

No. SC88651

**IN THE
MISSOURI SUPREME COURT**

REGINALD A. TURNER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**Appeal from the Circuit Court of Lafayette County, Missouri
15th Judicial Circuit, Division I
Honorable Dennis A. Rolf, Judge**

RESPONDENT’S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of Lafayette County. The conviction sought to be vacated was for the class D felony of driving while intoxicated, § 577.010, RSMo 2000, and § 577.023, RSMo Cum. Supp. 2004, for which appellant was sentenced to three years in the custody of the Department of Corrections. Appellant appealed to the Western District Court of Appeals, which affirmed the motion court's judgment. This Court sustained appellant's application for transfer to this Court pursuant to Supreme Court Rule 83.04, and therefore has jurisdiction over this case. Mo. Const., Art. V, § 10, (as amended 1982).

STATEMENT OF FACTS

Appellant, Reginald A. Turner, was charged by indictment in the Circuit Court of Lafayette County with the class D felony of driving while intoxicated (L.F. 3-4). Appellant appeared before the Honorable Dennis A. Rolf on April 18, 2005, and entered a guilty plea to that charge (L.F. 2, 10-14).

At the plea hearing, appellant admitted that, on October 17, 2004, he operated his motor vehicle on Highway 24 in Lafayette County while he was under the influence of alcohol (L.F. 12). He also admitted that he had previously pled guilty to driving while intoxicated on two other occasions: on December 26, 1998, in the Circuit Court of Lafayette County; and on October 17, 2005, in the Municipal Court of Higginsville, Missouri, at which the judge was an attorney and he was represented by counsel (L.F. 12). The court accepted appellant's plea of guilty and, in accordance with a plea agreement, sentenced appellant to three years in the custody of the Department of Corrections to be served concurrently to all other sentences appellant was serving (L.F. 13).

On October 6, 2005, appellant timely filed a *pro se* motion to vacate, set aside, or correct the judgment or sentence pursuant to Rule 24.035 (L.F. 19-24). Appointed counsel filed an amended motion, raising two claims of ineffective assistance of counsel and a claim that appellant's driving while intoxicated charge was improperly enhanced to a felony because one of the prior offenses was for a guilty plea in municipal court for which he received a suspended imposition of sentence, which he argued cannot be used to enhance a DWI charge (L.F. 26-47). On April 20, 2006, the motion court entered findings of fact and

conclusions of law denying appellant's motion without an evidentiary hearing (L.F. 53-62).

This appeal followed.

ARGUMENT

The motion court did not clearly err in denying, without an evidentiary hearing, appellant's claim that appellant's sentence exceeded the range of punishment for driving while intoxicated because appellant's claim did not warrant relief in that appellant's prior plea of guilty in municipal court could be used to properly enhance his offense to a class D felony as municipal court pleas of guilty with the suspended imposition of sentence are included in the clear and unambiguous language of the statutory definition of "intoxication-related traffic offense." Further, to the extent there is any ambiguity due to conflicting language in the various subsections of the DWI enhancement statute, such ambiguity is irrelevant, as statutory construction demonstrates the legislature's desire that a municipal ordinance violation with an SIS be used to enhance punishment and the allegedly ambiguous section deals with the presentation of evidence of "prior convictions," which appellant waived by pleading guilty and admitting his status as a persistent offender.

Prior municipal court pleas of guilty to driving while intoxicated, even where the imposition of sentence was suspended, are prior "intoxication-related traffic offenses" under the DWI enhancement statute. Appellant admitted at his guilty plea that he had pled guilty in municipal court to driving while intoxicated prior to his arrest for the DWI to which he was pleading guilty. Therefore, appellant's prior municipal plea of guilty was properly used to enhance his DWI offense.

A. Facts

Appellant was charged as a persistent DWI offender based on pleading guilty to two different prior DWI offenses, one in the Circuit Court of Lafayette County on June 2, 1997, and one in the municipal court of Higginsville, Missouri, on August 14, 1996 (L.F. 3). At his plea hearing, appellant admitted that he had entered both of the prior pleas of guilty (L.F. 12). The court accepted the plea, entering judgment for the class D felony of driving while intoxicated and sentencing appellant to three years in the custody of the Department of Corrections (L.F. 6-7, 13).

In his amended motion, appellant claimed that his sentence was improperly enhanced because the municipal guilty plea could not be used to enhance the offense (L.F. 28). To reach this conclusion, appellant alleged that §577.023, the DWI enhancement statute, is ambiguous on its face as to whether municipal pleas of guilty which resulted in a suspended imposition of sentence can be used for enhancement (L.F. 28, 31-32). Appellant argued that the rule of lenity required the ambiguity to be resolved in appellant's favor (L.F. 28, 32-33). Thus, appellant alleged, his sentence exceeded the maximum punishment for the offense (L.F. 28).

The motion court denied appellant's claim as follows:

3) Even if this case were a matter of first impression - which it is not - Movant's claim would be flawed. The language to which Movant cites as creating the ambiguity is found by comparing subsection 1 to subsection 16 of Section 577.023. The language now found in subsection 16 used to [be

in] subsection 2 of Section 577.023 prior to 1983. The pre-1983 version of the statute required a prior “conviction” for the enhancement provisions found in subsection 1. Subsection 2 defined what counts as a “prior conviction.” It is this language which is cited to by Movant, but this language is still the same as it was in 1982. Since 1982, however, the General Assembly has moved away from the requirement that there be a “conviction” and now merely requires a finding of guilt. These subsequent amendments reflect a clear intent on the part of the General Assembly to expand the prior offenses which can be used to enhance the punishment for driving while intoxicated. Movant’s argument would [] result in these amendments having no meaning whatsoever contrary to the canon of construction presuming that amendments are intended to change the law.

4) Furthermore, this claim has been previously raised and examined by the Court of Appeals in 1997. See State v. Meggs, 950 S.W.2d 608 (Mo.App., S.D. 1997); State v. Haskins, 950 S.W.2d 613 (Mo.App., S.D. 1997). Since these cases, the General Assembly has amended other parts of Section 577.023 without changing the relevant language to the questioned provisions. As such, given the presumption that the General

Assembly is aware of the law, the law assumes that the General Assembly intends the relevant part of Section 577.023 to be interpreted consistent with the Meggs and Haskins decisions. Movant offers no reason for this court to come to a conclusion different than those cases.

5) In fact, the sole basis of Movant's claim is the "rule of lenity." The rule of lenity is merely a default mechanism under the rules of construction. If a statute is ambiguous to such an extent that a court is unable, by use of the other canons, to determine the intent of the General Assembly, the rule of lenity dictates that the interpretation most favorable to the defendant be used. However, when the rules of construction - including the rules regarding the history of a statute - clearly indicate the proper interpretation of a provision, the rule of lenity does not apply. Claim 8A is denied.

(L.F. 56-58).

B. Appellant's Claim on Appeal

Appellant claims that the motion court clearly erred in denying his post-conviction claim that his sentence exceeded the range of punishment for driving while intoxicated (App.Br. 10). He argues that his prior municipal court plea could not be used to enhance the offense to a felony because that plea did not result in a “conviction,” which he contends is required for enhancement by the DWI statute (App.Br. 14-17). His argument that a “conviction” is required to use municipal pleas for enhancement is based on what he claims is inconsistent language in the enhancement statute which, under the rule of lenity, requires an interpretation of the statute preventing the municipal plea from being used for enhancement (App.Br. 13-14, 18-22). Thus, he argues, the motion court clearly erred in failing to apply the rule of lenity to resolve the alleged ambiguity in his favor (App.Br. 16, 22-23).

C. Standard of Review

Appellate review of the denial of post-conviction relief is limited to a determination of whether the findings of fact and conclusions of law are clearly erroneous. Dorsey v. State, 115 S.W.3d 842, 844-45 (Mo. banc 2003); Supreme Court Rule 24.035(k). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with a definite and firm impression that a mistake has been made. Woods v. State, 176 S.W.3d 711, 712 (Mo. banc 2005). On review, the motion court's findings and conclusions are presumptively correct. Wilson v. State, 813 S.W.2d 833, 835 (Mo. banc 1991).

D. Municipal Court Pleas with an SIS Can Enhance a DWI Offense

1. The DWI Enhancement Statute is Not Ambiguous Due to “Conflicting Language”

The version of § 577.023, the DWI enhancement statute, in effect at the time of appellant’s crime defined a “persistent offender,” in relevant part, as follows:

A person who has *pleaded guilty to or has been found guilty of* two or more intoxication-related traffic offenses, where such two or more offenses occurred within ten years of the occurrence of the intoxication-related traffic offense for which the person is charged;

§ 577.023.1(2)(a), RSMo Cum.Supp. 2004 (emphasis added). “Intoxication related traffic offense” was defined by that same statute as follows:

An “intoxication-related traffic offense” is *driving while intoxicated*, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (3) of subsection 1 of sections 565.082, RSMo, or driving under the influence of alcohol or drugs *in violation of* state law or county or *municipal ordinance*, where the judge in such case was an attorney and the

defendant was represented by or waived the right to an attorney
in writing[.]

§ 577.023.1(1), RSMo Cum. Supp. 2004 (emphasis added).

In interpreting a statute, this Court is to ascertain the intent of the legislature from the language used and give effect to that intent, if possible. Donaldson v. Crawford, 230 S.W.3d 340, 342 (Mo. banc 2007). In ascertaining the intent of the legislature, the Court is to consider the language used in its plain and ordinary meaning. Id.

Here, according to the plain and ordinary language used in the statute, a prior plea of guilty to a municipal ordinance violation, whether or not the imposition of sentence was suspended, can be used to enhance a DWI offense. A violation of a municipal ordinance is included in the definition of intoxication-related traffic offense. § 577.023.1(1), RSMo Cum. Supp. 2004. The statute clearly states that merely pleading guilty to the intoxication-related traffic offense is sufficient for that offense to be used for enhancement; there is no requirement that a prior plea of guilty had to result in a “conviction”—i.e. a sentence be imposed—to be counted as an intoxication-related traffic offense. § 577.023.1(2)(a), RSMo Cum. Supp. 2004. Therefore, under the plain and ordinary language of these two sections, pleas of guilty to municipal ordinance violations, regardless of the imposition of sentence, are all that is required to enhance the degree of the offense. Accord, State v. Meggs, 950 S.W.2d 608 (Mo.App., S.D. 1997); State v. Haskins, 950 S.W.2d 613 (Mo.App., S.D. 1997).

Appellant does not really contest the plain and ordinary language of these two sections, but argues that additional language found in subsection 14 of the statute at the time

of his crime conflicts with the language defining “intoxication-related traffic offense,” thus creating an ambiguity that must be resolved in his favor (App.Br. 14-16). The language from subsection 14 relied on by appellant states:

A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, probation or parole or any combination thereof in a state court shall be treated *as a prior conviction*.

§ 577.023.14, RSMo Cum.Supp. 2004. This reference to “prior convictions,” however, creates no ambiguity, as it is simply inapplicable to the definitions of “intoxication-related traffic offender” and “persistent offender.” Neither of these definitions ever reference “prior convictions”: the definition of “persistent offender” only requires a finding of prior pleas of guilty or findings of guilt to “intoxication-related traffic offenses,” and the definition of “intoxication-related traffic offense” only lists the offenses, never stating that those offenses must have been “convictions.” § 577.023.1(1)-(2a), RSMo Cum. Supp. 2004. Thus, despite appellant’s argument to the contrary (App.Br. 15-16), subsection 14 does *not* attempt to define “intoxication-related traffic offenses.”

Because the legislature has specifically defined “persistent offender” and “intoxication-related traffic offense” as being independent of “prior convictions,” any statutory reference to “prior conviction” cannot be applied to these two definitions. As the

Western District of the Court of Appeals stated in State v. Harris, 156 S.W.3d 817 (Mo.App., W.D. 2005):

Words employed in a statute are given their usual and ordinary meaning unless the legislature itself has defined a particular term or phrase. The statutory definition should be followed in the interpretation of the statute to which it relates and is intended to apply and supersedes the commonly accepted dictionary or judicial definition and is binding on the courts.

Id., quoting State ex rel. Nixon v. Estes, 108 S.W.3d 795, 798 (Mo.App., W.D. 2003).

Because the statutory definitions of “persistent offender” and “intoxication-related traffic offense” clearly and unambiguously permit prior pleas of guilty to municipal DWI offenses to be used, those definitions should be followed, and subsection 14’s reference to “prior convictions,” which qualifies neither definition, is simply inapplicable. As such, there is no statutory ambiguity affecting the finding of appellant’s persistent offender status, and his sentence was thus properly enhanced.

2. Statutory Construction Also Defeats Appellant's Claim

Further, even if there was some ambiguity in § 577.023 due to a perceived conflict between subsections 1(1)-(2)(a) and subsection 14, such ambiguity is resolved in favor of the motion court's interpretation of the statute through statutory construction, which shows that the legislature's intent was to eliminate the need for prior "convictions" to enhance punishment for DWI recidivists. To discern legislative intent, this Court may review the earlier versions of the law, or examine the whole act to discern its evident purpose, or consider the problem that the statute was enacted to remedy. United Pharmacal Co. of Missouri, Inc. v. Missouri Bd. of Pharmacy, 208 S.W.3d 907, 911-12 (Mo. banc 2006).

The first of these factors, earlier versions of the law, shows that the legislature intended to broaden the scope of prior offenses used for punishment to include not only "convictions," but also all offenses (including municipal ordinance violations) resulting in a plea or finding of guilt. As the motion court noted, older versions of the enhancement statute, which included the language found in subsection 14, did incorporate the term "convictions" into its requirements for finding the defendant to be a prior or persistent offender (PCR L.F. 56-57). See, e.g., § 577.023.1(2), RSMo Cum.Supp. 1982 ("previous **conviction**"); § 577.023.1(2), RSMo Cum.Supp. 1983 ("previous intoxication-related traffic offense **conviction**")(emphasis added). The statute was amended in 1993 to eliminate any reference to "conviction" in defining either "intoxication-related traffic offense" or "persistent offender." § 577.023.1(1)-(2), RSMo Cum.Supp. 1993.

Whatever purpose the language in subsection 14 (now subsection 16) currently serves,

the legislature's amendment of the statute to eliminate references to "convictions" in the enhancement provisions of the statute shows that it no longer intended to limit a finding of persistent offender status to situations where there were only prior "convictions." When the legislature amends a statute, it is presumed that the legislature intended the amendment to have some effect. Woods, 176 S.W.3d at 712. Further, when two statutory provisions conflict, the later enacted provision, even when there is no specific repealing clause, repeals the first statute to the extent of any conflict with the second. State ex rel. Francis v. McElwain, 140 S.W.3d 36, 38 (Mo. banc 2004); Covera Abatement Technologies, Inc. v. Air Conservation Com'n, 973 S.W.2d 851, 860 (Mo. banc 1998). Here, because the new definitions of "intoxication-related traffic offense" and "persistent offender" were enacted after the definition of "convictions" found in subsection 14, the new definitions should control to resolve any perceived ambiguity. Thus, the history of § 577.023 shows an intent by the legislature to include municipal ordinance violations with a suspended imposition of sentence for enhancement purposes.

Likewise, the other factors in statutory construction—looking at the statute as a whole and considering the problem the statute was meant to remedy—also support a finding that municipal ordinance violations resolved with an SIS are "intoxication-related traffic offenses" within the meaning of § 577.023. Section 577.023 "promotes the State's interest in 'deter[ring] persons who have previously been convicted of driving while intoxicated from repeating their unlawful acts and to severely punish those who ignore the deterrent message.'" State v. Pike, 162 S.W.3d 464, 471 (Mo. banc 2005), quoting A.B. v. Frank, 657

S.W.2d 625, 628 (Mo. banc 1983). Thus, the purpose of the statute—deterring and severely punishing DWI recidivists—is better served when *all* prior findings of guilt for DWI can be used for enhancement. Thus, the conclusion that “intoxication-related traffic offenses” includes municipal ordinance violations with an SIS better satisfies the legislative intent of the entire chapter, and thus gives effect to the legislature’s purpose in amending the statute. Therefore, statutory construction must defeat appellant’s claim.

Appellant, perhaps in realization that statutory construction would defeat his claim, essentially argues that this Court should *never* engage in statutory construction in a criminal case and instead hold that the “rule of lenity” requires any ambiguity—even one that can be resolved through construction—be resolved in favor of the defendant (App.Br. 18-22). This argument distorts the meaning and purpose of the rule of lenity.

The rule of lenity finds its roots in the Due Process clause of the Fourteenth Amendment of the United States Constitution.¹ It is a canon of statutory construction, not a rule of law, which serves to protect the due process guarantee that a criminal statute give “fair warning” of the conduct that will violate the criminal law. United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); Bouie v. City of Columbia, 378 U.S.

¹The Due Process clauses of the federal and Missouri constitutions are co-extensive. Doe v. Phillips, 194 S.W.3d 833, 841 (Mo. banc 2006). Thus, because the rule of lenity derives from the federal Due Process clause, its scope is not broadened under the Missouri Constitution.

347, 350-51, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964); Lurie v. Wittner, 228 F.3d 113, 126 (2d Cir. 2000). “The rule of lenity, however, is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act,’... such that even after a court has “‘seize[d] every thing from which aid can be derived,’” it is still ‘left with an ambiguous statute.’” Chapman v. State, 500 U.S. 453, 463, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991)(internal citations omitted). The rule of lenity is “always reserved” for “those situations in which a reasonable doubt persists about a statute’s intended scope even after resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.” Moskol v. United States, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). The rule of lenity “comes into operation at the end of the process” of construing the legislative body’s act, not “at the beginning as an overriding consideration of being lenient to wrongdoers.” Chapman, 500 U.S. at 463; Callanan v. United States, 364 U.S. 587, 596, 81 S.Ct. 321, 5 L.Ed.2d 312 (1961). This Court has likewise noted that the rule of lenity is not a first-step default rule, but must yield to the discernable will of the legislature: “We recognize that ambiguities in statutes in criminal cases must be construed against the State, but this rule of strict construction does not require that the court ignore either common sense or evident statutory purpose.” State v. Knapp, 843 S.W.2d 345, 347 (Mo. banc 1992).

When properly understood, the rule of lenity affords appellant no relief in this case. As demonstrated above, statutory construction supports that which the plain language of § 577.023(1)-(2)(a) indicates: that all adjudications for driving while intoxicated, including a municipal ordinance violation where the imposition of sentence is suspended, may be used to

enhance punishment and thus give meaning to the legislature's attempt to punish habitual drunk drivers. Because this legislative intent can be discerned through statutory construction, this Court should not apply the rule of lenity, as there is no unresolved ambiguity to cure. To hold otherwise would thwart the General Assembly's power to legislate. Mo. Const., Art. II & Art. III, § 1 (1875).

Further, the cases cited by appellant to support his argument for the immediate application of the rule of lenity without statutory construction do not support such a claim. In Woods, this Court did state that the rule of lenity supported the defendant's interpretation of an alleged ambiguity in the stealing enhancement statute, but only *after* engaging in statutory construction showing that the defendant's interpretation more accurately reflected the will of the legislature. Woods, 176 S.W.3d at 712-13. Thus, Woods cannot stand for appellant's proposition that lenity must apply without first engaging in statutory construction when this Court actually engaged in statutory construction. Likewise, in State v. Graham, 204 S.W.3d 655 (Mo. banc 2006), this Court held that the rule of lenity supported the defendant's interpretation of the statute of limitations application to sodomy, but again engaged in statutory construction prior to that point, comparing the use of the statutory language in question in other statutes. Id. at 656-58. Thus, the additional reliance on the rule of lenity in those cases merely provided additional support to a finding of legislative intent that supported the defendant; in essence, holding that "even if" there was still ambiguity, it should be resolved in the defendant's favor. In this case, statutory construction shows that the will of the legislature is contrary to the defendant's position, and thus lenity is

inapplicable.

Additionally, the Western District's case of Fainter v. State, 174 S.W.3d 718 (Mo.App., W.D. 2005), which appellant cites with emphasis numerous times in his brief to support his claim of lenity without construction (App.Br. 13-14, 18, 21), actually says the opposite. That opinion expressly recognized that a court should do all it can to discern the will of the legislature prior to applying the rule of lenity, stating, "The rule of lenity applies to interpretation of statutes *only if, after seizing everything from which aid can be derived*, we can make no more than a guess as to what the legislature intended." Id. at 721. While appellant seems to argue that this language means that lenity applies "without further exploration into the motives of the legislature" once it is determined that the statute is "facially ambiguous" (App.Br. 21), this is clearly not what that holding states. To the contrary, seizing "everything from which aid can be derived" to understand the will of the legislature embraces the use of statutory construction to determine the will of the legislature if aid can be derived from it. Therefore, appellant's argument that the rule of lenity applies upon a facial ambiguity without undertaking statutory construction is not supported by the law. Thus, appellant's position is untenable and should not be followed.

E. Section 577.023.14 Does Not Apply to Appellant’s Case

Finally, to the extent that § 577.023.14 still has any application at all, any perceived conflict between § 577.023.1(1)-(2)(a) and § 577.023.14 is irrelevant in this case. When viewed as a whole, the language of subsection 14 defining “conviction” refers only to the subject matter of subsection 14, which relates to the presentation of evidence of prior convictions:

14. Evidence of prior convictions shall be heard and determined by the trial court out of the hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri uniform law enforcement system maintained by the Missouri state highway patrol. After hearing the evidence, the court shall enter its findings thereon. A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in a state court shall be treated as a prior conviction.

§ 577.023.14, RSMo Cum. Supp. 2004. As this is the only provision in the statute which uses the term “prior convictions,” the definition included at the end of the subsection must

refer only to the language found earlier in the same subsection dealing with the presentation of evidence of “prior convictions” during a jury trial. Id. In this case, appellant waived his right to a jury trial, pled guilty, and admitted that he was a persistent offender with two prior alcohol-related traffic offenses (L.F. 12). The enhancement statute clearly allows a defendant to waive proof of his persistent offender status and make such an admission. § 577.023.9, RSMo Cum. Supp. 2004. Because appellant did so in this case, the presentation of evidence of “prior convictions” was irrelevant, and to any extent the language of subsection 14 is applicable to any case, it was not applicable to appellant’s guilty plea. Thus, appellant was not entitled to post-conviction relief on his claim.

Because, appellant’s sentence was properly enhanced, regardless of whether his municipal court prior intoxication-related traffic offense resulted in a “conviction” or not, his punishment was not outside the range of punishment for the offense, and the motion court’s judgment was correct. Therefore, appellant’s sole point on appeal must fail.

CONCLUSION

In view of the foregoing, the denial of appellant's Rule 24.035 motion should be affirmed.

Respectfully submitted,

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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 4853 words, excluding the cover, this certification and the appendix, 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 28th day of November, 2007, to:

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APPENDIX

Judgment, Findings of Fact and Conclusions of Law A-1
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