No.SC85651

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

vs.

DAVID B. GARRETT,

Appellant.

Appeal from the Circuit Court of
Jasper County, Missouri
Honorable David C. Dally, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from convictions for two counts of possession of a controlled substance with intent to distribute, § 195.211, RSMo 2000, obtained in the Circuit Court of Jasper County. Appellant was sentenced to consecutive terms of twenty years of imprisonment in the Missouri Department of Corrections. Appellant's convictions were reversed by the Court of Appeals, Southern District, **State v. Garrett**, No.25108 (Mo.App. S.D. October 2, 2003). This Court has jurisdiction as it sustained the State's application for transfer pursuant to Supreme Court Rule 83.04. Article V, §10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, David Garrett, was charged by amended information with two counts of possession of a controlled substance with intent to distribute for methamphetamine and marijuana respectively (L.F. 12-13). Appellant's case proceeded to trial on May 23, 2003, in the Circuit Court of Jasper County, the Honorable David D. Dally presiding (Tr. 25).

Appellant does not challenge the sufficiency of the evidence to sustain his convictions. Viewed in the light most favorable to the verdict, the evidence adduced at trial was as follows: James Altic, an officer with the Joplin Police Department, was working in the Narcotics Unit in March 2001, when appellant's name came up in an investigation (Tr. 160, 162). A confidential informant told Altic that appellant was dealing narcotics from his residence at 1624 Virginia (Tr. 162). As a result, Officer Altic started an investigation consisting of surveillance, building information through "running tags" on cars and determining if appellant lived at 1624 Virginia by checking the police computer (Tr. 162). During the surveillance, Altic observed appellant walk in and out of the front door of 1624 Virginia and noted that his car was parked there as well (Tr. 164). Officer Altic also discovered that appellant had previously made a police report stating that he lived at that address (Tr. 164).

On March 16, 2001, around noon, Officer Altic went to the residence at 1624 Virginia to serve a search warrant (Tr. 166). Because the officers were concerned for their safety, they decided to find a pretext to get appellant out of the house (Tr. 168).

Altic knocked on the door and appellant came to the door dressed only in blue jeans and looking like he had just woken up (Tr. 167). As a ruse to get appellant out, Altic told him that there had been an accident in front of his house and that he would like for appellant to step outside because he bumped his car (Tr. 167). Appellant went back upstairs stating that he did not care (Tr. 167).

Officer Altic then had a uniformed police officer knock on the door to inform appellant about the "accident" (Tr. 168). This time, appellant did leave the residence and walked from the front of the residence to around the corner (Tr. 168-169). At that point, Officer Matt Cowdin along with another officer approached appellant and detained him (Tr. 169, 209). Once inside, the officers also detained a woman named Samantha Overstreet (Tr. 170). Appellant was brought back inside once the residence was clear (Tr. 170). Officer Altic stayed with appellant in the living room while the other officers searched the house (Tr. 171).

Officer Cowdin searched the bedroom (Tr. 211). There were men's clothing throughout the bedroom and hanging in the closet in addition to men's shoes in the room (Tr. 224). He looked at the dresser, but did not see anything (Tr. 211). Cowdin then looked in the top drawer and found thirteen bags of marijuana, two handguns and four hundred dollars cash (Tr. 212, 215). One gun, a .38 special, was loaded (Tr. 213). Cowdin also found a black .40 caliber Glock semi-automatic handgun with the clips in

the handgun (Tr. 214). In addition, Cowdin found a wallet underneath a pillow containing seven hundred and forty-four dollars cash (Tr. 216).

Another officer located a larger bag of marijuana from the closet and on the side of the dresser (Tr. 217). In addition, a cardboard box was discovered on the floor (Tr. 218). Inside the box there was a large quantity of what appeared to be methamphetamine (Tr. 218). There were also various bags green or clear in color with some of the baggies containing white powder residue and some containing pills (Tr. 219). A small set of plastic scales, a mirror, and rolling papers were also found inside the box (Tr. 219).

Appellant was then arrested (Tr. 172). Because appellant was not completely clothed, he requested "a shirt and his wallet and some shoes" (Tr. 172). Officer Cowdin seized the billfold that was underneath a pillow, took the cash out and gave the billfold to Officer Altic because appellant had requested that Altic get appellant's wallet (Tr. 220). Appellant was given a shirt and shoes (Tr. 172).

Appellant's pants pockets were searched (Tr. 173). Officers discovered ten bags of white powder in his watch pocket (Tr. 173). After appellant was arrested, he gave his address in the book-in sheets as 1624 Virginia (Tr. 174).

Officers also collected nine letters that had been addressed to appellant at 1624 Virginia from Robert Nance (Tr. 174-175, 178). Nance lived in the back of the house on the south side (Tr. 178).

In total, officers seized ninety-four baggies containing white powder residue (Tr. 222, 224). The baggies found in appellant's pocket were similar in color to the baggies found in the box, such as the green and clear colored baggies (Tr. 225).

Tests were performed on all the baggies that were presented to the crime lab analyst (Tr. 241-242, 251). The tests showed that the powder substance was methamphetamine (Tr. 252). The test of the plant material indicated it was marijuana (Tr. 253, 255). There was more than five grams of marijuana (Tr. 256). In addition, methamphetamine was also found in the syringe and methamphetamine, amphetamine, and pseudoephedrine were present on the scale (Tr. 257).

Appellant did not testify but did present two witnesses on his behalf. The owner of the rental property presented what was purported to be a rental agreement with appellant's signature for the residence at 1620 Virginia, as opposed to 1624 Virginia where the drugs were found (Tr. 272-278). An employee for the electric company of Joplin presented a request signed by appellant for electricity to be turned on at 1620 Virginia (Tr. 280-282).

Appellant was convicted of two counts of possession of a controlled substance, with intent to distribute, and sentenced as a prior and persistent drug offender to consecutive terms of twenty years of imprisonment in the Missouri Department of Corrections (L.F. 95-97). Appellant's convictions were reversed by the Court of Appeals, Southern District, **State v. Garrett**, No.25108 (Mo.App. S.D. October 2, 2003).

This Court then sustained the State's application for transfer pursuant to Supreme Court Rule 83.04.

Argument

I.

The trial court did not abuse its discretion in overruling appellant's hearsay objections to evidence and comments regarding Officer James Altic receiving information from a confidential informant that appellant was dealing narcotics from his residence because this testimony was not offered for the truth of the matter asserted in that it was presented to explain the officer's subsequent conduct. Further, appellant cannot show how he was prejudiced by the statements because there was overwhelming evidence of guilt.

Appellant alleges that the trial court abused its discretion when it overruled appellant's objection to Officer Altic's testimony regarding information received from a confidential informant and to comments from the prosecutor regarding this evidence (App. Br. 18). According to appellant, the information that the informant provided-- that appellant was dealing narcotics from his residence-- was used for the truth of the matter asserted and not to show subsequent police conduct (App. Br. 18).

A. Trial Proceedings

Prior to trial, appellant moved in limine to prevent the State from admitting "inferential hearsay" as to what a confidential informant told the police "in order to get them to go out there and search this place" (Tr. 33). The State argued that any such

testimony would be offered to explain the officers' "course of conduct" (Tr. 33). The trial court deferred ruling until trial (Tr. 33). During opening statement, the State informed the jury that a search warrant was served at 1624 Virginia and that appellant was living at that residence (Tr. 142). The State then began to explain the information that was the basis for the warrant when appellant objected on the grounds of hearsay (Tr. 143). The State responded that the statement "explains the course of conduct" and the trial court overruled appellant's objection (Tr. 143).

Officer Altic explained during his direct-examination testimony that as a member of the narcotics unit, he usually investigated people he suspected as narcotics dealers through information from informants or through "undercover buys" (Tr. 161). He testified that in March 2001 he became aware of appellant's "activity," at which point counsel objected to Officer Altic's testimony and requested to approach the bench (Tr. 161). The court told defense counsel that he could "just state [the] objection because [he] already made it" and so defense counsel renewed his previous objection and asked for it to be continuing (Tr. 162). The court overruled the objection (Tr. 162).

Officer Altic then testified that a confidential informant told him that appellant was dealing narcotics from his residence at 1624 Virginia (Tr. 162). As a result, Officer Altic started an investigation consisting of surveillance, building information through "running tags" on cars and determining if appellant lived at 1624 Virginia by checking the police computer (Tr. 162). During the surveillance, Altic observed appellant walk in

and out of the front door of 1624 Virginia and noted that his car was parked there as well (Tr. 164). Officer Altic also discovered that appellant had previously made a police report stating that he lived at that address (Tr. 164). On March 16, 2001, at around noon, Officer Altic went to the residence at 1624 Virginia to serve a search warrant (Tr. 166).

On cross-examination, Officer Altic testified that the informant had been arrested on a drug case and that he had made a deal that if the informant helped them, the informant could go free (Tr. 187). On redirect, Altic stated that he first met the informant "years ago" and that the informant had been arrested for possessing a "user amount" of narcotics (Tr. 201-202).

The evidence at trial then showed that officers searched the house and seized numerous baggies that contained methamphetamine and more than five grams of marijuana was also found in the house (Tr. 241-242, 251- 252, 256). Also, methamphetamine was found in a syringe that was seized and methamphetamine, amphetamine, and pseudoephedrine were present on a scale (Tr. 257).

B. Standard of Review

The trial court has broad discretion to admit or exclude evidence, and the appellate court will reverse only upon a showing of a clear abuse of discretion. **State v. Simmons**, 944 S.W.2d 165, 178 (Mo. banc 1997), *cert. denied*, 522 U.S. 953 (1997). A trial court abuses its discretion when a ruling is "clearly against the logic and circumstances before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate

a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." **State v. Brown**, 939 S.W.2d 882, 883 (Mo. banc 1997).

C. Analysis

1. Statements can be used to explain subsequent police conduct

The "[t]estimony of a witness regarding the statement of another is hearsay . . . only when the statement is offered as proof of the matters therein stated." **State v. Schlup**, 724 S.W.2d 236, 241 (Mo. banc 1987), *cert. denied*, 482 U.S. 920 (1987). Thus, a statement is not hearsay, when it is offered to explain subsequent conduct by a person who heard it. For example, a well-recognized rule is that a police officer may testify about statements made to the officer for the non-hearsay purpose of explaining the officer's subsequent conduct. *See, e.g*, **State v. Murray**, 744 S.W.2d 762, 773 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988) (testimony that a witness told an officer her friend had been raped and gave him the location of the crime scene, name of the defendant and description of the person involved admitted to explain officer's subsequent action in reporting to crime scene); **State v. Brooks**, 618 S.W.2d 22, 25 (Mo. banc 1981) (this Court found that a police officer could properly testify to what a confidential informant told him to explain his subsequent action and to supply relevant background and continuity to the action); **State v. Gee**, 822 S.W.2d 892, 895 (Mo.App. E.D. 1991) (testimony from witness that the defendant raped her sister was admitted to explain the

commencement of officer's investigation of defendant); **State v. Baker**, 23 S.W.3d 702, 715-716 (Mo.App. E.D. 2000) (testimony from an officer that the victim told him she was sexually involved with three police officers proper to explain "the course of the police investigations")[1].

The Court of Appeals has also applied this rule in drug-related cases to explain subsequent police conduct. *See* **State v. Davenport**, 924 S.W.2d 6, 10 (Mo.App. E.D. 1996) (informant rode with police and identified people, including defendant, who police suspected of selling drugs); **State v. Richardson**, 810 S.W.2d 78, 79-80 (Mo.App. W.D. 1990) (police responded to house after citizens complained that drugs were being sold there); **State v. McKeehan**, 824 S.W.2d 152, 153-54 (Mo.App. S.D. 1992) (no plain error when officer testified that confidential informant told him that defendant was at her house and had drugs for sale); **State v. White**, 809 S.W.2d 731, (Mo.App. E.D. 1991) (officer's testimony that the defendant's accomplice told police he was to deliver drugs to

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[1]Indeed, this rule can be found in civil cases as well. *See e.g.*, **Goodman v. State Farm Insurance Co.**, 710 S.W.2d 423, 424 (Mo.App.E.D. 1986) (testimony of the defendant's investigator concerning statements made to him linking plaintiff to a fire not offered for its truth, but "to establish the information in the possession of the defendant when it denied plaintiff's claim"); **Rackers and Baclesse, Inc. v. Kinstler**, 497 S.W.2d 549, 554 (Mo.App. K.C.D. 1973); **Scott v. Missouri Insurance Co.**, 233 S.W.2d 660, 665 (Mo. banc 1950).

the defendant was proper as it was a statement that led to action by the police and it supplied relevant background); *see also* **State v. Mozee**, 112 S.W.3d 102, 109 (Mo.App. W.D. 2003) (where it was held that it was not inadmissible hearsay for an officer to testify that a confidential informant was not able to name a drug dealer because such testimony was "admissible to explain [the officer's] subsequent conduct in going to the police department and attempting to ascertain the drug dealer's name").

For example, in **State v. Brooks**, **supra** at 24, the court allowed the prosecutor to inform the jury in opening statement that "[the police] work through informants . . . .they received information that narcotics were being sold - - heroin was being sold at 2918 Sheridan by Paul Brooks." However, the court later sustained the defendant's objections to testimony of the informant's statements. **Id**. at 25. Thus, the issue on appeal was whether the trial court abused its discretion permitting the prosecutor to make the comment in opening statement. This Court found that the trial court erroneously sustained the defendant's objections to the testimony at trial and that the subsequent ruling cannot serve as a basis for declaring error in the prior decision of the court during opening statement. **Id**. This Court reasoned as follows:

> Here evidence as to the informant's observations was "arguably admissible", as the officer's testimony was offered not to prove that the information received was true but rather to explain his surveillance of the house. It is well established that such testimony is admissible to explain the

> officers' conduct, supplying relevant background and continuity to the action. Under this rule the triers of fact can be provided a portrayal of the events in question, more likely to serve the ends of justice in that the jury is not called upon to speculate on the cause or reasons for the officers' subsequent activities. Hence, the statement was relevant and, at the very least, arguably admissible to explain the commencement of police investigation at that particular residence.

618 S.W.2d at 25.

The facts in **State v. Howard**, 913 S.W.2d 68 (Mo.App. E.D. 1995), are particularly on point. In **Howard**, **supra** at 69, an informant told an officer that the defendant sold drugs from the restaurant where he worked. The informant arranged for a drug transaction to take place at the restaurant. **Id**. Later that day, the informant and several officers went to the restaurant; the informant and an undercover agent approached the defendant and purchased cocaine. **Id**. At trial, the undercover agent testified that the informant told him that "he knew of a subject which [sic] was selling cocaine." **Id**. at 70. The informant told the agent the defendant's name and said that the sale would take place where the defendant worked. **Id**. The defendant's trial counsel failed to make timely and sufficient objections; accordingly, the Eastern District reviewed for plain error. **Id**. However, the Court noted, "The testimony was not plain error. Nor was it inadmissible as hearsay." **Id**. The Eastern District held that the out-of-court statements

which explained the police's conduct were "admissible to supply relevant background and continuity." **Id**. The Court also held that the statements were "also admissible to show why an investigation focused on a defendant." **Id**.

Here, as in **Brooks** and **Howard**, Officer Altic's testimony about the information he received from the confidential informant was admissible to explain police conduct. After Officer Altic testified about what the informant told him, he then immediately went on to say that as a result of the information, Officer Altic started an investigation consisting of surveillance, building information through "running tags" on cars and determining if appellant lived at 1624 Virginia by checking the police computer (Tr. 162). Altic then testified how he and the other officers served the search warrant and found marijuana, methamphetamine, baggies, large amounts of cash and scales. Such evidence gave the jurors a clearer portrayal of the events the arrest, and it alleviated any speculation as to why the officers went to appellant's house and why they focused on him. **State v. Brooks**, **supra** at 25; **Howard**, **supra** at 70.

Appellant acknowledges that "the prosecution may provide context by eliciting testimony about why an officer approached a certain residence" (App.Br. 25). Appellant argues however, that all Officer Altic had to say was that he received information that drugs were being sold at the residence and that he did not have to further elicit that the informant specifically identified appellant as selling drugs and that he lived at the residence (App.Br. 19). Appellant's argument on this matter really raises an issue of

relevancy and not hearsay because as explained above the testimony elicited from the State here was admissible for the non-hearsay purpose of explaining subsequent police conduct. At every instance, the prosecutor noted that the testimony was being offered for that purpose and there is nothing in the record to suggest otherwise. Also, as demonstrated above, the statements here were relevant to supply background and continuity and to explain why the police focused on appellant and the residence in question.

Because the evidence elicited from Officer Altic was proper, appellant was not prejudiced by the prosecutor's statements during closing argument. During closing argument the State went over the verdict director and argued that the elements had been met then stated as follows:

> Now, how else can [sic] connect some more dots here? And you remember Jim Altic told you about what his crime unit does, how they develop informants. Now, that notion of informants may leave a bad taste in people's mouths but it's a necessary evil. The informant told Altic that this Defendant was dealing drugs out of his house.

(Tr. 307). Appellant objected on the basis of hearsay and the trial court overruled (Tr. 307). The prosecutor then stated again that the informant told Altic that appellant was dealing "dope" out of the house on 1624 Virginia (Tr. 308). Then in rebuttal closing argument the State argued as follows:

> The informant's statements, the Defendant was selling drugs at 1624 Virginia and the Defendant lived at 1624 Virginia. Well, it sure panned out, didn't it? It sure panned out, we got this meth, this marijuana, all those baggies, tools of the trade, the guns, the money, we got it on that informant's testimony . . .

(Tr. 332-333).

It was proper for the prosecutor to argue during closing argument that information from the confidential informant could be used to "connect the dots" and that the informant's information "panned out" as the prosecutor was merely attempting to give the jurors a clearer portrayal of the events of the arrest by explaining the subsequent police conduct. This is particularly so since the prosecutor made reference to the informant after having already gone over the verdict director and elements of the offense with the jury.

Furthermore, the jury was told by defense counsel that they could not use Altic's testimony for the truth of the matter asserted. Defense counsel argued to the jury during closing argument that

> . . . whatever this informant allegedly told Corporal Altic that my client was dealing drugs or that my client was dealing drugs from the residence, that is not something that you can consider in deciding whether or not my client was dealing drugs or dealing drugs from that residence.

> The only reason that that is admitted into evidence was as some sort of an explanation rather than just saying that Corporal Altic went out of the blue, out to this residence. Explanation of that he did because the informant supposedly told him these things. That is absolutely not evidence that my client lived at that residence.

(Tr. 311). The evidence elicited from Officer Altic was proper and the prosecutor did not use it or argue it to the jury for the truth of the matter asserted.

2. Cases relied on by appellant

Appellant's reliance on **State v. Shigemura**, 680 S.W.2d 256 (Mo.App. E.D. 1984); **State v. Kirkland**, 471 S.W.2d 191 (Mo. 1971), and **Moore v. United States**, 429 U.S. 20, 97 S.Ct. 29, 50 L.Ed.2d 25 (1976) (per curiam) is misplaced. These were cases where the stated purpose for using the testimony in question was to explain subsequent police conduct, but the cases were reversed as the evidence was weak and it was evident that the respective fact-finders used the evidence for the truth of the matter asserted to convict. **Moore**, 429 U.S. at 21-23; **Kirkland**, 471 S.W.2d at 192-193; **Shigemura**, 680 S.W.2d at 257.

Indeed, this Court has held that "**Kirkland** has been distinguished as a case in which the hearsay testimony was relied on heavily by the state to identify the defendant as the person who committed the crime and in which there was very little, if any other evidence that connected the defendants . . . with the offense with which they were

charged." **Brooks**, 619 S.W.2d at 26. The dangers of misuse found in **Kirkland** and the other cases appellant relies on are not present here and if appellant was concerned about the dangers of misuse by the jury, he could have requested a limiting instruction. At any rate, appellant could not have possibly been prejudiced by the jury hearing those statements because, as will be demonstrated below, here there was overwhelming evidence of guilt.

3. The Court of Appeals opinion below

The Court of Appeals, Southern District, opinion below held "[i]t would have been more than sufficient . . . for Altic to have testified that he approached [Appellant] or went to [1624 Virginia] by stating that he did so '*upon information received*.'" **State v. Garrett**, No.25108, slip. op. at 12 (Mo.App. S.D. October 2, 2003) (emphasis added). This holding is not only contrary to all the cases cited above, but it is also contrary to the recent opinion in **State v. Robinson**, 111 S.W.3d 510, 514 (Mo.App., S.D. 2003), where it was held that "[t]o explain subsequent conduct of law enforcement, it was adequate for the officer to testify that the reason they went to the address was because of *information received from the informant that marijuana and crack cocaine were present there*" (emphasis added).

Appellant asserts that the holdings from the Court of Appeals, Southern District, opinion below in the case at bar and **Robinson** were identical (App.Br. 29). However, the fact remains that the opinion below stated that it would have been sufficient for Altic

to say "upon information received." **Garrett**, **supra**. Despite what cases the Court may or may have not been relying on, (as appellant theorizes in his brief) it would appear from the plain language of the cases, that the Court further restricted the amount of information that could be elicited at trial. Therefore, such differences in the opinions could create confusion in future prosecutions.

4. Overwhelming evidence of guilt

Even assuming *arguendo* that the evidence was inadmissible hearsay, appellant cannot demonstrate that he was prejudiced by the admission of the statements. "[A] conviction will not be reversed because of [the] improper admission [of] testimony which is not prejudicial to defendant. The burden is on defendant to show both the error and the resulting prejudice before reversal is merited . . ." **State v. Leisure**, 796 S.W.2d 875, 879 (Mo. banc 1990); *see also* **State v. Lyons**, 951 S.W.2d 584, 594 (Mo. banc 1997), *cert. denied*, 522 U.S. 1130 (1998). In the case at bar, the State presented overwhelming evidence which indicated that appellant was guilty of distribution of methamphetamine and marijuana.

The officers conducted surveillance and observed appellant going in and out of the house, they discovered that appellant had previously made a police report and stated 1624 Virginia as his address (Tr. 164). When the officers served the search warrant on the house, appellant was in the house dressed only in blue jeans (Tr. 167). Officers observed men's clothing throughout the bedroom and hanging in the closet, in addition to men's shoes in the room (Tr. 224). Officers found thirteen bags of marijuana, two handguns and four hundred dollars cash in the top drawer (Tr. 212, 215). One gun, a .38 special, was loaded (Tr. 213). Cowdin also found a black .40 caliber Glock semi-automatic handgun with the clips in the handgun (Tr. 214). In addition, Cowdin found a wallet underneath a pillow containing seven hundred and forty-four dollars cash (Tr. 216).

Another officer located a larger bag of marijuana from the closet as well as a cardboard box containing a large quantity of what appeared to be methamphetamine (Tr. 217-218). There were also various bags green or clear in color with some of the baggies containing white powder residue and some containing pills (Tr. 219). A small set of plastic scales, a mirror, and rolling papers were also found inside the box (Tr. 219).

Appellant was then arrested (Tr. 172). Because appellant was not completely clothed, he requested "a shirt and his wallet and some shoes" (Tr. 172). Officer Matt Cowdin seized the billfold that was underneath a pillow, took the cash out and gave the billfold to Officer Altic because appellant had requested that Altic get appellant's wallet (Tr. 220). Appellant was given a shirt and shoes (Tr. 172).

Appellant's pants pockets were searched (Tr. 173). Officers discovered ten bags of white powder in his watch pocket (Tr. 173). After appellant was arrested, he gave his address in the book-in sheets as 1624 Virginia (Tr. 174). Officers also collected nine letters that had been addressed to appellant at 1624 Virginia from Robert Nance, a man who lived in the back of the house on the south side (Tr. 174-175, 178).

In total, officers seized ninety-four baggies containing white powder residue (Tr. 222, 224). The baggies found in appellant's pocket were similar in color to the baggies found in the box, such as the green and clear colored baggies (Tr. 225).

Thus, there was overwhelming evidence of appellant's control of the residence and of his possession of methamphetamine and marijuana with his intent to distribute.

The bottom line is that in the case at bar, the State did not use the confidential informant's communication for the truth of the matter asserted; rather, it relied on appellant's own actions and the abundant evidence seized during the search of his home to show appellant's guilt. For this reason, the trial court did not abuse its discretion, and appellant's first point must be denied.

II.

The trial court did not commit plain error when it admitted State's Exhibit 6, nine letters consisting of utility bills or correspondence with insurance companies addressed to appellant at 1624 Virginia, the house where the search warrant was executed, because the letters were not offered into evidence for the truth of the matter asserted, i.e. that employees from the various utility and insurance companies sent bills or correspondence to appellant and addressed them to 1624 Virginia, in that the letters were offered as circumstantial evidence that appellant received and stored property in his house, including his drugs and his mail. Moreover, appellant failed to prove that manifest injustice occurred in light of the overwhelming evidence that also linked appellant to the house where the drugs were found.

Appellant claims that the trial court should have overruled his objection to the admission of State's Exhibit 6, which included several letters addressed to appellant at 1624 Virginia, the residence where the search warrant was executed and drugs were found (App.Br. 35). Appellant contends that the letters constituted inadmissible hearsay offered to "prove the truth of the matter asserted - - that [appellant] lived at 1624 Virginia" and that the letters were inadmissible because they had not been properly authenticated (App.Br. 35).

A. Facts

Appellant filed a motion in limine to exclude mail that was addressed to appellant at 1624 Virginia that was seized from the residence at 1624 Virginia from Robert Vance, a man who lived in the back of the house (Tr. 15). The motion was overruled (Tr. 17).

At trial, Officer Altic was questioned on direct-examination whether he had collected other evidence "confirming the defendant's living at that residence" (Tr. 174). Altic indicated that after appellant was arrested he gave 1624 Virginia his address on his book-in sheets at the jail (Tr. 174). Altic then also noted that he collected "some mail that had went [sic] to the residence" (Tr. 174). State's Exhibit 6 was marked and Altic stated that the envelope contained mail collected from Nance that was addressed to appellant at 1624 Virginia (Tr. 174). Altic testified that the letters were in substantially the same condition as when he seized them (Tr. 174-175). There were nine letters total (Tr. 175). The State then offered State's Exhibit 6 (Tr. 175). Appellant objected on the basis of hearsay and insufficient foundation (Tr. 175-176). The trial court overruled the objection and allowed for the admission of State's 6, with the exception of removing a letter from a public defender (Tr. 177). State's Exhibit 6 consisted of eight letters, two from Southwestern Bell, two from Gateway Insurance Company and one from Bay Insurance Company, one from Citi Financial, one from the Department of Revenue and one unidentified business letter. Altic then explained that Nance lived at the back of the house on the side (Tr. 178). The house only had one mailbox (Tr. 178).

B. Standard of Review

Appellant's objection to the State's offer of State's Exhibit 6, the envelope containing eight letters addressed to appellant is not preserved for appeal. Although appellant filed a pre-trial motion seeking to exclude the letter, the trial court overruled the objection (Tr. 15-17). A ruling on a motion in limine is interlocutory in nature and preserves nothing for appeal. **State v. Purlee**, 839 S.W.2d 584, 592 (Mo. banc 1992). At trial, appellant did not object when Officer Altic testified that he seized nine letters from appellant's residence that had been addressed to appellant at 1624 Virginia, but only objected when the State moved to admit the letters (Tr. 175).

The Court of Appeals, Eastern District, faced a similar set of facts in **State v. Rayford**, 611 S.W.2d 377, 378 (Mo.App. E.D. 1981). In **Rayford,** the defendant filed a pretrial motion to suppress his oral and written statements to the police based on the alleged invalidity of his arrest. The trial court denied the motion to suppress. **State v. Rayford**, 611 S.W.2d at 378. At trial two police officers testified as to the content of the defendant's oral and written statements without objection from the defendant. **Id**. The defendant did not object until the State moved for admission of his written statement. **Id**. In addition, the challenges raised on appeal were not the same made in the trial court. **Id**. On these facts, the Court concluded that the defendant's failure to properly object left nothing for the Court to review. **Id**. Moreover, because the defendant did not request

plain error review, the Court declined to conduct such review *sua sponte*. **Id.**; *see also* **State v. Howard**, 840 S.W.2d 250, 252 (Mo.App. E.D. 1992).

In this case, appellant did not object to Officer Altic's testimony that he seized letters from appellant's residence that were addressed to appellant, and appellant declines to acknowledge his procedural defaults or request plain error review under Supreme Court Rule 30.20. In light of these shortcomings, this Court should decline review of appellant's claim altogether. **State v. Rayford**, *supra*.

Alternatively, the trial court did not plainly err by allowing the State to introduce appellant's statements. "Relief under the plain error standard is granted only when an alleged error so substantially affects a defendant's rights that a manifest injustice or miscarriage of justice inexorably results if left uncorrected." **State v. Ballard**, 6 S.W.3d 210. 214 (Mo.App. S.D. 1999).

C. Analysis

Appellant claims that the trial court should have overruled his hearsay objection to the admission of State's Exhibit 6, which included several letters addressed to appellant at 1624 Virginia, the residence where the search warrant was executed and drugs were found (App.Br. 35). "A hearsay statement is any out-of-court statement that is used to prove the truth of the matter asserted and that depends on the veracity of the statement for its value." **State v. Sutherland**, 939 S.W.2d 373, 376 (Mo. banc 1997), *cert. denied* 118 S.Ct. 186 (1997). "The underlying rationale for the hearsay rule is for the purpose of

securing the trustworthiness of the assertions. . . Courts generally exclude hearsay because of the out-of-court statement is not subject to cross-examination, is not offered under oath, and the fact-finder is not able to judge the declarant's demeanor and credibility as a witness." **State v. Link**, 25 S.W.3d 136, 145 (Mo. banc 2000), *cert. denied*, 531 U.S. 1040 (2000). Furthermore, if the out-of-court statement does not contain an assertion, the statement cannot be hearsay. *Accord* **State v. Tate**, 817 S.W.2d 578, 580 (Mo.App. E.D. 1991) (where the declarant did not intend to make an assertion, the out-of-court statement was not hearsay).

In the case at bar, the out-of-court statement by the sender of the respective letters-- really, the act of addressing an envelope to appellant at 1624 Virginia-- does not contain an assertion but rather is circumstantial evidence that appellant had reason to be at that address. Even if the act of addressing an envelope could be considered an assertion-that the sender believes appellant lives at 1624 Virginia- it was not an assertion the State was seeking to use for its truth. It is irrelevant what the respective companies believed.

Appellant claims in his brief that there are not any Missouri cases directly on point with this issue (App.Br. 37). **State v. McCurry**, 582 S.W.2d 733 (Mo.App. E.D. 1979), however, is on point. In **McCurry**, officers obtained a valid search warrant for the premises at 2525 North Market in St. Louis. **Id**. at 734. The officer observed the defendant enter the premises and then sought to serve the warrant. **Id**. During the search,

the officers observed the defendant holding a bottle of heroin tablets and during the search of the "second bedroom" the officers seized various weapons, marijuana, and other drug paraphanalia. **Id**. In addition, in the top drawer of a dresser, the officers seized a telephone bill addressed to defendant at 2525 North Market. **Id**. The defendant complained at trial that the bill was irrelevant because it was from a year prior to the offense and on appeal the defendant claimed it was inadmissible hearsay. **Id**. In denying the defendant's claim the Eastern District held as follows:

> The telephone bill was not offered to show the truth of the matter asserted on the face of the bill. It was offered because it was a personal effect of the defendant and it was located in the "second bedroom." Since the methamphetamine and the marijuana were found in a jointly controlled residence, further evidence connecting defendant with those illegal drugs was required.

Id.

Other jurisdictions have ruled similarly. *See* **Hernandez v. Florida**, 863 So.2d 484, 486 (2004) ("Appellant's name and address printed on an envelope was not an assertion, nor was the placement of the name and address on the envelope nonverbal conduct intended as an assertion."); **Shurbaji v. Commonwealth of Virginia**, 444 S.E.2d 549, 550-551 (1994) (utility bills addressed to the defendant found in the master bedroom where drugs were located was not hearsay); and **United States v. Hazeltine**,

444 F.2d 1382, 1384 (10th Cir. 1971) (envelope with the defendant's name and address was not hearsay). The reasoning and analysis used in **United States v. Snow**, 517 F.2d 441 (9th Cir. 1975), is instructive.

In **Snow**, the defendant was convicted of a firearm offense and the government presented evidence that the brief case where an automatic weapon was found had a tape on it with the defendant's name. **Id**. at 443 The defendant argued that the admission of the tape with his name on it was error because it was hearsay. **Id**. at 443. The court in **Snow** cited to 1 WIGMORE ON EVIDENCE, 24 (3rd ed. 1940), and noted that the "two possible modes" of "producing persuasion" as to the proposition at issue are through (1) "the presentation of the thing itself" such as "a blood-stained knife; the exhibition of an injured limb; the viewing of the premises by the jury; the production of a document" and (2) "the presentation of some independent fact by inference from which the persuasion is produced." **Id**. This second mode of persuasion is broken down into two classes as well- (a) "the assertion of a human being as to the existence of the thing in issue," also referred to as testimonial or direct evidence or (b) any other fact, also referred to as circumstantial or indirect evidence. **Id**.

The court in **Snow**, found that the gun case with the tape bearing appellant's name falls within the circumstantial or indirect evidence category such as when:

> the uniform of the driver of a vehicle was admissible to prove the identity of his employer, or the name on a wagon or truck to prove ownership of

> the vehicle, the name on a dog collar to prove ownership of the dog, the wearing of a uniform to prove employment by the persons whose name appears on the uniform, and the lettering on a locomotive to prove its ownership.

Id. at 444. The court further reasoned that because the name tape was circumstantial evidence, the evidence need only meet the relevancy standard and to "meet this standard it is only necessary to show that the name tape renders the inference that the [defendant] owned the case more probable that it would be without the tape." **Id**.

Likewise here, the mail addressed to appellant is circumstantial or indirect evidence tending to prove that appellant lived in the house because it was found in the residence. After appellant was arrested, Officer Altic received the letters from Mr. Vance who lived in the back of house (Tr. 174-175). Although appellant characterizes the house at 1624 Virginia as being broken into separate apartments, Officer Altic testified that there was only one mailbox for that residence (Tr. 178-179). The fact remains that the letters addressed to appellant at 1624 Virginia were ultimately found at 1624 Virginia. The letters were not used to prove the truth of the matter asserted, i.e., that employees from the various utility and insurance companies wrote letters to appellant and addressed them to 1624 Virginia, but as circumstantial evidence that appellant received and stored property in his house, including his drugs and his mail. The bottom line is that the

writing of the name and address was not intended to "communicate the thought, idea, or fact that [appellant] lived at the address." **Hernandez**, 863 So.2d at 486.

Furthermore, the underlying rationale for applying the hearsay rule-- securing the trustworthiness of the assertions-- is not necessary because it is "irrelevant what the utility bills 'asserted therein.'" **Shurbaji**, 444 S.E.2d 549 (1994). Appellant suffered no prejudice from not being able to cross-examine the employees of utility and service companies. All but one of the letters appeared to be addressed by computer and all of the envelopes came from companies and did not constitute a private letter. Here, there is no need to depend "on the veracity of the statement for its value." **State v. Sutherland**, 939 S.W.2d at 376. What is of value here is that the letters were found at that residence.

Appellant also claims that the mail was inadmissible because it was not properly authenticated in that "the general rule is that the execution or authenticity of a private writing must be established before it may be received into evidence." (App.Br. 36, *quoting* **State v. Swigert**, 852 S.W.2d 158, 163 (Mo.App. W.D. 1993)). However, as noted above, it is not relevant to the issues in the case to determine the reliability of appellant's various utility bills and insurance letters. It is undisputed that the letters in question that were admitted into evidence were properly authenticated by the seizing officers as being the evidence that was found in appellant's home. The authenticity of a letter may be established by circumstantial evidence. **State v. Durham**, 822 S.W.2d 453, 455 (Mo.App. E.D. 1991). *See also* **State v. Nicklasson**, 967 S.W.2d 598, 617 (Mo.

banc 1998), *cert. denied*, 525 U.S. 1021 (1998). The Court of Appeals, Southern District, was recently faced with a similar issue in **State v. Charlton**, 114 S.W.3d 378, 387 (Mo.App. S.D. 2003). In **Charlton**, the defendant challenged the admission of a book titled, "Secrets of Methamphetamine Manufacture", a monthly planner, seven pages from a planner which contained a methamphetamine "recipe," a list of companies that manufacture matches, a list of chemistry books, a green notebook containing formulas, phone numbers, and pager numbers, and a Priority Mail package accompanying the book and bearing the name "D. Charlton" and appellant's address. **Id**. at 386-387.

The defendant challenged, as appellant does here, the admission of the exhibits based on lack of authentication. **Id**. at 387. The Court found no abuse of discretion in the admission of the exhibits and held that "[t]he authorship of the materials in question is immaterial to show that Appellant was aware of the meth lab in his bedroom closet and in the office room of his house; their presence where they were located serves to prove that fact." **Id**. Similarly here, the authorship of the letters is immaterial to show that appellant was aware of the drugs in his house; the fact that they were addressed to the home where the drugs were found serves to prove that fact. Thus, the trial court did not abuse its discretion when it admitted the exhibits in question.

Even assuming *arguendo* that the letters contained in State's Exhibit 6 are inadmissible hearsay, appellant's claim would still fail. "[A] conviction will not be reversed because of [the] improper admission [of] testimony which is not prejudicial to

defendant. The burden is on defendant to show both the error and the resulting prejudice before reversal is merited . . .” **State v. Leisure**, 796 S.W.2d 875, 879 (Mo. banc 1990); *see also* **State v. Lyons**, 951 S.W.2d 584, 594 (Mo. banc 1997), *cert. denied*, 522 U.S. 1130 (1998). Furthermore, appellant here bears a burden of demonstrating manifest injustice or miscarriage of justice.” **State v. Ballard**, 6 S.W.3d at 214.

Appellant insists that the admission of this evidence was prejudicial to him because “the State’s evidence linking [appellant] to the drugs found in the bedroom dresser and closet was not overwhelming” (App.Br. 40). But as respondent argued in the first point, there was other overwhelming evidence tying appellant to the house. Officer Altic conducted surveillance on the house and observed appellant walk in and out of the front door of 1624 Virginia and noted that his car was parked there as well (Tr. 164). Officer Altic also discovered that appellant had previously made a police report stating that he lived at that address (Tr. 164).

When officers searched the house there were men’s clothing throughout the bedroom and hanging in the closet in addition to men’s shoes in the room (Tr. 224). Officers seized various bags green or clear in color with some of the baggies containing white powder residue and some containing pills (Tr. 219). Appellant was then arrested (Tr. 172). Because appellant was not completely clothed, he requested “a shirt and his wallet and some shoes” (Tr. 172). Officer Cowdin seized the billfold that was underneath a pillow, took the cash out and gave the billfold to Officer Altic because appellant had

requested that Altic get appellant's wallet (Tr. 220). Appellant was given a shirt and shoes (Tr. 172). Appellant did not deny that these items were his (Tr. 200).

Appellant's pants pockets were searched (Tr. 173). Officers discovered ten bags of white powder in his watch pocket (Tr. 173). The baggies found in appellant's pocket were similar in color to the baggies found in the box in the master bedroom, such as the green and clear colored baggies (Tr. 225). After appellant was arrested, he gave his address in the book-in sheets as 1624 Virginia (Tr. 174).

In light of this evidence, the additional impact of the letters being admitted into evidence was only cumulative to the other evidence linking appellant to the house where the drugs were found, including two admissions by appellant wherein he gave 1624 Virginia as his address. "It is well settled that if evidence is improperly admitted, but other evidence before the court establishes the same facts, there is no prejudice to defendant and no reversible error." **State v. Draman**, 797 S.W.2d 575, 577 (Mo.App. S.D. 1990). Again,the testimony regarding the seizure of the letters and how it was addressed to appellant was not objected to at trial, only the admission of the letters themselves. Under these circumstances, it cannot be said that the jury found appellant guilty of possession of methamphetamine and marijuana with intent to distribute based solely on appellant's mail admitted at trial. Moreover, the appellant has not shown that manifest injustice resulted from the admission of the letters in light of the overwhelming evidence of the appellant's guilt as outlined in Point I. Thus, the trial court did not

commit plain error when it admitted the letters and appellant's second claim on appeal is without merit.

III

This court need not address appellant's claim of error under this point because the claim was not preserved for appeal and plain error is rarely, if ever, found in closing argument as trial strategy often looms as an important consideration. In any event, the trial court did not plainly err in allowing the prosecutor to say in closing argument "did he ever tell you, did he ever deny to the police . . ." because (1) appellant did not object to the comment at trial and thus precluded the trial court from alleviating any prejudice which may have arisen from that comment and (2) when taken in context, the comment was neither a direct nor an indirect comment on appellant's failure to testify and did not result in a manifest injustice or miscarriage of justice.

Appellant claims that the trial court plainly erred in failing to declare a sua sponte mistrial or to instruct the jury to disregard the prosecutor's comment when the prosecutor stated, did he ever tell you, did he ever deny to the police . . ." (App.Br. 41). Appellant alleges that the statement was a direct reference to his right not to testify (App.Br. 41).

A. Facts

When officers searched the house there were men's clothing throughout the bedroom and hanging in the closet in addition to men's shoes in the room (Tr. 224). Officers seized various bags green or clear in color with some of the baggies containing

white powder residue and some containing pills (Tr. 219). Appellant was then arrested (Tr. 172). Because appellant was not completely clothed, he requested "a shirt and his wallet and some shoes" (Tr. 172). Officer Cowdin seized the billfold that was underneath a pillow, took the cash out and gave the billfold to Officer Altic because appellant had requested that Altic get appellant's wallet (Tr. 220). Appellant was given a shirt and shoes (Tr. 172). Appellant did not deny that these items were his (Tr. 200).

During the State' opening argument, the prosecutor argued as follows:

> The second element was that the Defendant knew or was aware of its presence and nature. Well, how do we know that? The first ten bags were in his pants pocket. The pants he's wearing, they're in his pocket. In his drawer, he has clothes in that drawer, he gets in that drawer, gets his clothes out. He is surely going to see this (indicating) in that dresser drawer. How can you not?
>
> He knew it was there. How else did he know it was there? Well, these (indicating) were found in the same drawer with all that marijuana. Two guns, they were loaded. Why do you keep loaded guns in your house? To protect your property? Isn't that right? He knew what was in his drawer (indicating).
>
> Just like he knew all of this (indicating), all that meth, ninety-four bags, eighty-four of them found in a box in his bedroom beside the dresser.

> **Did he ever tell you, did he ever deny to the police, that's what the police says; he never denied that the bedroom was his.** I submit to you, under that evidence, he knew, he knew, that he was in possession of these drugs.

(Tr. 303-304) (emphasis added). Appellant complains of the emphasized portion of the argument and claims that the prosecutor's argument was a direct comment on appellant's right not to testify (App.Br. 35). Leaving for the moment the characterization of the State's comment as direct or indirect, respondent notes that appellant, in any event, declined to object to the comment.

B. Preservation and Standard of Review

Where there has been a direct reference made to a defendant's failure to testify, in the absence of a timely objection thereto, the error will not be considered. **State v. Neff**, 978 S.W.2d 341, 345 (Mo. banc 1998); **State v. Kempker**, 824 S.W.2d 909, 911 (Mo. banc 1992); **State v. Dees**, 916 S.W.2d 287, 296 (Mo.App. W.D. 1995). An objection to the prosecutor's comment would have allowed the trial judge to take appropriate action and to make a correction. **Kempker**, **supra**. "[P]rejudice from such comments can normally be cured by an instruction to the jury." **Dees, supra**. As noted above, by failing to object, appellant denied the trial court the opportunity to avoid prejudice by means of an instruction. **Kempker**, **supra**, **Dees**, **supra**. Appellant has therefore waived his right to raise this issue as error on appeal. **Dees**, **supra**.

At any rate, the plain error rule is to be used sparingly and does not justify review of every trial error which has not been properly preserved for review. **State v. McMillin**, 783 S.W.2d 82, 98 (Mo. banc 1990), *cert. denied*, 498 U.S. 994 (1990). It is well settled that relief should rarely be granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explication. **State v. Cobb**, 875 S.W.2d 533, 537 (Mo. banc 1994), *cert. denied* 513 U.S. 896 (1994).

C. Analysis

Appellant's claim fails because the prosecutor did not make a direct comment on his failure to testify. The general rule is that a prosecutor is prohibited from making direct references to an accused's failure to testify. **State v. Lopez**, 898 S.W.2d 563, 570 (Mo.App. W.D. 1995); **State v. Laws**, 854 S.W.2d 633, 636 (Mo.App. S.D. 1993). A direct reference to defendant's failure to testify is made when the prosecutor uses such words as "defendant," "accused," and "testify" or their equivalent. **State v. Lawhorn**, 762 S.W.2d 820 (Mo. banc 1988); **State v. Graham**, 906 S.W.2d 771, 781 (Mo.App. W.D. 1995). A prosecutor is also prohibited from making indirect references to a defendant's failure to testify, but only if there is a calculated intent demonstrated by the prosecutor to magnify that decision so as to call it to the jury's attention. **Lawhorn**, 762 S.W.2d at 826; **Graham,** 906 S.W.2d at 781. Because of the trial court's wide latitude in controlling argument and its superior vantage point to observe the nature and effect of a

prosecutor's comments and its effect upon a jury, the appellate court "will disturb the trial court's decision when the prosecutor allegedly has alluded to a defendant's failure to testify, only where the references are direct and certain" (*court's emphasis*). **State v. Robinson**, 641 S.W.2d 423, 426 (Mo. banc 1982).

In the present case, the prosecutor's comment was *not* a direct reference to appellant's failure to testify, rather it was made in reference to appellant's statements to the police after he was arrested wherein he requested clothes and shoes and was handed a shirt, shoes and a billfold found in the bedroom and he never denied that the clothes were his. Counsel did *not* argue that appellant "did not testify," that appellant "did not take the witness stand," or any other words to that effect. Counsel was simply pointing out that in not denying that the clothes belonged to him, by implication, appellant also never denied that the bedroom was his. It is perfectly proper and legitimate for a prosecutor to argue the effect of evidence, and the reasonable inferences to be drawn therefrom. **State v. Redman**, 916 S.W.2d 787, 792 (Mo.banc 1996); **State v. Futo**, 900 S.W.2d 7, 19 (Mo.App. E.D. 1999).

Even assuming *arguendo* that the prosecutor's comment indirectly referenced appellant's failure to testify, the comment was not improper. "[A]n indirect reference is improper only if the prosecutor demonstrates a calculated intent to magnify the defendant's decision not to testify so as to call it to the jury's attention." **State v. Richardson**, 923 S.W.2d 301, 314 (Mo. banc 1996), *cert. denied* 117 S.Ct. 403 (1996).

Here, as noted above, the prosecutor's comment merely referenced the weakness of appellant's case by calling attention to appellant's tacit admission. When appellant requested clothes and was handed a shirt and shoes by the officers, appellant did not deny that the clothes were his. No such "calculated intent to magnify the defendant's decision not to testify" was present here.

Although the appellant may disagree with the State's interpretation of the transcript, appellant's failure to object precluded the parties or the court from either clarifying the record as to the State's intent as to the comment or from providing relief, if the trial court deemed it warranted. The trial court, on the other hand, was able to hear the State's comment in context and could make a better determination as to whether it was necessary under the circumstances to make what would have been an "uninvited interference with summation and a corresponding increase in the risk of error by such intervention." **State v. Stewart**, 18 S.W.3d 75, 84 (Mo.App. E.D. 2000).

This is precisely why plain error relief for matters contained in closing argument is rarely granted, "for trial strategy looms as an important consideration and such assertions are generally denied without explication." **State v. Stewart**, **supra**. The trial court was in a better position to make a determination as to whether the State's comment even warranted relief, let alone what relief. Appellant should not be allowed to benefit now from his failure to give the trial court even the opportunity to grant some form of relief, if indeed any had been necessary.

Thus, appellant is not entitled to review, in that he has waived review by failing to object. He is not entitled to reversal of his conviction because of the unobjected to comment, having precluded the trial court from any chance of determining what relief, if any at all, was warranted, and thus his claim on appeal should be denied.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed.

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CERTIFICATE OF COMPLIANCE AND SERVICE:

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 10,229 words, excluding the cover and this certification, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 5th day of March, 2004, to:

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Respondent's Appendix