. In this brief, the parties will be referred to as they stood in the proceedings below. In this brief, the following symbols will be used:

“R" will be used to denote the record on appeal.

STATEMENT OF THE CASE AND FACTS

The defendant, Willis, was charged with four counts of armed kidnaping and four counts of robbery with a firearm (R. 1, State's Exhibit I and II). Following a jury trial, he was convicted of four counts of false imprisonment, a lesser-included offense, and four counts of robbery with a firearm as charged. Id. The trial court sentenced Willis to five years in prison on each of the false imprisonment charges and to 155.25 months, with a three year mandatory minimum sentence on each of the robbery charges.

Willis filed a post conviction motion alleging that his trial attorney was ineffective because he did not object when the trial court failed to instruct the jury that robbery with a weapon is a lesser-included offense of robbery with a firearm. (R. 1, Defendant's Post Conviction Motion). Whereupon, the State filed a response contending that the defendant's claim was not cognizable in a motion for post-conviction relief. (R. 1, State's Response to Defendant's Post Conviction Motion). On July 22, 2002, the trial court denied the defendant's motion for post-conviction relief (R. 1, Order denying post conviction relief).

The Fourth District Court of Appeal by order dated October 23, 2002, issued an order to show cause to the State as to why

the trial court's order denying the motion for post-conviction relief should not be remanded to the trial court either for (1) an evidentiary hearing thereon or (2) for the attachment to the order of denial portions of the record which conclusively showed that the defendant was entitled to no relief. The State responded to the order to show cause raising three grounds as to why the defendant was not entitled to the relief requested (R. 1, State's Response to Order to Show Cause). The first being that this issue could have been raised on direct appeal and was not cognizable in a motion for post-conviction relief. Id. Also, the State contended that the defendant failed to meet either prong of the Strickland[1] analysis. Id. Specifically, the State argued that Willis could not show that counsel's performance was deficient because once counsel requested that the jury be instructed on the necessarily lesser-included offense, no further objection was necessary to preserve the issue for appeal. Id. Appellant in his post conviction motion never contended that trial counsel failed to request an instruction on robbery with a weapon. Id. Instead, his attack focused on the trial counsel's failure to subsequently object to the trial court's failure to so instruct the jury. Id.

As to the prejudice prong of Strickland, the State contended

[1]Strickland v. Washington, 466 U.S. 668 (1984).

that the defendant failed to show that there was a "reasonable probability" that the outcome of the proceedings would have been different. Id. Willis failed to show that, given the opportunity, the jury would have declined to follow the law and given him a jury pardon. Id. The Fourth District Court of Appeal first issued its opinion in Willis v. State, 28 Fla. L. Weekly D315 (Fla. 4th DCA 2003), which was subsequently withdrawn on denial of rehearing and grant of certification on March 26, 2003.

The subsequent opinion Willis v. State, 840 So. 2d 1135, 1137 (Fla. 4th DCA 2003), also rejected the State's contention that this issue could have been raised on direct appeal noting that the State did not allege and nothing in the record showed that counsel requested the instruction. Additionally, the Court found the failure to request an instruction on a necessarily lesser-included offense was a legally sufficient ground to support an ineffective assistance of counsel claim. Id. at 1136. However, the Court certified conflict with the First District Court of Appeal's decision in Sanders v. State, 847 So. 2d 504, 507 (Fla. 1st DCA 2003).

Sanders, *infra*, held that the failure to request an instruction on a necessarily included offense is not a colorable claim of ineffective assistance of counsel because the

allegation could not satisfy the prejudice prong of Strickland because there was no reasonable probability that the jury would have declined to follow the law and grant a jury pardon. The Court held that the defendant failed to meet the prejudice prong because courts should not speculate on whether the jury has reached its verdict through compassion or compromise but rather a court should limit its inquiry to whether there was a factual basis and that courts may not assume that "rational" juries ignore the instructions given them by trial judges and pardon defendants in conducting a Strickland analysis. Id. at 507-08.

After certifying conflict, the State invoked the discretionary jurisdiction of this Court. This Court has postponed its decision on jurisdiction pending receipt of briefs on the merits. This brief follows.

SUMMARY OF ARGUMENT

Willis' claim is speculative and a conclusory claim that does not support an ineffective assistance of counsel claim. General allegations or mere conclusions are insufficient to demonstrate entitlement to relief. Willis has the burden of proving actual prejudice which must be attributable to counsel and directly impact the overall result obtained, it is not sufficient to show that counsel's error had some conceivable effect on the outcome. A court cannot grant collateral relief

on mere speculation that the defendant was prejudiced by trial error.

Moreover, in making the determination whether the specified errors resulted in the required prejudice, a court should presume, that the judge or jury acted according to law. The assessment of prejudice should proceed on the assumption that the decision-maker acted reasonably, conscientiously, and impartially applying the standards that govern the decision. As such, the assessment of prejudice should not depend on the unusual propensities toward harshness or leniency. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, should not be considered in the prejudice determination. Willis has not overcome that presumption and as a result his claim is facially insufficient. As such, the defendant has failed to show that he was prejudiced by counsel's alleged error.

The State respectfully asks this Court to hold that a trial court may summarily deny a post conviction motion as facially insufficient where the defendant asserts by a general conclusory claim that he was prejudiced by the omission of a necessarily included offense because he speculates that had the jury been given the opportunity to exercise its pardon power it would have done so.

ARGUMENT

WHETHER A TRIAL COURT MAY SUMMARILY DENY A POST CONVICTION MOTION AS FACIALLY INSUFFICIENT WHERE THE DEFENDANT ASSERTS BY A GENERAL CONCLUSORY CLAIM THAT HE WAS PREJUDICED BY THE OMISSION OF A NECESSARILY INCLUDED OFFENSE BECAUSE HE SPECULATES THAT HAD THE JURY BEEN GIVEN THE OPPORTUNITY TO EXERCISE ITS PARDON POWER IT WOULD HAVE DONE SO.

The sole issue at bar is whether a claim that a jury could have used its pardon power, had it been given the opportunity, sets forth a sufficient claim that satisfies the prejudice prong of Strickland. The State would assert that the defendant's claim is a speculative and conclusory claim that does not support an ineffective assistance of counsel claim.

General allegations or mere conclusions are insufficient to demonstrate entitlement to relief. Reaves v. State, 593 So. 2d 1150 (Fla. 1st DCA 1992); see also, Freeman v. State, 761 So. 2d 1055, 1061 (Fla. 2000)("The defendant bears the burden of establishing a *prima facie* case based upon a legally valid claim. Mere conclusory allegations are not sufficient to meet this burden;") Armstrong v. State, 28 Fla. L. Weekly, S801 (Fla. 2003)(Defendant failed in his post-conviction motion to adequately allege prejudice from attorney's alleged ineffective assistance in failing to invoke the Rule of Sequestration until after some state witnesses had already testified; defendant made

a mere conclusory allegation that prejudice resulted from the witnesses' opportunity to listen to each other's testimony;) Ferguson v. U.S., 699 F. 2d 1071 (11th Cir. 1983)(Bare and conclusory allegations of ineffective assistance of counsel which contradict the existing record and are unsupported by affidavits or other *indicia* of reliability, are insufficient to require a hearing or further consideration.) As such, the motion must allege facts that the defendant was prejudiced by counsel's failure to act, or else the allegations "are facially insufficient to demonstrate an entitlement to relief." Id.

> A defendant may not simply file a motion for postconviction relief containing conclusory allegations that his or her trial counsel was ineffective and then expect to receive an evidentiary hearing. The defendant must allege specific facts that, when considering the totality of the circumstances, are not conclusively rebutted by the record and that demonstrate a deficiency on the part of counsel which is detrimental to the defendant.

Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Therefore, actual prejudice must be attributable to counsel and directly impact the overall result obtained. A court cannot grant collateral relief on "mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." Calderon v.

Coleman, 525 U.S. 141, 146, 142 L. Ed. 2d 521, 119 S. Ct. 500 (1998). The standard for collateral review of errors in instructions to which no contemporaneous objection was made and no error was assigned on direct appeal is a "cause and actual prejudice" standard. United States v. Frady, 456 U.S. 152, 167-68 (1982). It is not sufficient to show that counsel's error had some "conceivable effect on the outcome", but rather it must be proven with reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d [674] (1984); Downs v. State, 453 So. 2d 1102 (Fla. 1984). Reviewing courts apply a 'strong presumption of reliability' to judicial proceedings and require a defendant to overcome that presumption," Smith v. Robbins, 528 U.S. 259, 286, 120 S.Ct. 746 (citing Strickland, *supra*, at 696, 104 S.Ct. 2052)(U.S. 2000), by "show[ing] how specific errors of counsel undermined the reliability of the finding of guilt," United States v. Cronic, 466 U.S. 648, 659, n. 26, 104 S.Ct. 2039 (U.S. 1984). Thus, in cases involving mere "attorney error," courts require the defendant to demonstrate that the errors "actually had an adverse effect on the defense." Strickland, *supra*, at 693, 104 S.Ct. 2052.

Therefore, the factual allegations supporting the claim(s)

for relief in a Rule 3.850 motion must be specific and not mere conclusions. Reaves v. State, 593 So. 2d 1150 (Fla. 1st DCA 1992); see also, Betts v. State, 792 So. 2d 589, 590 (Fla. 1st DCA 2001) citing, Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990)(A claim of ineffective assistance of counsel will warrant an evidentiary hearing only where the movant alleges "specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant.")

At bar, Willis has not alleged any specific facts nor does point to any evidence that would support his claim that had the instruction on the necessarily included offense been given the jury would have exercised its pardon power. Willis points to nothing in the record nor does he provide supporting facts. He does not contend that there was any evidence that the instrument he used was anything other than a firearm. Rather, his claim is based upon mere speculation and the hope that the jury would have declined to follow the law. Such a claim cannot satisfy nor support a colorable claim of ineffective assistance because the prejudice prong has not been properly pled.

The First District Court of Appeal opined that they had a “difficulty accepting the proposition that there is even a substantial possibility that a jury which has found every

element of an offense proved beyond a reasonable doubt, would have, given the opportunity, ignored its own findings of fact and the trial court's instructions on the law and found a defendant guilty of only a lesser included offense" Sanders v. State, 847 So. 2d 504, 507 (Fla. 1st DCA 2003).

The Court went on to opine that their reasoning was supported by the reasoning employed by this supreme court in Gragg v. State, 429 So. 2d 1204 (Fla. 1983). Responding to an argument by the State that the verdicts in Gragg's trial on the charges of aggravated battery and aggravated assault might have been the product of a jury pardon, this Court held that "courts should not speculate on whether the jury has reached its verdict through compassion or compromise." Id. Instead, a court "should limit its inquiry to whether there was a factual basis, rather than an emotional basis, upon which the jury's verdict could have rested." Id. at 1207. The First District opined that this Court therefore held, at least in the context of a collateral estoppel analysis, that courts may not assume that "rational" juries ignore the instructions given them by trial judges and pardon defendants. The Sanders opinion notes that Gragg did not, however, address whether courts should, in other contexts, engage in speculation that a jury might act in a manner that is not rational and as such in that decision

presented the following question to this Court:

> IN CONDUCTING A PREJUDICE ANALYSIS PURSUANT TO A POSTCONVICTION STRICKLAND V. WASHINGTON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, MAY A COURT FIND A "REASONABLE PROBABILITY" THAT, HAD THE JURY BEEN GIVEN THE OPPORTUNITY TO RETURN A VERDICT OF GUILTY OF ONLY A LESSER INCLUDED OFFENSE, THE JURY WOULD HAVE DONE SO, THUS IGNORING ITS OWN FINDINGS OF FACT AND THE TRIAL COURT'S INSTRUCTIONS ON THE LAW?

Sanders, 847 So. 2d at 507. However, it is quite clear that this Court's rational applied in Gragg applies in conducting a Strickland analysis. In reviewing the Strickland opinion on conducting the prejudice analysis it is clear that the propensities toward harshness or leniency are irrelevant to the determination of prejudice.

Strickland clearly states that:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the

> assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

466 U.S. at 694-695. As such, it is clear that a proper application of Strickland mandates a negative answer to the question certified in Sanders.

In Chace v. Bronson, 19 Conn. App. 674, 684-85, 564 A.2d 303 (Conn. App., 1989), the Court held that the petitioner had not met his burden of proving prejudice under the second prong of Strickland because the petitioner clung to the possibility that the jury, given the option of a second degree manslaughter charge, would have chosen to convict him of that charge. The Court recognized and cited to Strickland that a defendant has no entitlement to the "luck of a lawless decision maker."

However, the Court further stated that on the record before it, the Court could not conclude that the defendant's claim was sufficiently realistic to warrant upsetting the guilty judgment. The Court held that even assuming that the petitioner was entitled to an instruction on second degree manslaughter, and that counsel's failure to request such an instruction constituted ineffective assistance of counsel, it noted that there was strong evidence of intent to cause either serious physical injury or death rendered it unlikely that a jury instructed on murder, first degree manslaughter, and second degree manslaughter would have found that the petitioner acted recklessly, rather than with intent to cause serious physical injury or death. As such, the Court concluded that any possibility that the jury would have convicted the petitioner of manslaughter in the second degree did not amount to "a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, *supra*, 694.

Similarly, in the present case, Willis has not met his burden of proving prejudice. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. Willis does not point to instances in the record which illustrate that the jury would have exercised this

pardon or if the evidence even would have supported the instruction or that the instruction was consistent with his theory of defense. Rather, Willis only speculated that given the opportunity to exercise its pardon power the jury would have done so. As such, Willis has failed to show that the jury would have declined to follow the law and given him a jury pardon but for "the idiosyncracies of the particular decision-maker" "propensities toward leniency." Therefore, his particular claim and motion are legally insufficient.

In the Sander's opinion the dissent cited to Beck v. Alabama, 447 U.S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980), to show that counsel's position on foregoing the lesser degree instructions fell below the standard of criminal defense lawyers, and because rational jurors could have found Sanders guilty of the lesser included offense and should have been given that choice. 847 So.2d at 511-12. However, Beck is distinguishable in that the Alabama state statute in Beck precluded a second degree murder instruction, leaving the defendant there with no choice (unlike here); Beck was essentially given the death penalty by operation of law in the guilt phase. See Hopkins v. Reeves, 524 U.S. 88, 94-100, 141 L. Ed. 2d 76, 118 S. Ct. 1895 (1998)(distinguishing Beck).

In Spaziano v. Florida, 468 U.S. 447, 82 L. Ed. 2d 340, 104

S. Ct. 3154 (1984), the Court noted that a defendant's right to a second degree instruction is waivable, and that the defendant chose to waive it and go for broke. As the Supreme Court explained:

> Although the Beck rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him ... to give the State ...an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder. He knowingly chose not to do so. Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on the lesser included offenses.

Id. at 456-57 (footnote omitted).

In Jones v. State, 484 So. 2d 577, 578 (Fla. 1986), Jones was tried for aggravated battery, he waived his right to have the jury instructed on the lesser-included offense of battery in accord with his "all or nothing" defense. He was convicted, and the conviction was affirmed on appeal. This Court held that only capital defendants had a fundamental right to jury instructions on lesser-included offenses. The court opined that petitioner's counsel below chose to base its defense on a sole ground--that

petitioner had not done the act--and thus put the State to its proof. Id. It noted that the record below indicated a classic waiver of the right to have the jury instructed on lesser included offenses. Id. In Jones, the defendant asked this Court to apply the label of "fundamental error" to his case. Id. at 579. In support of his contention, Jones pointed to an "evolution in the case law" recognizing a defendant's right to jury instructions on lesser included offenses as "fundamental" in nature.

This Court noted that in Harris v. State, 438 So. 2d 787 (Fla. 1983), *cert. denied*, 466 U.S. 963, 80 L. Ed. 2d 563, 104 S. Ct. 2181 (1984), a capital defendant, as a matter of due process, is entitled to have the jury instructed on all necessarily lesser included offenses. However, it also found that while there is a fundamental right to such instructions to due process in the capital context, it declined to apply that case's requirement of an express personal waiver outside of the context in which it was found necessary. Id. As such, this Court declined “to stray from the long and unbroken lines of precedent conditioning a right to jury instructions on lesser included offenses upon a request for such instructions.” Id. at 579. As such, the issue at bar is far from the situation in Beck wherein a state statute precluded the giving of an

instruction.

The fact that a necessarily included instruction was omitted does not automatically result in fundamental error nor does it show ineffective assistance. While, a trial court's failure to give jury instructions on all necessarily included offenses is fundamental error and can be considered on direct appeal even though defense counsel did not object to the omission there is an exception to this rule if defense counsel affirmatively agrees to the omission or alteration of the instruction. Roberts v. State, 694 So. 2d 825; 826 (Fla. 2nd DCA 1997) see also, Firsher v. State, 834 So. 2d 921, 922 (Fla. 3rd DCA 2003). Under a Strickland analysis it is plausible that counsel's decision to forego a request of a necessarily lesser included offense was strategy. See, e.g., Platt v. State, 697 So. 2d 989 (Fla. 4th DCA 1997)(An evidentiary hearing was required to determine whether defense counsel's alleged error or omission to instruct the jury on excusable homicide was in fact a reasonable trial tactic were the failure of defense counsel to request that instruction severely prejudiced his client's case as the error complained of negated the only defense put forth by trial counsel;) State v. Daniels, 826 So. 2d 1045 (Fla. 5th DCA 2002)(Florida law does not place a duty on trial counsel to obtain the defendant's express record consent to counsel's

tactical decisions relating to trial strategy such as the decision to waive the right to request a jury instruction on a permissive lesser included offense;) In re Trombly, 160 Vt. 215, 219; 627 A.2d 855 (Vt. 1993)(It may be a valid defense strategy for defendant to forgo an instruction on manslaughter in a murder case, despite that the facts may warrant its inclusion; furthermore, where the omission is part of trial strategy and the defendant does not request such charge or object to its omission, the court need not include the charge on its own violation;) Commonwealth v. Donlan, 436 Mass. 329, 335; 764 N.E.2d 800 (Mass. 2002)(It is not ineffective assistance of counsel to fail to request a lesser-included offense instruction where the evidence at trial does not support the giving of such an instruction); Hagans v. State, 316 Md. 429, 559 A.2d 792, 804 (Md. 1989)(whether to instruct on lesser included offense is question of strategy best left to the parties); Commonwealth v. Carver, 33 Mass. App. Ct. 378, 600 N.E.2d 588, 594-95 (Mass. App. Ct. 1992)(where defendant, upon counsel's advice, chose "all or nothing" strategy and did not request manslaughter charge, no error in omission). Thus, absent any evidence in the record that this was not his counsel's trial strategy, the presumption that his counsel's strategy constituted reasonably effective assistance cannot be overcome. See, Chandler v.

United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*)(quoting Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)), *cert. denied* 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001).

A strategic decision of counsel generally cannot establish the first "cause" prong for ineffectiveness. Strickland v. Washington, 466 U.S. 668, 691. However, the performance component need not be addressed first. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Strickland v. Washington, 466 U.S. 668, 697, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Therefore, a court “need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied.” Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

Willis has not satisfied the prejudice component. At bar, there was no showing that there was a reasonable probability that the result would have been different if the necessarily lesser included offense had been requested. Willis has failed to show that given the opportunity the jury would have convicted him of a necessarily included lesser based upon anything other than the jury’s propensity towards leniency and their disregard

of the law. And, failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. See, Oce v. State, 742 So. 2d 464, 466 (Fla. 3d DCA 1999), see also, Stewart v. State, 801 So. 2d 59, 64 (Fla. 2001)(When a defendant fails to make a showing as to one prong of claim of ineffective assistance of counsel, it is not necessary to delve into whether he has made a showing as to other prong.) As such, no evidentiary hearing is warranted as the lower court need not delve into whether there was a tactical decision not to request the instruction because the prejudice prong was insufficiently pled.

CONCLUSION

Based upon the arguments and authorities cited herein, the petitioner respectfully requests this Court reverse the Fourth District's opinion.

Respectfully Submitted,

CHARLES J. CRIST JR.,
Attorney General

_____

JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

_ CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar Number 0094757
Office of the Attorney General
Department of Legal Affairs
1655 Palm Beach Lakes Blvd., Suite 300
West Palm Beach, Florida 33401

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed this ___ day of January 2004, to BIANCA LISTON, Esq, Attorney for Respondent, Clark, Robb, Mason, Coulombe & Buschman, 19 West Flagler Street, Miami, FL 33130.

_ CLAUDINE M. LaFRANCE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in 12 point Courier New Font.

_____
CLAUDINE LaFRANCE
Assistant Attorney General