No. SC92491

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JASON REECE PETERSON,

Respondent.

Appeal from Carroll County Circuit Court
Eighth Judicial Circuit
The Honorable Kevin L. Walden, Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of Carroll County dismissing a felony indictment that charged Respondent Jason Reece Peterson with being a sex offender present within 500 feet of a public park in violation of section 566.150, RSMo Cum. Supp. 2009, on the basis that application of the statute to the Respondent violated the prohibition contained in article I, section 13 of the Missouri Constitution on the enactment of laws that are restrospective in their operation. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004). Although the dismissal was denominated as being without prejudice, refiling the charge would be a futile act given the reasons underlying the trial court's ruling. The dismissal thus had the practical effect of terminating the litigation and constituted a final and appealable judgment. *State v. Smothers*, 297 S.W.3d 626, 630-31 (Mo. App. W.D. 2009). This appeal involves the validity of a state statute, section 566.150, RSMo Cum. Supp. 2009. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Jason Reece Peterson was indicted in Ray County Circuit Court on June 17, 2011, on a single count of the class D felony of Loitering Within 500 Feet of a Public Park or Swimming Pool, section 566.150, RSMo Cum. Supp. 2009. (L.F. 2, 26-27). The indictment alleged that on or about September 20, 2010, Peterson knowingly was present in real property comprising a public park with playground equipment or a swimming pool. (L.F. 26-27). The indictment also alleged that on or about January 20, 1998, Peterson had been found guilty in the Twenty-Fifth Judicial District of Louisiana of the crime of Indecent Behavior with a Juvenile, which would be a violation of Chapter 566 RSMo if committed in this State. (L.F. 26).

On August 3, 2011, Peterson filed a "Motion to Dismiss Charge as Unconstitutional." (L.F. 4, 36-37). The motion alleged that the effective date of section 566.150, RSMo was August 29, 2010, and that his conviction in Louisiana occurred in 1997.[1] (L.F. 36). The motion further alleged that an

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[1] The actual effective date of section 566.150, RSMo would appear to be 2009, and the State continued to allege that the date of Peterson's Louisiana conviction was 1998. (L.F. 38). Those discrepancies ultimately have no bearing on the disposition of the case, since Peterson's Louisiana conviction clearly predates the effective date of section 566.150, RSMo.

essential element of the charge in the indictment was a conviction that preceded the effective date of section 566.150, RSMo. (L.F. 37). The motion then alleged that because Peterson was convicted of the prior offense before the effective date of the statute that he was being charged under, Missouri's ban on retrospective laws applied and the charge should be dismissed. (L.F. 37). The State filed a Response to Defendant's Motion to Dismiss. (L.F. 4, 38-47). The State argued that, based on this Court's precedent in *Ex parte Bethurum*, 66 Mo. 545 (1877), the constitutional ban on retrospective laws is limited exclusively to civil rights and remedies and has no application to crimes and punishment. (L.F. 38-47).

Peterson filed an amended motion to dismiss in Carroll County Circuit Court after the case was transferred there on his change of venue motion. (L.F. 110-11). The State filed a response that again argued that the ban on retrospective laws does not apply to criminal charges. (L.F. 137-154). The court issued an order on March 28, 2012, in which it found that the constitutional ban on retrospective laws is not limited in applicability to civil cases, and that section 566.150, RSMo is an unconstitutional retrospective law as applied to Peterson. (L.F. 7, 155-56). The court granted Peterson's amended motion and dismissed the charge without prejudice. (L.F. 156). The State filed a Notice of Appeal in the Circuit Court on April 3, 2012. (L.F. 7, 157-58).

POINT RELIED ON

The trial court erred in dismissing the felony indictment filed against Respondent Jason Reece Peterson because the statute under which Peterson was charged, section 566.150, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 566.150, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

Ex parte Bethurum, 66 Mo. 545 (1877).

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006).

Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942).

State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

Mo. Const. art. I, § 13 (1945).

Mo. Const. art. II, § 15 (1875).

Mo. Const. art. I, § 28 (1865).

Mo. Const. art. XIII, § 17 (1820).

Section 566.150, RSMo Cum. Supp. 2009.

ARGUMENT

The trial court erred in dismissing the felony indictment filed against Respondent Jason Reece Peterson because the statute under which Peterson was charged, section 566.150, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 566.150, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

The trial court dismissed the felony indictment filed against Respondent Peterson on the grounds that section 566.150, RSMo was retrospective as applied to him. But the trial court erred in applying the constitutional ban against retrospective laws to the criminal statute under which Peterson was charged because the ban on retrospective laws relates exclusively to civil statutes and has no application to criminal statutes.

A. Standard of Review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed to be valid and will not be found unconstitutional unless it clearly contravenes a constitutional provision. *Id.*

The person challenging the statute's validity bears the burden of proving that the act clearly and undoubtedly violates the constitution. *Id.*

B. Analysis.

The prohibition against retrospective laws is contained in article I, section 13 of the Missouri Constitution, which states:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grants of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13 (1945). A similar provision has been a part of Missouri law since this State adopted its first constitution in 1820.[2] *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

A. <u>This Court has construed the ban on retrospective laws as being limited to civil rights and remedies</u>.

The term "retrospective" that appears in each of Missouri's constitutions, including article I, section 13 of the present constitution, had acquired a definite, legal meaning long before the adoption of Missouri's first constitution. *Ex parte Bethurum*, 66 Mo.at 548. When a constitution

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[2] *See* Mo. Const. art. XIII, § 17 (1820); Mo. Const. art. I, § 28 (1865); Mo. Const. art. II, § 15 (1875).

employs words that have long had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense, unless there is something to show that they were employed in a different sense. *Id.*

The Court noted in *Ex parte Bethurum* that the prohibition against *ex post facto* laws served to prevent the retrospective application of criminal laws, while the phrase "law retrospective in its operation" related to civil rights and proceedings in civil causes. *Id.* at 550. Applying the technical meaning of retrospective that existed when the constitution was adopted, this Court stated, "A retrospective law, as the phrase is employed in our constitution, is one which relates exclusively to civil rights and remedies." *Id.* at 550. And the Court found that the phrase retained that same meaning in both the 1865 and 1875 constitutions. *Id.* at 552. The Court went on to conclude, "[W]e think there can be no doubt that the phrase 'law retrospective in its operation,' as used in the bill of rights, has no application to crimes and punishments, or criminal procedure . . . ." *Id.* at 552-53.

Despite that limitation, this Court has recently declared criminal statutes unconstitutional as violating the constitutional ban on retrospective laws. In *R.L. v. Department of Corrections*, the Court applied the ban on retrospective laws to section 566.147, RSMo Cum. Supp. 2006, a statute making it a felony for certain sex offenders to reside within one-thousand feet

of a school or a child care facility. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237, 238 (Mo. banc 2008). In *F.R. v. St. Charles County Sheriff's Dept.*, the Court again declared that section 566.147, RSMo was retrospective. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 65-66 (Mo. banc 2010). The Court also applied the ban on retrospective laws to uphold the dismissal of misdmeanor charges filed for a violation of section 589.426, RSMo Cum. Supp. 2008, a statute that required registered sex offenders to comply with certain requirements on Halloween. *Id.*

Appellant respectfully suggests that *R.L.* and *F.R.* are contrary to this Court's precedents, to the understanding of the drafters of the constitution and the voters who approved it, and to the standards that this Court uses to construe the constitution. Those decisions should thus no longer be followed.

B. The construction adopted in *Ex Parte Bethurum* is consistent with the understanding of the drafters.

Adopted by a vote of the people, the Missouri Constitution is a direct expression of the public will. Accordingly, "[i]t is the duty of this Court to be faithful to the constitution. '[I]t cannot ascribe to it a meaning that is contrary to that clearly intended by the drafters. Rather, a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.'"

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 872 (Mo. banc 2006) (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)).

Ex Parte Bethurum was issued just two years after the adoption of the 1875 Constitution, and the judges who joined in the unanimous opinion were contemporaries of the delegates to the constitutional convention and almost certainly voted on the adoption of that constitution when it was presented to the public. The Court in *Ex Parte Bethurum* would have been well-attuned to the thinking of its fellow citizens who drafted and adopted the constitution. And the debates of the 1875 Constitutional Convention demonstrate that the Court accurately captured the intended scope of the prohibition on laws retrospective in their operation.

a. Debates of the relevant constitutional conventions demonstrate the drafters' understanding that the ban on retrospective laws did not apply to criminal statutes.

As originally introduced at the convention, the proposed article II, section 15 prohibited retrospective legislation but did not expressly include *ex post facto* laws and those impairing the obligation of contracts, both of which had been incorporated into the constitutions of 1820 and 1865. Debates of the Missouri Constitutional Convention, 1875, Vol. II, p. 10 (Isidor Loeb & Floyd C. Shoemaker eds., State Historical Soc'y of Mo. 1938). A substitute article II, section 15 was introduced that added those provisions and also

prohibited any irrevocable grants of special privileges or immunities. *Id.* During debate on the substitute provision, a delegate named Gantt argued for the original proposal, which simply read, "no law retrospective in its operation shall be passed by the General Assembly." *Id.* at 405. Delegate Gantt argued that adding a ban on *ex post facto* laws was unnecessary because an *ex post facto* law is a retrospective criminal law and would necessarily be included in a ban on laws retrospective in their operation. *Id.* at 405-10. That argument was challenged by another delegate, who questioned why the 1820 Constitution would have banned both retrospective laws and *ex post facto* laws if the two terms really meant the same thing. *Id.* at 410. Despite Delegate Gantt's arguments, the convention adopted the substitute provision that banned both *ex post facto* laws and laws retrospective in their operation. *Id.* at 447-48.

During debate on the final adoption of section II, article 15, Delegate Gantt repeated his argument that the ban on retrospective laws was broad enough to encompass *ex post facto* laws and laws impairing obligations of contracts. *Id.* at Vol. IV, pp. 94-95. He offered an amendment so that the section would read: "That no law retrospective in its operation or making any irrevocable grants of special privileges or immunities can be passed by the General Assembly." *Id.* at 95. That amendment was defeated and the convention adopted article II, section 15 with the prohibitions on *ex post facto*

laws, retrospective laws, and laws impairing the obligation of contracts. *Id.* at 95. The full context of the debate shows that Gantt's opinion was the minority view, and that the majority of the delegates believed that analysis of the retrospective effect of new criminal statutes should be confined to the boundaries of the *Ex Post Facto* Clause.

The present article I, section 13 was adopted at the constitutional convention of 1943-1944. Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, *at* http://digital.library.umsystem.edu. The only discussion prior to the vote approving the amendment was to note that the new amendment was identical to article II, section 15 of the 1875 Constitution. *Id.* Both the delegates to the 1943-1944 convention and the voters who adopted the constitution in 1945 are presumed to have known of the construction that this Court had placed on the term "retrospective" when they approved the present article I, section 13. *Moore v. Brown*, 350 Mo. 256, 266-67, 165 S.W.2d 657, 662 (1942). And because the term "retrospective" has been retained in the same context in every version of the Missouri Constitution since *Ex parte Bethurum*, it is presumed to retain the original meaning ascribed by the Court. *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991).

When the rules that this Court has established for construing constitutional provisions are applied to article I, section 13, the term

"retrospective" must be construed as applying exclusively to civil rights and remedies because that is how the term was understood by the convention that adopted that provision and by the voters who approved it. (*See* pp. 12-13 *supra*). And since the passage of the present constitution, both this Court and the Court of Appeals have continued to expressly recognize the distinction that *ex post facto* laws as described in article I, section 13 are limited to crimes and punishment and criminal procedure, while retrospective laws as described in that same provision are limited to civil rights and remedies. *See, e.g.*, *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34-35 (Mo. banc 1982); *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010); *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. W.D. 1989); *State v. Thomaston*, 726 S.W.2d 448, 459, 460 (Mo. App. W.D. 1987).

Even in *R.L.*, the Court noted that, "The constitutional bar on retrospective **civil** laws has been a part of Missouri law since this State adopted its first constitution in 1820." *R.L.*, 245 S.W.3d at 237 (emphasis added). But despite that acknowledgement of the limited scope of the ban on retrospective laws, the Court applied that ban to invalidate a felony statute barring certain sex offenders from residing within one-thousand feet of a school or a child care facility. *Id.* at 237, 238. That holding relied on the Court's previous opinion in *Doe v. Phillips*, where the Court held that a

statute requiring registration as a sex offender for crimes committed before the effective date of the registration law imposed new obligations on the offender, and was thus retrospective as applied to those offenders. *Id.* at 237 (citing *Phillips*, 194 S.W.3d at 850). But the Court stated in *Phillips* that "'the thrust of the registration and notification requirements are civil and regulatory in nature.'" *Phillips*, 194 S.W.3d at 842 (quoting *In re R.W.*, 168 S.W.3d 65, 70 (Mo. banc 2005)).[3]

b. Recent decisions extending the ban on retrospective laws to criminal statutes are inconsistent with the understanding of the drafters and this Court's precedent in Ex Parte Bethurum.

The Court correctly applied the ban on retrospective laws to the sex offender registration statute in *Phillips* since the statute was one that involved civil rights and remedies.[4] In *R.L.*, the Court appears to have

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[3] The Court also rejected a claim that the registration requirement was an *ex post facto* law on the basis that the bar on *ex post facto* laws applied only to criminal laws. *Phillips*, 194 S.W.3d at 842. That limitation on *ex post facto* laws is also found in *Ex Parte Bethurum*, 66 Mo. at 550.

[4] While the registration statute at issue in *Phillips* authorized criminal penalties for failure to comply, the Court found that provision was unimportant to the retrospective law analysis. *Phillips*, 194 S.W.3d at 852.

extended *Phillips* to the school residency statute simply because both laws involved restrictions placed on persons convicted of sexual offenses. *See R.L.*, 245 S.W.3d at 237. In *F.R.* the Court in turn relied on *R.L.* and *Phillips* to again declare as retrospective the criminal statute prohibiting convicted sex offenders from living within one-thousand feet of a school or child care facility, and to also invalidate as retrospective criminal charges filed under the statute creating a misdemeanor offense when registered sex offenders fail to comply with certain requirements on Halloween. *F.R.*, 301 S.W.3d at 65-66.

Undersigned counsel has reviewed the briefs filed in *R.L.* and *F.R.*, and none of them address whether article I, section 13 can be applied to criminal statutes. Instead, the parties seemed to assume that since the ban on retrospective laws was applied in *Phillips* to the statute requiring sex offender registration, it would equally apply to any statute restricting the activities of sex offenders. The Court thus was not asked to consider the long-standing construction of article I, section 13, and the majority extended

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Indeed, were a litigant to challenge enforcement of that criminal penalty under article I, section 13, the claim would have to be brought as an alleged *ex post facto* violation, not as a retrospective law. *Ex parte Bethurum*, 66 Mo. at 550.

Phillips to the statutes being challenged in *R.L.* and *F.R.*[5] But in doing so, the Court construed article I, section 13 in a manner that was contrary to the meaning of "retrospective" as understood when that provision was adopted.

Rather than continue down that path, Appellant respectfully suggests that this Court should, consistent with the understanding of the drafters of the constitution and the voters who approved it, reaffirm that article I, section 13's ban on retrospective laws is limited to civil rights and remedies, and that it does not apply to criminal statutes like section 566.150, RSMo.

C. Excluding criminal statutes from the ban on retrospective laws advances the purposes behind the criminal laws.

In addition to honoring the understanding of the Constitution's drafters, there are other sound reasons why the ban on retrospective laws should not extend to criminal laws and punishments. The concern

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[5] The dissent did discuss the 1875 Constitutional Convention and noted that the chief concern expressed in the debates over the prohibition against retrospective laws was to prevent the legislature from passing a retrospective law that would tread on citizens' financial or property interests. *F.R.*, 301 S.W.3d at 68-69 (Russell, J., dissenting). But the dissent did not discuss this Court's previous construction limiting the application of that prohibition to civil rights and remedies.

motivating the ban on retrospective laws is to prevent situations where a person cannot avoid liability because all of the events necessary to impose liability have already occurred before the law's passage. Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62 Okla. L. Rev. 273, 305 (2010). Applying the ban on retrospective laws to a civil obligation like sex offender registration comports with the purpose behind the ban because once a person is convicted of a qualifying offense there is no way to avoid the civil registration requirement.

But the same is not true of criminal statutes like section 566.150, RSMo. The concern that motivates the ban on retrospective laws is already addressed in the criminal law through the ban on *ex post facto* laws, which operates to prevent the legislature from retrospectively criminalizing conduct that was not criminal at the time it was committed. *In re R.W.*, 168 S.W.3d at 68. Criminal statutes are thus forward looking. Section 566.150, RSMo, in particular, does not attempt to punish or adjudicate behavior that occurred prior to its effective date. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1986). It instead uses a person's prior convictions for felony offenses to fix that person's status as one who is subject to the statutory restrictions and is liable for knowingly violating those restrictions. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1255, 232 S.W.2d

897, 901 (1950), *overruled on other grounds by*, *State ex rel. North v. Kirtley*, 327 S.W.2d 166, 167 ((Mo. banc 1959). That is something that even the ban on retrospective laws permits. *Id.*; *Phillips*, 194 S.W.3d at 851. In *Phillips* this Court suggested that prior criminal convictions could be used to bar certain future conduct by the offender. *Id.* at 852. That is precisely what section 566.150, RSMo does. And unlike the civil registration requirement that was found to be retrospective in *Phillips*, a prior felony offender can avoid criminal liability under section 566.150, RSMo simply by refraining from the activities prohibited under the statute.

But this Court has broadly applied the ban on retrospective laws to invalidate statutes that impose criminal liability for activity that occurs after the statute's effective date. *R.L.*, 245 S.W.3d at 236, 237; *F.R.*, 301 S.W.3d at 65-66. Applying the ban on retrospective laws in that manner unduly restricts the legislature's ability to enact legislation that furthers the purpose of the criminal laws, which is "to protect and vindicate the interests of the public as a whole, to punish the offender and deter others." *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993). In enacting laws to fulfill that purpose, the legislature is free to recognize degrees of harm. *Sweezer*, 360 Mo. at 1255, 232 S.W.2d at 901. The legislature is entitled to determine that sexual crimes against children are so serious that any level of recidivism is unacceptable and that affirmative steps aimed at deterring reoffending are

necessary. *See id.* (legislature is entitled to exercise its police power by extending statutes to cases where it deems the need to be greatest and the evil most apparent). The wisdom of that determination is not subject to judicial second-guessing. *Id.* Section 566.150, RSMo seeks to prevent future harm by providing a deterrent that will keep offenders with a history of preying on children away from areas that are frequented by large numbers of children and that have been targeted in the past by pedophiles seeking victims, in this case public parks and public swimming pools.[6]

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[6] *See, e.g., State v. Parker*, 890 S.W.2d 312, 314 (Mo. App. S.D. 1994) (defendant abducted 13, 11, and 10 year old girls in public park and molested two of the girls in park bathroom); *State v. Young*, 801 S.W.2d 378, 379 (Mo. App. E.D. 1990) (defendant attempted to sodomize nine-year-old girl in restroom of public park); *State v. Grady*, 649 S.W.2d 240, 242 (Mo. App. E.D. 1983) (defendant forced nine-year-old boy into nearby park and sodomized him); *State v. Mathews*, 328 S.W.2d 642, 643 (Mo. 1959) (defendant approached eleven-year-old girl at public swimming pool and molested her). *See also State v. Pribble*, 285 S.W.3d 310, 312-13 (Mo. banc 2009) *and State v. Wadsworth*, 203 S.W.3d 825, 830 (Mo. App. S.D. 2006). In both cases the defendant drove to a public park for an arranged meeting to engage in sexual acts with a person that he thought was a young teenage girl

The legislature's duty to promote public safety requires it to do more than just punish people who commit crimes. It also requires the enactment of laws designed to prevent crimes from happening in the first place. That duty is thwarted if the legislature cannot use a person's prior criminal history to fix that person's status under a statute prohibiting activity that is reasonably seen as increasing the risk of that person committing future crimes. Extending the ban on retrospective laws to criminal statutes cripples the legislature's ability to assess degrees of harm and take reasonable steps to decrease those risks. The concern over retrospective application of criminal statutes is adequately addressed by the prohibition against *ex post facto* laws. This Court should therefore reaffirm the long-standing construction placed on article I, section 13 and find that the trial court erred in dismissing the charge against Respondent.

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that he had corresponded with over the internet, but who was actually an undercover police officer. The cases cited in this footnote by no means represent a comprehensive listing of cases involving actual or intended sexual assaults against children in public parks or swimming pools, but are merely illustrative.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing the felony indictment filed against Respondent Jason Reece Peterson should be reversed and the case should be remanded to the trial court for reinstatement of the indictment and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 4,911 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 28th day of August, 2012, to:

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