IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 84377**
	)	
ALEJANDRO FRANCO-AMADOR,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S SUBSTITUTE STATEMENT, BRIEF, AND ARGUMENT

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JURISDICTIONAL STATEMENT

Alejandro Franco-Amador appeals his conviction following a jury trial in the Circuit Court of Callaway County, Missouri, for second degree trafficking, §195.223.[1] The Honorable Gene Hamilton sentenced Mr. Franco-Amador to ten years imprisonment. After the Missouri Court of Appeals, Western District, issued its opinion in WD 59506, this Court granted the State's application for transfer pursuant to Rule 83.03. This Court has jurisdiction of this appeal under Article V, Section 3, Mo. Const. (as amended 1976).

[1] All statutory citations are to RSMo Cum. Supp. 1998, unless otherwise stated.

STATEMENT OF FACTS

Alejandro Franco-Amador is from a small town in Mexico, about an hour or hour and a half from Mexico City (Tr. 245-46).[2] He had previously worked in California and Oregon picking strawberries and blueberries (Tr. 246). Alejandro[3] illegally entered the United States and made his way to Phoenix, Arizona (Tr. 246, 248).[4] His brother in Atlanta told Alejandro that he could find work there in construction, so Alejandro sought a ride to Atlanta (Tr. 247).

In Phoenix, Alejandro met Jose Efrain Amador[5] in a convenience store (Tr. 160, 247, 264). Alejandro did not have the money to travel to Atlanta, so he was going to look for work and save up for a ride (Tr. 247, 251). Alejandro also did not know exactly where Atlanta is or how to get there from Phoenix (Tr. 248-49). At some point, Alejandro told Jose that he was going to Atlanta, and Jose offered him a ride there (Tr. 247). Alejandro said that he agreed to pay Jose $400 for the ride, but he thought it would be reduced to $200 or $300 if he did part of the driving (Tr. 264). Alejandro did not have that much money -- he had only about $35 or $36 -- but Jose said he could pay after he worked and earned some money (Tr. 249, 259).

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[2] The Record on Appeal consists of a transcript (Tr.) and a legal file (L.F.).

[3] Because a second person with the surname Amador is involved in this matter, they will be referred to by their first names.

[4] Alejandro testified at trial through an interpreter (Tr. 61, 245).

[5] The men are not related (Tr. 198-99).

On March 30, 2000, while crossing Missouri on I-70, Alejandro was driving Jose's Lincoln[6] through Callaway County (Tr. 61, 158-59, 162-63, 222). Alejandro had driven for only forty minutes to an hour; Jose picked the route and directed him where to go (Tr. 249). Highway Patrol corporal Rex Scism was just completing a traffic stop and saw the Lincoln go past in the left lane, then move to the right lane without signaling (Tr. 158-59). He gave chase, using his lights and siren, and the Lincoln pulled over immediately (Tr. 159-60, 191).

Scism went up to the Lincoln and asked Alejandro to step out and to the rear of the car (Tr. 161, 191). He noticed that Alejandro was "extremely nervous" and was having difficulty understanding English (Tr. 161). While standing at the window, Scism could smell air freshener and a spicy odor that he could not identify (Tr. 162). During a hearing on Alejandro's motion to suppress, Scism testified that the smell was not anything that he could identify as contraband (Tr. 20). He also noticed several food wrappers, soda containers, and a road atlas (Tr. 162, 201).

Standing between the two cars, Scism asked Alejandro for his license or identification (Tr. 160, 191). Through gestures, Scism tried to communicate the reason for the stop and Alejandro appeared to understand (Tr. 161). Alejandro produced an Oregon identification card, and said he also showed Scism his Mexico driver's license, because he did not know how to say that he did not have a U.S. license (Tr. 160, 193, 252). Scism did not recall seeing a license and had no intent to

[6] Scism referred to the car as both a Lincoln Continental (Tr. 159), and a Lincoln

arrest Alejandro for driving without a license (Tr. 193-94). Alejandro said he was nervous because he did not have "papers" allowing him to be in the United States or a U.S. driver's license (Tr. 253, 257).

Scism gave Alejandro a warning[7] for changing lanes without signaling, then, after Alejandro indicated that Jose owned the car, Scism contacted Jose to verify that the men had the right to have the car (Tr. 163, 192, 197). Jose could speak English better than Alejandro, and he provided Scism with documents showing that he owned the car (Tr. 198).

Based on his training and experience, Scism recognized the strong smells as "masking" agents -- to cover contraband (Tr. 165). The smells, plus the men's apparent anxiety -- which continued to increase even after Alejandro was told that he would only receive a warning -- and the items he saw in the car, caused Scism to ask Jose, in Spanish,[8] for permission to search his car (Tr. 163-65, 199, 203). Unlike Alejandro, Jose was visibly shaking (Tr. 199). Jose pointed at the car and said "Si, si." (Tr. 200). Scism said he had the men stand in front of the Lincoln -- safe from traffic and to keep them well away from him -- as he searched (Tr. 164, 167-68).

Town Car (Tr. 166).

[7] According to Scism this was a written warning, though he did not have Alejandro sign it or give him a copy (Tr. 163).

[8] Scism repeated from memory a phrase he learned from a Highway Patrol guidebook (Tr. 193, 199).

Scism began in the trunk, then moved to the car's interior (Tr. 169). He pulled the fabric lining away from the fender wells in the trunk and found black pepper poured one to two inches deep (Tr. 169). Under the front passenger seat was a roll of duct tape, which he said was commonly used to wrap contraband (Tr. 170-71). A new, strong-smelling air freshener lay on the back seat (Tr. 165, 167). Scism saw that the rear seat back was not uniform in how it fit against the car's trim (Tr. 171). He pulled up the seat bottom and found a large amount of black pepper poured under it (Tr. 171). "Buried" in a cavity between the seat back and the trunk wall he found three bundled packages, wrapped in duct tape, that were eventually tested and found to be 1,113 grams of a substance containing methamphetamine (Tr. 174-75, 183, 205, 227-29).

On discovering the bundles, Scism pulled his gun and ordered the men to lay on the ground; they complied (Tr. 177, 209-10). As Scism backed toward his patrol car to retrieve a second set of handcuffs, it appeared that there was an exchange between the men, though he did not hear anything (Tr. 177-79). Scism said that the men got up and ran at the same time, Jose going south up the hill that ran along the interstate, and Alejandro going north, crossing the highway into the woods on the other side (Tr. 179). Alejandro said that Jose screamed at him to run, then Jose started running (Tr. 257). The trooper followed Jose, so Alejandro got up and ran the other way (Tr. 257). He thought he heard a shot as he crossed the highway (Tr. 257, 260).

Alejandro testified that when Scism pointed his gun at them, he thought he was going to be arrested because he did not "have papers for to be in the United States." (Tr. 257). It cost a lot of money to get into the United States, and he thought he was going to be sent back to Mexico (Tr. 263). Alejandro had no idea that there were drugs in the car and did not suspect that Jose was doing anything illegal (Tr. 251, 259). He did not smell pepper in the car, though Jose was smoking and there was an odor of cigarette smoke in the car (Tr. 265-66). Alejandro denied that he ever said that he thought Scism pulled his gun because he found something in the car (Tr. 261).

Scism said he started to follow Jose because he was not going to cross the interstate, but decided not to leave both cars and the contraband unsecured (Tr. 179). He called for backup, and a manhunt ensued (Tr. 179-80). After spending the night in the woods, Alejandro was arrested the next morning at a convenience store near Kingdom City, where he had gone to buy some food and a drink (Tr. 232-33, 235).

A Spanish speaking member of the Highway Patrol interviewed Alejandro at the Callaway county jail (Tr. 267-69). He said that Alejandro told him that he was traveling with a friend from Phoenix to Atlanta and the friend paid Alejandro[9] to drive him there (Tr. 273). He also said that he asked Alejandro why he ran and Alejandro answered, in Spanish, that his friend told him to run, he was scared, and it appeared to him that the trooper had "found something in the car." (Tr. 274, 277-78). Alejandro denied in the interrogation that he knew there were drugs in the car (Tr. 278). He did not ever talk to Jose about what was in the car (Tr. 280).

The jury found Alejandro guilty of second degree trafficking, and on January 2, 2001, the court sentenced him to ten years imprisonment (L.F. 33, 44). Notice of appeal was filed January 10, 2001 (L.F. 47).

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[9] Alejandro testified that he told the trooper that he was to pay Jose (Tr. 284).

POINT RELIED ON

The trial court erred in overruling Alejandro's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of second degree trafficking, because the rulings violated Alejandro's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that Alejandro possessed a controlled substance because the jury could not have reached a "subjective state of near certitude" that Alejandro was aware of or exercised control over the methamphetamine hidden in Jose's car.

State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999);

State v. Whalen, 49 S.W.3d 181 (Mo. banc, 2001);

State v. Purlee, 839 S.W.2d 584 (Mo. banc 1992);

State v. Smith, 33 S.W.3d 648 (Mo. App., W.D. 2000);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10;

§§ 195.010 and 195.223; and

MAI-CR3d 325.02.

ARGUMENT

The trial court erred in overruling Alejandro's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of second degree trafficking, because the rulings violated Alejandro's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that Alejandro possessed a controlled substance because the jury could not have reached a "subjective state of near certitude" that Alejandro was aware of or exercised control over the methamphetamine hidden in Jose's car.

Alejandro complied when the Highway Patrol trooper pulled his gun and ordered him to the ground, along with the owner of the car he was driving; both stood up and ran as the trooper went to his car for more handcuffs (Tr. 177-79). Jose Efrain Amador's Lincoln had, buried in a cavity between the rear seat back and the trunk wall, more than a kilogram of methamphetamine (Tr. 174-75, 183, 205, 227-29). The drugs were not in plain sight and corporal Scism could not tell that there was contraband in the car until he pulled the seat back and saw the three bundles (Tr. 173-74, 205). In fact, the eight year veteran was only suspicious of the smell in the car based on his training and experience in law enforcement (Tr. 158, 165, 203). There was nothing that would have been visible to an occupant of the car that appeared to be illegal (Tr. 203).

Before the State can deprive Alejandro of his liberty, the Due Process Clause requires that it prove each element of the charged offense beyond a reasonable doubt. ***In re Winship***, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). *Also see*, ***State v. O'Brien***, 857 S.W.2d 212, 215 (Mo. banc 1993). This impresses "upon the fact finder the need to reach a subjective state of *near certitude* of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315, 99 S.Ct. 2781, 2787, 61 L.Ed.2d 560 (1979). (emphasis added). The critical inquiry is whether the evidence could reasonably support a finding of guilt beyond a reasonable doubt. *Id.*, 443 U.S. at 318, 99 S.Ct. at 2788-2789.

This Court considers "whether a reasonable juror could find each of the elements beyond a reasonable doubt." ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993). In reviewing the case on appeal, this Court takes the evidence and *reasonable* inferences therefrom in the light most favorable to the State. *Id*. But this Court must ensure that the jury did *not* decide the facts "based on sheer speculation." *Id*. at 414.

The car was Jose's, not Alejandro's (Tr. 163). There was no evidence that Alejandro had been in the car other than for the men's trip from Phoenix to Missouri. And Alejandro denied knowledge of the presence of the drugs (Tr. 278). Nonetheless, the State charged Alejandro with second degree trafficking under § 195.223, meaning that it had to prove to the jury beyond a reasonable doubt that:

> . . . [Alejandro] possessed 450 gram or more of any mixture containing any quantity of methamphetamine, a controlled substance, and
>
> Second, that [Alejandro] knew or was aware of the presence and illegal nature of the controlled substance
>
> * * *
>
> As used in this instruction, the term "possessed" means either actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of an object, possession is joint.

(L.F. 25-26); § 195.010(32); MAI-CR3d 325.02.

The State was required to prove that Alejandro: (1) had conscious and intentional possession of the methamphetamine, either actual or constructive, and (2) was aware of its presence and nature. ***State v. Purlee***, 839 S.W.2d 584, 587 (Mo. banc 1992). The State did not present direct evidence that he *actually* possessed the methamphetamine; its theory was that the jury could *infer* that he constructively possessed it. Where there is no actual possession, the State must not only prove

constructive possession but also show other facts that buttress the inference of possession. *Id*.

Constructive possession requires, at a minimum, evidence that Alejandro had access to *and* control over the premises where the drugs were found. ***State v. Withrow***, 8 S.W.3d 75, 80 (Mo. banc 1999). Exclusive possession of the premises raises an inference of possession and control; however, in cases of joint possession, further evidence is necessary to connect him to the drugs. *Id*. Here, the "premises" were Jose's car, and not only did Alejandro not have *exclusive* access to or possession of the car, it can only be argued that he had even *joint* access or possession because he happened to be driving when the men were stopped. Otherwise, he was but a passenger in another man's car that carried, hidden from view, a controlled substance that gave no sign of its presence.

Here, Alejandro had no drugs or paraphernalia on his person, he made no admissions that he knew the drugs were in the car, and the evidence was not that he "had possession of the car, [but] was simply driving it at the request of . . . the passenger[]." *Id*. Though Alejandro was driving, no evidence showed that he routinely drove Jose's car or ever had access to the cache where the drugs were concealed. Alejandro had driven for only forty minutes to an hour, and Jose picked the route and directed him where to go (Tr. 249). Even if driving the car shows *access* to the "premises", it does not show access to the *drugs*. Nor does this evidence show any *control* over Jose's car or its contents. Therefore, the evidence does not show constructive possession. ***Withrow***, *supra*.

Additional evidence that may support a conviction in a joint possession case includes: routine access to an area where such substances are kept, ***State v. Kerfoot***, 675 S.W.2d 658, 662 (Mo. App., E.D. 1984); the presence of large quantities of the substance at the scene where appellant is arrested, ***State v. Barber***, 635 S.W.2d 342, 344 (Mo. 1982); admissions of the accused, ***State v. Wiley***, 522 S.W.2d 281, 292-93 (Mo. banc 1975); being in close proximity to drugs or drug paraphernalia in plain view of the police, ***State v. Jackson***, 576 S.W.2d 756, 757 (Mo. App., E.D. 1979); mixture of defendant's personal belongings with the drugs, ***State v. Dethrow***, 674 S.W.2d 546, 550 (Mo. App., E.D. 1984); and flight, ***State v. Keeper***, 787 S.W.2d 887, 890 (Mo. App., E.D. 1990). The totality of the circumstances is considered in determining whether sufficient additional incriminating circumstances have been proved. ***Purlee***, 839 S.W.2d at 589.

The only one of these factors present here is flight. Of course, the State has argued that flight shows consciousness of guilt. ***State v. Davis***, 982 S.W.2d 739, 743 (Mo. App., E.D. 1998). But flight does not establish a defendant's guilty knowledge of a *particular* crime in comparison to other possible charges. ***State v. Schwartz***, 899 S.W.2d 140, 145 (Mo. App., S.D. 1995). And flight alone will not support a conviction. *Id*., at 144-45; *citing*, ***State v. Castaldi***, 386 S.W.2d 392, 395 (Mo. 1965). *See*, *also*, ***State v. Smith***, 11 S.W.3d 733, 739 (Mo. App., E.D. 1999) (flight alone does not establish probable cause).

Here, Alejandro's flight shows only that he was an illegal alien, not that he knew that Jose had secreted drugs in his car. If his flight can be connected to the

drugs at all it at most shows only *knowledge* of the drugs. And even if Alejandro had knowledge of the *presence* of the drugs, that does not show possession because it does not show *control*. As stated *supra*, while inferences are to be taken in the light most favorable to the verdict, neither the jury nor this Court may "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001) (citation omitted). A conclusion that Alejandro's flight shows control over Jose's drugs would be sheer speculation.

The State in its transfer application asked this Court to believe that the Court of Appeals failed to follow the long-standing law as set forth in ***Grim***, *supra*. (App., at 6). It did not. It actually gave effect to ***Grim***'s prohibition against allowing speculation to substitute for reasonable inferences. In fact, the decision of the Court of Appeals recognizes that the evidence shows at most knowledge of the drugs, not possession and control, and to convict Alejandro would not be drawing a reasonable inference from the evidence, but rather stacking inference upon inference, which is nothing short of speculating. The jury first has to *infer* that Alejandro's nervousness and flight was due to a guilty mind. From this inference it must then *infer* that the crime for which Alejandro feels guilty is trafficking drugs rather than some other, obvious choice -- such as illegally entering the United States.

But as Alejandro has long argued, even in the light most favorable to the State, none of these inferences, nor the smell of pepper, shows anything beyond knowledge of the *presence* of the methamphetamine. They show nothing about control. Is it surprising that an illegal alien would run when a law enforcement officer pulls his

gun? Is it evidence of *control* of drugs hidden in someone else's car that the illegal alien runs across an interstate highway when he -- perhaps -- knows that the drugs are there? The answer to both questions is a resounding "No."

The State apparently believes that the following evidence proves Alejandro's control over the drugs in Jose's car: Alejandro's nervousness; the smell of pepper in the car; his flight when the trooper pulled a gun; a roll of duct tape in the car; and Alejandro's "incredulous [sic] false story that he was traveling from Phoenix, Arizona, to Atlanta, Georgia, via Callaway County, Missouri" (Trans. App. 9).[10]

Alejandro has already set out above that nervousness and flight -- essentially the same evidence -- show no more than his knowledge of the drugs, if that. The same is true of the smell of pepper. None of this pepper was visible inside the passenger area of the car (Tr. 202). And it was the trooper's extensive training in drug detection that allowed him to recognize it as a masking agent (Tr. 165, 203). The State presented no evidence that Alejandro had such training, yet it claims that this smell proved his knowledge of the presence of the drugs.

As for the duct tape -- to which the State continues to refer in its brief, motion for rehearing, and transfer application -- it is not a significant factor. First of all the State's assertion is untrue that the tape was in the front seat. (Resp. Br. 6; Trans. App. at 5). This is false. The officer testified, "And *under* the front passenger seat I

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[10] The State did not argue this last at trial or in its brief in the Court of Appeals. It asserts this ground for the first time in the transfer application.

discovered a roll of duct tape." (Tr. 169-70). There is no evidence that this roll of tape was even *visible* to an occupant of the car. And it was not located with the drugs. It is simply a non-factor, an item found in many cars that does not even raise an inference of *knowledge*, let alone *control*.

Then there is the "incredulous" [sic] story. The State does not explain *why* the story is not credible. It did not argue to the jury that it was false, therefore indicative of guilt. It did not present evidence that the men claimed to be taking a direct route to Atlanta. Alejandro testified that he told Jose that he was going to Atlanta, and Jose offered him a ride -- for $400, less if Alejandro did some of the driving (Tr. 247, 249, 264). Now the State declares Alejandro's testimony false just because Missouri is not in a direct line between Phoenix and Atlanta. From this premise it argues that this is still more "evidence of consciousness of guilt." (Trans.App. 7). But it is a false premise, not a false story. There is a difference between *ignoring* evidence contrary to the verdict and declaring it to be *false*. The State does not recognize this distinction but instead claims that just because this evidence was offered by the defense it must be false.

While the State is on the subject of "false" stories, it also claims, now, that the Court of Appeals should not have taken into account what the State terms "evidence" that Jose owned the car. (Trans.App. 6). It implies that this was not truly evidence in the case. But in its brief in the Court of Appeals, the State makes this same assertion: "The trooper . . . discovered that passenger Jose Amador owned the car." (Resp.Br.

6). It should not be able to assert this as a fact in the Court below, then attack that Court for accepting it as a fact in its opinion.

In ***State v. Smith***, 33 S.W.2d 648 (Mo. App., W.D. 2000), when officers searched a farm on which Smith had lived for ten years, they found in an outbuilding several items commonly used in the production of methamphetamine. 33 S.W.3d at 651. In Smith's shared bedroom, they found a spoon with methamphetamine residue on it, a razor blade with methamphetamine powder on it and pseudoephedrine. *Id*. at 652. More related items were in the kitchen. *Id*. at 654. But the Court held that there was not sufficient evidence to convict Smith of either possessing or manufacturing methamphetamine:

> The evidence strongly suggests that Smith was involved with the production of methamphetamine and/or that his girlfriend [Schultz] was involved. The evidence also strongly suggests that Schultz's ex-husband, Latrelle, was also involved. Thus, either Smith was guilty of the crime charged or he was guilty of bad choices in his associates. Making bad choices in companions is not a crime. No one saw Smith with any of the substances or constituent elements. We do not know if any were in a space that he uniquely controlled. We do not even know if any of his personal belongings were in the bedroom or storage room. There was no evidence whether he farmed the property or that he had the exclusive use of the outbuilding to the exclusion of others who might be working on the property.

> Although the evidence is suggestive of Smith's guilt, the test the court is constitutionally obligated to follow is whether the evidence is sufficient beyond a reasonable doubt to show that Smith constructively possessed the illegal substances.

Id. at 655. Here, the evidence is not even suggestive of Alejandro's guilt, for it does not reach the element of control at all.

What does it really mean that Alejandro fled? It means just as he said, that as an illegal alien, he was afraid that he would be arrested and sent back to Mexico (Tr. 257, 263). That belief is entirely consistent with Alejandro becoming increasingly nervous as the duration of the stop increased (Tr. 164), and with him running when Jose told him to (Tr. 257). But the State argues that Alejandro's increasing nervousness despite being given only a warning somehow shows possession of the drugs. (Trans.App. 8). It does not comprehend that an inference does not become reasonable simply because it is possible. It is a possible inference that Alejandro became increasingly nervous because he knew the drugs were in the car. It is not a reasonable inference that he controlled those drugs just because he knew about them.

The Southern District of the Court of Appeals has followed a line of reasoning similar to that in ***Smith*** (W.D. 2000) in its decisions in three related cases, ***State v. Condict***, 952 S.W.2d 784 (Mo. App., S.D. 1997); ***State v. Janson***, 964 S.W.2d 552 (Mo. App., S.D. 1998); and ***State v. McClain***, 968 S.W.2d 225 (Mo. App., S.D. 1998). All three cases arose from the same incident. As the Court described the facts

in ***Condict***, in executing an arrest warrant for Janson at his uncle's auto garage, the police arrested Janson as he exited, and Condict and McClain inside. 952 S.W.2d at 785. Janson and McClain were armed and McClain had methamphetamine on his person *Id*. The arrest took place on a Sunday when the garage was closed, but members of the public sometimes entered on weekends. *Id*. In a closet in the garage office was a bag with "meth lab equipment." *Id*. The bag was not there during a search for Janson conducted earlier that day. *Id*.

The Court reversed the convictions of all three men for attempted manufacturing of methamphetamine. In ***Condict***, the Court said, "[t]his case presents nothing more than a defendant's presence on premises where contraband is found in an adjacent area with no evidence or reasonable inferences that Defendant had knowledge or control of such items." *Id*., at 786. Condict's access to the bag was not sufficient evidence of control. *Id*.

In ***Janson***, the Southern District said that the additional factors that the defendant was armed and his uncle owned the garage were not enough to distinguish the case from ***Condict***. ***Janson***, 964 S.W.2d at 555. These factors did not show control of the bag or the chemicals in it. *Id*.

And in ***McClain***, even the defendant's possession of methamphetamine, the drug whose manufacture had been charged, was not sufficient. The Court examined three differences between the evidence against McClain and that against Condict.

> (1) inferably, the loaded automatic pistol [deputy] Fowler retrieved from the truck body was tossed there by [McClain]; (2) [McClain] had on his

> person a small package of powder that "tested positive" for amphetamine and methamphetamine; (3) [McClain] told [deputy] Haynes the blue bag was behind the garage when "they" arrived and J[anson] brought it inside.

968 S.W.2d at 226. As to the gun, the Court followed ***Janson*** and held it insufficient to show possession. *Id*., at 227. Even possessing the finished product that he was charged with attempting to manufacture did not prove possession: "even if he saw the contents, and even if he recognized them as items used to manufacture methamphetamine, such knowledge alone does not support a finding that [McClain] had possession of the items." *Id*. Finally, McClain's statement "does not indicate [he] ever had joint possession with J[anson] of the bag or its contents." *Id*.

These cases illustrate the difference between knowledge and control. Alejandro's nervousness and flight, and the pepper, show at most that he knew Jose was carrying drugs, but this evidence does not show that he ever had access to those drugs, let alone control over them. The mere presence of the accused on the shared premises where the drugs are found does not suffice to convict for possession. ***Janson***, 964 S.W.2d at 554; *citing* ***Wiley***, 522 S.W.2d at 292. Even if Alejandro knew about the methamphetamine, that is all the State proved here.

The Court of Appeals followed this Court's directives about how to analyze a sufficiency case. It correctly held:

> Considering the totality of these circumstances together: nervousness, flight, duct tape and masking odors, this court cannot say that this evidence was sufficient to find that Alejandro constructively possessed the methamphetamine because it did not prove that Alejandro had the power and intention to exercise dominion or control over the methamphetamine.

Slip Op. at 8.

The State has never answered this problem, as the Court of Appeals held, that none of this evidence points to *control* over the drugs. Considering *all* of the evidence in the light most favorable to the State, as the State claims the Western District failed to do, the State proved no more than knowledge, which this Court has held not to be sufficient proof in a drug possession case. ***Purlee***, *supra*; ***Withrow***, *supra*. The State, at most, has met half of the definition of possession.

In summary, in ***Wiley***, *supra*, 522 S.W.2d at 292, this Court stated:

> Where a person is present on premises where drugs are found but does not have exclusive use or possession of the premises, it may not be inferred that he had knowledge of the presence of the drugs or had control, so that no submissible case is made. Additional factors are required. When the defendant is present on the premises and if there are additional independent factors showing his knowledge and control, then that is sufficient to withstand a motion for directed verdict. To justify a

> conviction in any case of possession it is necessary to prove that the accused knew of the presence of the forbidden substance and *that the same was under his control*. In the absence of incriminating circumstances no case is made.

(emphasis added). The essence of the State's case is that an inference of knowledge arises, not from the *evidence* but from another *inference* -- that nervousness, flight, a smell, and duct tape permit an inference that Alejandro has a guilty conscience. On this inference, it stacks another -- that knowledge of drugs in the car may be inferred from a guilty conscience. This Court must not permit this stacking of inferences to substitute for proof beyond a reasonable doubt, but even if it could, the State is left with half a case; it cannot bridge the gap from knowledge to control. No inference it has suggested proves that part of the element of possession.

There was no substantial evidence from which a jury could *reasonably* infer *to a near certainty*, ***Jackson v. Virginia***, *supra*, either that Alejandro had knowledge of Jose's methamphetamine, or that it was under Alejandro's control; it could only speculate, or "supply missing evidence, or give the [State] the benefit of unreasonable, speculative or forced inferences." ***State v. Whalen***, *supra*. This Court must therefore reverse Alejandro's conviction and discharge him from his sentence.

CONCLUSION

For the reasons set forth herein, appellant Alejandro Franco-Amador respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,850 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated on May 8, 2002. According to that program, these disks are virus-free.

On the ____ day of May, 2002, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

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Kent Denzel