

IN THE SUPREME COURT OF FLORIDA

TIMOTHY T. KOILE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	FSC CASE NO. SC05-132
	)	
STATE OF FLORIDA,	)	FIFTH DCA CASE NO. 5D04-91
	)	
Respondent.	)	
_____	)	

**ON DISCRETIONARY REVIEW FROM  
THE FIFTH DISTRICT COURT OF APPEAL**

PETITIONER’S MERIT BRIEF

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

MARVIN F. CLEGG  
ASSISTANT PUBLIC DEFENDER  
FLORIDA BAR NO. 0274038  
112 Orange Avenue, Suite A  
Daytona Beach, Florida 32114  
(386) 252-3367

COUNSEL FOR PETITIONER

**TABLE OF CONTENTS**

	<b><u>PAGE NO.</u></b>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
SUMMARY OF ARGUMENT 10	
ARGUMENT	11
ISSUE ONE: DOES SECTION 775.089, FLORIDA STATUTES (2003), AUTHORIZE A RESTITUTION AWARD FOR THE ESTATE OF A MURDER VICTIM OF AN AMOUNT CONSISTING OF THE LOST FUTURE INCOME OF THE VICTIM?	
CONCLUSION	20
CERTIFICATE OF SERVICE	21
CERTIFICATE OF FONT	21

## TABLE OF CITATIONS

<u>CASES CITED:</u>	<u>PAGE NO.</u>
<u>Bautista v. State</u> 863 So.2d 1180 (Fla. 2003)	19
<u>Herrington v. State</u> 823 So.2d 286 (Fla. 1st DCA 2002)	18
<u>Kirby v. State</u> 863 So. 2d 238 (Fla. 2003)	13
<u>Koile v. State</u> 30 Fla. L. Weekly D168 (Fla. 5 <sup>th</sup> DCA Jan. 7, 2005)	9, 14
<u>Kyser v. State</u> 513 So.2d 68 (Ala. Cr. App. 1987)	18
<u>Lee v. Walgreen Drug Store, Inc.</u> 10 So. 2d 314 (Fla. 1942)	14
<u>Osteen v. State</u> 616 So. 2d 1215 (Fla. 5th DCA 1993)	18-19
<u>State v. Mayberry</u> 415 N.W. 2d 644 (Iowa 1987)	18
<u>State v. Moriarty</u> 742 P. 2d 704 (Or. App. 1987)	17
<u>Stocks v. State</u> 687 So. 2d 325 (Fla. 5th DCA 1997)	18
<u>Thomas v. State</u> 581 So. 2d 992 (Fla. 2d DCA 1991)	18

## TABLE OF CITATIONS

<u>OTHER AUTHORITIES CITED:</u>	<u>PAGE NO.</u>
Section 775.021, Florida Statutes (2004)	19
Section 775.021(1), Florida Statutes (2004)	14
Section 775.089(1)(c), Florida Statutes (2003)	15
Section 775.089, Florida Statutes (2002)	13
Section 775.089, Florida Statutes (2003)	11
Section 775.089(1)(c), Florida Statutes	7
O.R.S. §§ 137.103	17

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_____	)	

**PRELIMINARY STATEMENT**

In this brief, the initial “R” shall represent the Record on Appeal. “T” shall denote the trial transcript page as renumbered by the lower court clerk of court.

## **STATEMENT OF THE CASE**

Timothy Koile and co-defendant Catherine Cousins were charged by Osceola County indictment with the May 6-12, 2001, first degree murder of Sean Cousins. (Vol. I, R 1) Conflict counsel was appointed for Mr. Koile. (Vol. I, R 19)

Upon Mr. Koile's oral request, venue was transferred to Palm Beach County on April 3, 2003. (Vol. I, R 45) The co-defendants' cases were severed. (Vol. I, R 73)

A plea form was signed by this Petitioner and the state on May 30, 2003 after trial began, and on September 19, 2003, sentencing took place with Mr. Koile ordered to prison for ten years, to be followed by five years on supervised probation. (Vol. II, R 156; 158)

On October 27, 2003, a restitution hearing was held, with the trial judge entering its restitution order on December 19, 2003. (Vol. II, R 199-200) The Notice of Appeal on the restitution order was filed on December 23, 2003, and the Office of the Public Defender was appointed for appellate purposes on December 30, 2003. (Vol. II, R 209)

The Fifth District Court of Appeals issued its opinion on January 7, 2005, certifying two questions to this Court as issues of great public importance in Case

No. 5D04-91.

## **STATEMENT OF THE FACTS**

After pleading to the second degree murder of Sean Cousins, Timothy Koile was ordered to pay more than \$2,000,000 in restitution to the Cousins estate for lost future wages of the decedent. (Vol. II, R 199-200)

Mr. Koile's agreement called for a Guilty plea to Second Degree Murder and "truthful testimony" in future proceedings and for a sentence of between eight and ten years in Department of Corrections, followed by five years of supervised probation. (Vol. II, R 120-121)

Counsel for the Estate of Sean Cousins filed a request for the victim's family members to appear for restitution purposes and sentencing purposes. (Vol. II, R 133) The state later filed a notice of its intent to seek \$4,003,240.76 in lost income, \$5,238 for funeral expenses, \$12,000 in lost wages for Patrick Cousins, \$1,500 in lost wages for Roseanne Cousins, \$2,500 in investigator fees, \$370.33 for travel expenses, and \$88 in parking expenses. (Vol. II, R 135) The Presentence Investigation recommended no restitution to be paid. (Vol. II, R 143)

On September 19, 2003, sentencing on the lesser charge of Second Degree Murder took place with Mr. Koile ordered to prison for ten years, to be followed by five years on supervised probation. (Vol. II, R 156; 158)

A restitution hearing was held on October 27, 2003, and the state called the



decedent's father to testify that in addition to funeral home expenses, he incurred expenses at the church and had at least three bills he personally paid, for \$1700, \$550, and \$2188. (Vol. III, T 217; 220) He believed there was \$800 spent in contributions to the church for the use of the facility, for the pastor who flew in from Jamaica and also a choir and soloist, for a total of \$5,238. (Vol. III, T 221)

The father also testified he took a leave of absence to be available for the trial, for three weeks. His missed income was around \$12,000, he believed. (Vol. III, T 222) As a pilot for Air Jamaica, he based this upon his monthly salary of \$16,000: "I'm a Captain. I fly the big jets." (Vol. III, T 222) He was Director of Flight at the time, in charge of all pilots, after 24 years with the airline. (Vol. III, T 226)

He also stated he hired an investigator when his son was first missing, and that bill was \$2500. (Vol. III, T 224) Finally, he had prepared an affidavit giving \$370.33 for his own travel expenses, with 250 miles per day--this included \$88 in parking fees. (Vol. III, T 225-226)

The father acknowledged he testified only one day during the trial and observed the trial during the remaining days. (Vol. III, T 234) He was a founder of the pilots association that negotiated pilot raises. (Vol. III, T 245)

The captain stated his son worked for the same airline as a first officer and

his salary was \$87,998 per year at the time of his death. When the state attempted to move these expense billings into evidence, the defense counselors' objections on grounds of hearsay and relevancy were overruled. (Vol. III, T 231)

The decedent's mother testified that her son had been providing \$356 a month, total, for two of his five children as child support, by court order. (Vol. III, T 249) There was a civil suit concerning a life insurance policy of one million dollars, and the victim's mother said she had filed a wrongful death suit on behalf of her son. (Vol. III, T 252)

Her attorney testified that he was married to the decedent's former wife and had been appointed as personal representative for the estate. (Vol. III, T 255) He stated that three of the victim's children were receiving \$660 per month in child support. (Vol. III, T 255) A lawsuit had been filed on behalf of the estate, he stated, in Palm Beach County. (Vol. III, T 257)

The personal representative stated he had been appointed to that role on May 18, 2001, and he did not know what date the surviving wife, Cathy Cousins, had been arrested for his murder, but she was not appointed because of the extenuating circumstances. (Vol. III, T 260)

Defense counsel objected unsuccessfully to the speculative nature of lost income projections when a tax planner/CPA was called to testify that he had

performed present day value calculations regarding lost future income in the past many times. (Vol. III, T 264; 267-268) The planner assumed the victim would have lived to age 60 and earned income until then, of \$87,998 annually. He also assumed a COLA increase of three percent annually, and assumed a raise coincident with promotion to captaincy. (Vol. III, T 270-271)

The planner calculated that \$3,120,741 would be the total present value of the salary itself. (Vol. III, T 278-279) He acknowledged factors that he had included or had omitted in his calculations.(Vol. III, T 278-279; 282-283)

Co-defendant Cousins acknowledged she was pursuing the benefits of her deceased husband's million dollar life insurance policy. (Vol. III, T 331) She stated she had no income to look forward to and had not received any benefits from Air Jamaica. (Vol. III, T 335) The state requested \$21,696.33 in restitution to the decedent's parents for funeral expenses, lost income, private investigation fees and travel. (Vol. III, T 341)

The prosecution also argued that Section 775.089(1)(c), Florida Statutes defined *victim* to include a decedent's estate and Mr. Koile had five biological children—he requested \$3,322,743 in lost future income. (Vol. III, T 342-343) The defense argued loss of future income was mere speculation and the legislature did not specifically identify this as a legitimate restitution issue. (Vol. III, T 352)

The trial court delayed ruling, entering its restitution order on December 19, 2003, and finding by a preponderance of the evidence the following:

A. Patrick Cousins suffered loss in travel expenses of \$370.33, parking expenses of \$88.00, funeral expenses of \$5,238.00, and three weeks of lost income in the amount of \$12,000.00.

B. Roseanne Cousins suffered three weeks of lost income at \$1,500.00.

C. Sean Cousins' estate suffered estimated lost wages and pension benefits in the amount of \$2,042,126.00, based upon the court's projection from the income level at which he died, but assuming a 3% cost of living adjustment and 4.2% discount rate. The court did not assume the decedent would become a captain.

(Vol. II, R 199-200)

Based upon those findings, the court ordered \$17,696.33 in restitution to Patrick Cousins, \$1,500 to Roseanne Cousins, and \$2,042,126.00 to the estate. Both Mr. Koile and his co-defendant were ordered jointly and severally liable for restitution and the widow was not to be considered an estate beneficiary. (Vol. II, R 199-200)

The Fifth District Court of Appeals issued its opinion on January 7, 2005 and struck the award of lost wages to the parents of the decedent for the time they spent watching the court proceedings. However, that court found the awarding of the decedent's future lost income to his estate was appropriate' but reversed the

award for reconsideration and recalculation of the methodology used. The Fifth District certified two questions to this Court as issues of great public importance in Case No. 5D04-91:

DOES SECTION 775.089, FLORIDA STATUTES (2003),  
AUTHORIZE A RESTITUTION AWARD FOR THE LOST WAGES  
OF A NEXT OF KIN VOLUNTARILY ATTENDING THE  
MURDER TRIAL OF THE PERSON ACCUSED OF KILLING THE  
VICTIM?

DOES SECTION 775.089, FLORIDA STATUTES (2003),  
AUTHORIZE A RESTITUTION AWARD FOR THE ESTATE OF A  
MURDER VICTIM OF AN AMOUNT CONSISTING OF THE LOST  
FUTURE INCOME OF THE VICTIM?<sup>1</sup>

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<sup>1</sup> Koile v. State, 30 Fla. L. Weekly D168 (Fla. 5<sup>th</sup> DCA Jan. 7, 2005)

## **SUMMARY OF ARGUMENT**

The trial court erred in awarding lost future wages of the decedent to his estate, where more than \$2,000,000 in restitution for potential lost income of the deceased victim was ordered, along with \$17,696.33 in restitution to the decedent's father and \$1,500 to Roseanne Cousins, the mother, for their for lost income and expenses as they viewed the trial and ultimate plea proceedings. The potential lost income award was inaccurate, speculative, based upon hearsay, and not authorized by statute and the district court erred in holding that any award of future lost income was appropriate.

## ARGUMENT

ISSUE ONE: DOES SECTION 775.089, FLORIDA  
STATUTES (2003), AUTHORIZE A RESTITUTION  
AWARD FOR THE ESTATE OF A MURDER VICTIM OF  
AN AMOUNT CONSISTING OF THE LOST FUTURE  
INCOME OF THE VICTIM?

### Preface

Petitioner agrees with the district court that this particular question has no direct Florida precedent and is of great public importance. However, Petitioner now submits that in this Court, where the question involves one of law in this statutory interpretation, the standard of review is not that of abuse of discretion, but rather, it calls for a review *de novo*.

With regard to the first question certified by the Fifth District concerning the denied next-of-kin wages, Petitioner agrees with the ruling of the Fifth District Court of Appeal of January 7, 2005 on this issue and relies upon that opinion together with Petitioner's underlying briefs in support thereof.<sup>2</sup>

The restitution statute involved is Section 775.089, Florida Statutes (2003):

#### **Restitution**

(1)(a) In addition to any punishment, the court shall order the defendant to make restitution to the victim for:

1. Damage or loss caused directly or indirectly by the defendant's offense; and

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<sup>2</sup> All briefs filed by the parties in the district court have been attached as Appendix "B, C, and D."

2. Damage or loss related to the defendant's criminal episode, unless it finds clear and compelling reasons not to order such restitution. Restitution may be monetary or nonmonetary restitution. The court shall make the payment of restitution a condition of probation in accordance with s. 948.03. An order requiring the defendant to make restitution to a victim does not remove or diminish the requirement that the court order payment to the Crimes Compensation Trust Fund pursuant to chapter 960. Payment of an award by the Crimes Compensation Trust Fund shall create an order of restitution to the Crimes Compensation Trust Fund, unless specifically waived in accordance with subparagraph (b)1.

(b)1. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in this section, it shall state on the record in detail the reasons therefor.

2. An order of restitution entered as part of a plea agreement is as definitive and binding as any other order of restitution, and a statement to such effect must be made part of the plea agreement. A plea agreement may contain provisions that order restitution relating to criminal offenses committed by the defendant to which the defendant did not specifically enter a plea.

(c) The term "victim" as used in this section and in any provision of law relating to restitution means each person who suffers property damage or loss, monetary expense, or physical injury or death as a direct or indirect result of the defendant's offense or criminal episode, and also includes the victim's estate if the victim is deceased, and the victim's next of kin if the victim is deceased as a result of the offense.

(2)(a) When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

1. Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical



care and treatment rendered in accordance with a recognized method of healing.

2. Pay the cost of necessary physical and occupational therapy and rehabilitation.

3. Reimburse the victim for income lost by the victim as a result of the offense.

4. In the case of an offense which resulted in bodily injury that also resulted in the death of a victim, pay an amount equal to the cost of necessary funeral and related services.

As noted in Kirby v. State, 863 So. 2d 238, 241 (Fla. 2003) the statute had not changed since 1999.

**Projected future income of victim**

A. The Lack of Statutory Authority

Trial court counsel for Mr. Koile argued that the legislature did not specifically identify projected future income of a deceased victim as a legitimate restitution item. (Vol. III, T 352) In fact, under the section dealing with the death of a victim, only funeral expenses are specified:

(2)(a) When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

\* \* \* \* \*

4. In the case of an offense which resulted in bodily injury *that also resulted in the death of a victim*, pay an amount equal to the cost of necessary funeral and related services.

§ 775.089, Fla. Stat. (2002)(*emphasis added*)

There is no statute which specifically states projected lost future income

should be awarded to the estate or next of kin of the decedent. As argued below, any ambiguities in the statute's wording should be resolved in favor of the defendant.<sup>3</sup> Where the definition for 'victim' can be defined as either the actual decedent *or* their estate, depending upon whether the person is dead or alive, there is reasonable confusion as to why the legislature worded this statute in the fashion it did. This demonstrates the need for legislative revisiting rather than the judicial creation of new remedies, especially in light of the problems discussed below.

Any doubt as to legislative intent should be resolved in favor of the defendant and statutory provisions should not be extended by implication. Lee v. Walgreen Drug Store, Inc., 10 So. 2d 314, 316 (Fla. 1942). (R 178)

#### B. Practical problems with speculating about lost income

First, Petitioner would note that the district court, in attempting to make the existing legislation fit this situation, concluded that “(u)nder the circumstances, therefore, we conclude that an award of the decedent's future lost income to his or her *estate* is appropriate.” Koile v. State, 30 Fla. L. Weekly D168, 170 (Fla. 5<sup>th</sup> DCA Jan. 7, 2005). (**emphasis added**) However, the statute specifically states

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<sup>3</sup> § 775.021(1), Fla. Stat.(2004)(“ The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.”)

that:

(c) The term "victim" as used in this section ... includes the victim's *estate* if the victim is deceased, and the *victim's next of kin if the victim is deceased as a result of the offense.*

§ 775.089(1)(c), Fla. Stat. (2003)(*emphasis* added) Therefore, even if the restitution were legislatively authorized, it would be to the *next of kin*, and not just the *estate*, as ordered.

There is a wide variety of difficulties in trying to handle an issue as complex as this during a criminal restitution hearing, even if it is determined that criminal court as well as civil court could assess these damages.

Sean Cousins' mother stated her son had been providing \$356 a month, total, for two of his five children as child support, by court order. (R 249) But her attorney testified that three of the victim's children were receiving \$660 per month in child support. (R 255) It is unclear how the lower courts' award would be divided or distributed.

There was a civil suit concerning a life insurance policy of one million dollars, and the victim's mother said she had filed a wrongful death suit on behalf of her son. (R 252) Her attorney testified that he was married to the decedent's former wife and had been appointed as personal representative for the estate. (R 255) A lawsuit had been filed on behalf of the estate, he stated, in Palm Beach

County. (R 257)

However, a tax planner was called by the state—the planner assumed the victim would have lived to age 60 and earned income until then, of \$87,998 annually. He also assumed a COLA increase of three percent annually, and assumed a raise coincident with promotion to captaincy. (R 270-271) He calculated that \$588,730 would be invested by the time of retirement with conservative interest rates, and he calculated that \$3,120,741 would be the total present value of the salary itself. (R 278-279)

The strength of the airline company and industry in general was not factored into his calculations. The decedent's prior health was not factored into his numbers, and the large factor of income taxation was also not deducted from his numbers. (R 282-283) The decedent's father testified that there was no guarantee as to how long his son would have continued working for that airline. (R 243)

There was no evidence to show how much of the presumed lost income would have actually gone toward the children versus other “estate” entities, and the state's expert did not take into the equation many critical factors, some of which he admitted while testifying. He did not consider any debts of the decedent or his family, for instance. (R 353; 361) The co-defendant's counsel also argued there was lack of evidence as to what might be in the decedent's pension plan and regarding any rates of investment return. (R 361) The defense argued that

projecting loss of income was mere guesswork under these circumstances. (R 352)

The trial judge found there was not a preponderance of evidence showing the decedent would have been promoted to captain rank and eventually came up with its own dollar amount in figuring what it thought the present value of estimated lost wages and pension benefits would be. Even that, however, assumed that there would be pension plan benefits and there did not appear to be any testimony as to whether the young Cousins had vested, as far as retirement benefits, having only worked with the company for six years.

### C. Law on the subject

The state has argued below that this is a case of first impression in this state and the Fifth District adopted the prosecution's use of Oregon's State v. Moriarty, 742 P. 2d 704 (Or. App. 1987) as persuasive. However, Petitioner continues to point out that Moriarty's trial court used as a measure of lost earnings the *Social Security benefits* that the decedent's family *would have* received, but did not because they could not prove that the victim was dead. That trial court also based its award upon a set of restitution statutes very different from Florida's—one which specifically incorporated civil remedies.<sup>4</sup> The Oregon case does not assist in

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<sup>4</sup> (2) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action..." O.R.S. §§ 137.103

interpreting Florida's restitution statute.

Likewise, the Fifth District's reliance upon State v. Mayberry, 415 N.W. 2d 644 (Iowa 1987) may have overlooked *that* state's restitution statute which provides in part that “*Pecuniary damages*' means all damages to the extent not paid by an insurer, which a victim could recover against the offender in a civil action....” *Id* at 645. Finally, Kyser v. State, 513 So.2d 68 (Ala. Cr. App. 1987), as cited in the Fifth District's opinion, does not appear to involve a decedent's future lost income. In short, the caselaw cited from other states lends no insight into the legislative intent of Florida's lawmakers and if anything, reveals that our legislature could have expressly incorporated or adopted civil law remedies into our statutes as other states have done, if that had been desired.

As to evidence admitted through the victim's father that was hearsay in nature, trial counsel for Mr. Koile made proper objection. While hearsay evidence may be used to determine the amount of restitution if there is no proper objection to that evidence, it should have been sustained here. Thomas v. State, 581 So. 2d 992, 993 (Fla. 2d DCA 1991); Herrington v. State, 823 So.2d 286 (Fla. 1st DCA 2002)

In Stocks v. State, 687 So. 2d 325 (Fla. 5th DCA 1997), the fifth district

wrote that the trial court had properly disallowed a “lost profits” claim for the amount of time a vandalized motel room had been “off the market,” citing Osteen v. State, 616 So. 2d 1215 (Fla. 5th DCA 1993), wherein an order awarding “loss of business” expenses was reversed because the damage was too speculative.

In summary, Petitioner submits this Court should leave it to the legislature to define whether it intends the criminal courts of this state to get into the highly speculative and technical area of projecting future lost wages on the part of a deceased victim. The language in the statute is ambiguous and presently would require the reader to substitute changing meanings to the word *victim* in order to come up with the result sought by the prosecution in this case.

The Fifth District acknowledged it ruled on this issue not out of clear direction of the statute, but because it felt it would be “inconsistent” to do otherwise and because this authorization of restitution “furthers the purposes of the restitution statute.”<sup>5</sup> However, the legislature has made it very clear through the Rule of Lenity that ambiguities should be resolved in favor of the defendant.

Bautista v. State, 863 So.2d 1180, 1183 (Fla. 2003); § 775.021, Fla. Stat. (2004)

For these reasons, Petitioner would respectfully submit that the award of projected future lost income in this cause should be struck.

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<sup>5</sup> “Thus, the statute *appears* to support such an award.” Koile, at D170. (*emphasis added*)





## **CONCLUSION**

Petitioner respectfully submits that both of the certified questions from the Fifth District Court of Appeals should be answered in the negative and the provisions of the trial court's restitution order which concern projected lost income and three weeks of lost wages and travel expenses should be stricken.

Respectfully submitted,

JAMES S. PURDY  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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MARVIN F. CLEGG  
ASSISTANT PUBLIC DEFENDER  
Florida Bar No. 0274038  
112 Orange Avenue, Suite A  
Daytona Beach, Florida 32114  
(386) 252-3367

COUNSEL FOR PETITIONER

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand-delivered to the Honorable Charles J. Crist, Jr., Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to: Mr. Timothy T. Koile, Inmate # 443192, C2-123-S, New River Correctional Institution - East, 7819 N.W. 228<sup>th</sup> Street, Raiford, Florida 32026-3120, this 17<sup>th</sup> day of February 2005.

**CERTIFICATE OF FONT**

I HEREBY CERTIFY that the font used in this brief is 14 point proportionally spaced Times New Roman.

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MARVIN F. CLEGG  
ASSISTANT PUBLIC DEFENDER