NO. SC84377

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

ALEJANDRO FRANCO-AMADOR,

Appellant.

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

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Error! No table of authorities entries found.

Statutes

Error! No table of authorities entries found.

JURISDICTIONAL STATEMENT

This appeal is from a conviction for trafficking in the second degree, §195.223, RSMo 2000, for which the appellant was sentenced to ten years in the custody of the Missouri Department of Corrections. Jurisdiction in this case is proper because this Court granted transfer in this case after opinion by the Missouri Court of Appeals, Western District, pursuant to Article V, §10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Alejandro Franco Amador, was charged by information with trafficking in the second degree, §195.223, RSMo 2000 (L.F. 6). Appellant was represented by counsel and appeared for trial before the Circuit Court of Callaway County, the Honorable Gene Hamilton presiding, on November 14, 2000 (Tr. 61).

Appellant contests the sufficiency of the evidence to sustain his conviction. Viewed in the light most favorable to the verdict, the following evidence was adduced at trial.

Corporal Rex Scism of the Missouri Highway Patrol was on patrol on August 30, 2000, near Kingdom City, Missouri (Tr. 158). At about 12:30 P.M., Corporal Scism was stopped in the eastbound lane of Interstate 70 at the 148-mile marker (Tr. 158). He observed an eastbound tan Lincoln Continental change lanes without using its turn signal and he pulled the Continental over (Tr. 159-60). Appellant was driving the car and another man, José Efraín Amador[1], was in the passenger seat (Tr. 160).

Appellant was extremely nervous when the trooper approached him (Tr. 161). Corporal Scism noticed the strong odor of air freshener and a lot of spices, and black pepper, which he recognized as common masking agents to conceal the odor of contraband (Tr. 162, 165). Corporal Schism stated that the odor of the spices was "extremely strong. Just picture a pound of black pepper dumped inside your vehicle, how strong that would be, and that is what it was" (Tr. 169). Appellant stated that he was

[1] Appellant and José Amador are not related.

coming from Kansas and going to Georgia (Tr. 162), and appellant later told the police that he was going from Phoenix, Arizona, to Atlanta, Georgia, via Missouri (Tr. 273

The trooper gave appellant a warning for the traffic violation and discovered that passenger José Efraín Amador owned the car (Tr. 162-63). Corporal Scism then decided, based on the nervousness of appellant and passenger Amador, the fast-food wrappers and road atlas, and the strong odor of pepper and spices, to search the car (Tr. 164-65). After obtaining consent, the trooper asked appellant and passenger Amador to exit the car and they stood in front of the car away from traffic (Tr. 168).

Corporal Scism discovered that black pepper and other spices were poured one to two inches deep in the rear fenders of the car and he found a roll of duct tape under the front passenger seat (Tr. 169). Upon investigation of the back seat, the trooper found that the seat back on the right side had been tampered with (Tr. 171). When the trooper removed the rear seat cushion, he found more pepper and spices poured under the cushion (Tr. 171). Officer Scism then pulled the seat back away and found three bundles of drugs wrapped in duct tape and encased in white plastic bags with more spices and pepper (Tr. 174-76). The bundles contained 1,113.08 grams of methamphetamine (Tr. 228).

After Corporal Scism found the methamphetamine, he stopped the search, drew his service weapon, ordered appellant and passenger Amador to the ground, and backed up to his patrol car to get another set of handcuffs (Tr. 177). As the trooper backed up, appellant and passenger Amador instantaneously jumped up and ran in opposite directions (Tr. 179). Appellant ran across four lanes of traffic on I-70 (Tr. 179). Corporal Scism began to chase passenger José Efraín Amador, but stopped and decided to secure the patrol car and the contraband (Tr. 180). A manhunt for appellant and

passenger Amador lasted well into the evening (Tr. 180). Appellant was arrested the next morning while attempting to avoid police at the Petro Travel Center in Kingdom City (Tr. 233-35).

After the instructions of the court and the arguments of counsel, the jury convicted appellant of second-degree trafficking (Tr. 310). The court sentenced appellant to ten years imprisonment in the custody of the Missouri Department of Corrections (Tr. 320). This Missouri Court of Appeals, Western District, reversed appellant's conviction on March 5, 2002, because the court found that the evidence was insufficient to sustain appellant's conviction. State v. Franco-Amador, No. WD59506 (Mo.App., W.D. Mar. 5, 2002). This Court granted respondent's motion for transfer on April 23, 2002.

ARGUMENT

The trial court did not err in denying appellant's motion for acquittal at the close of all the evidence because a reasonable juror could have found that appellant possessed 1,113.08 grams of methamphetamine.

Appellant claims that the trial court erred in overruling his motion for acquittal at the close of all the evidence because the evidence was insufficient to support his conviction for second-degree trafficking in a case where appellant was driving a car with 1,113.08 grams of methamphetamine hidden under the back seat.

In determining whether evidence is sufficient to sustain a conviction, courts do not weigh the evidence. State v. Crawford, 68 S.W.3d 406, 408 (Mo. banc 2002). Appellate review is "limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the appellant guilty beyond a reasonable doubt." Crawford, *supra*; State v. Brown, 902 S.W.2d 278, 288 (Mo. banc 1995), cert. denied 516 U.S. 1031 (1995). This Court should look at the evidence in the light most favorable to the verdict and give the State all reasonable inferences from the evidence. Crawford, *supra*; State v. Grim, 854 S.W.2d 403, 411 (Mo. banc 1993), cert. denied 510 U.S. 997 (1993). "Evidence and any inferences therefrom that do not support a finding of guilt are ignored." State v. O'Brien, 857 S.W.2d 212, 216 (Mo. banc 1993).

The elements of the crime of trafficking in the second degree are 1) possession or control of 2) more than thirty grams of methamphetamine. §195.223.9, RSMo 2000. The only element at issue in this case is possession of the methamphetamine. Possession is defined by statute as

> a person, with the knowledge of the presence and nature of a substance, has 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, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. 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 a substance, possession is joint.

§195.010(32), RSMo 2000.

Constructive possession requires "evidence that defendant had access to and control over the premises where the substance was found." State v. Purlee, 839 S.W.2d 584, 588 (Mo. banc 1992). In joint control cases, some further evidence other than the defendant's presence is required to connect the defendant to the drugs. Id. Constructive possession may be shown by circumstantial evidence. State v. Fuente, 871 S.W.2d 438, 442 (Mo. banc 1994); Purlee, *supra*, at 587; State v. Powell, 973 S.W.2d 556, 558 (Mo.App., W.D. 1998). Constructive possession will suffice to support a conviction when other facts support an inference of defendant's knowledge of the possession of the substance. Fuente, *supra*; State v. Smith, 11 S.W.3d 733, 736 (Mo.App., E.D. 1999); State v. Shinn, 921 S.W.2d 70, 72 (Mo.App., E.D. 1996). The fact that two or more people have joint control over the property is not inconsistent with the defendant's control over the property and the contraband. Powell, 973 S.W.2d at 559. Courts examine the totality of the circumstances to determine constructive

possession. Purlee, *supra*, at 589. Consciousness of guilt raises an inference of knowledge and control. State v. Smith, 33 S.W.3d 648, 653 (Mo.App., W.D. 2000).

1. Appellant constructively possessed 1,1113.08 grams of methamphetamine

Appellant in this case was driving the car containing 1.1 kilograms of methamphetamine. Appellant had both access to the car and control over the car because he was driving the car, and appellant thus had constructive possession of the methamphetamine. However, as appellant was not alone in the car, this case is one of joint possession, which requires a further showing of some evidence that connects appellant to the drugs. As will be discussed below, that evidence is amply provided by the strong odors of drug masking agents in the car, appellant's giving a false story to law enforcement and at trial, appellant's nervousness when stopped by a state trooper, appellant's flight after the trooper found the 1,113.08 grams of methamphetamine, and a roll of duct tape, which was used to package the drugs hidden in the car, under the front passenger seat of the car.

2. Masking agents in the car show appellant's knowledge of the drugs and control over the drugs

The jury could reasonably have inferred that the odors in the car were caused by drug masking agents and that appellant had to have known that drugs were in the car or that something else was amiss for at least one pound of black pepper to be dumped in the car. The following evidence adduced at trial shows the overwhelming smell of black pepper, spices, and air freshener inside the car and shows that this activity is common in the drug trade.

A. [Corporal Scism] Well, I was up at the vehicle itself with the window down. I could smell the strong odor of air freshener combined with spices, if you will, a lot of spices. I could just tell that there was something of that nature creating an odor within the vehicle.

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Q. [Prosecutor] What was the significance of that odor?

A. It's not uncommon for people to have an air freshener in the vehicle. It was a brand-new air freshener. It was extremely strong, combined with the fact that they had some kind of spice in there of something creating that odor of spices. And in my training and experience, I've found that a lot of the time the masking agents, such as spices or other things like that, air fresheners, are used to try to conceal the odor of contraband that may be in the vehicle.

*****

A. When I pulled the fabric that lines the inner fenders within the trunk away from that fender, I noted that there was a large amount of spice and what appears to be black pepper, actually poured into the rear fenders themselves, it was probably one to two inches deep of pepper or spices of some kind.

Q. Is that the odor you smelled?

A. Yes.

Q. Can you give the jury some indication of the strength of the odor when you first observed it?

A. It was extremely strong. Just picture a pound of black pepper dumped within your vehicle, how strong that odor would be, and that was what it was.

*****

A. I found more of same spices that I had found in the rear fenders, poured under the back seat cushion.

(Tr. 165, 170, 171). The air freshener, pepper and spices hit the officer's nose when he first approached the car, and he later found, in addition to the brand-new air freshener, over a pound of black pepper and other spices dumped in the car and in the bags with the drugs. The officer stated that these substances commonly are used as masking agents for drugs (Tr. 165.).

Odors of masking agents covering up the scent of drugs are evidence of a defendant's knowledge of the drugs. The Missouri Court of Appeals, Southern District, found in State v. Castellanos, 853 S.W.2d 384 (Mo.App., S.D. 1993), that a "very strong odor of deodorizers or air fresheners," among other factors, was a factor in determining that the evidence was sufficient to convict the defendant for trafficking over 31,000 grams of marijuana. Further, in State v. Mercado, 887 S.W.2d 688, 691 (Mo.App., S.D. 1994), the Missouri Court of Appeals, Southern District, stated that discernable odors, either "emitted by the marijuana or something used to mask an otherwise pungent smell" would be evidence of possession of drugs.[2]

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[2]The court in Mercado ultimately found that no scent of drugs or any masking agent was

noticeable in the van. Mercado, 887 S.W.2d at 691.

Courts from other jurisdictions have applied rationales similar to Castellanos and Mercado in holding that the odors of drug masking agents are valid factors in considering the sufficiency of the evidence. In United States v. Ojeda, 23 F.3d 1473 (8th Cir. 1994), the United States Court of Appeals for the Eighth Circuit dealt with a case in which, like the case at bar, police stopped a motorist for a traffic violation and found methamphetamine in the car. The car in Ojeda contained a "strong odor" of Pinesol, a cleaning agent "commonly used to mask drugs." Ojeda, 23 F.3d at 1474. The court concluded that "[t]he vehicle had a strong odor of pine that likely would lead a naive passenger to question its presence" and that this factor, among others, was sufficient to convict the defendant of possession of methamphetamine with intent to distribute. Id. at 1476. *See also* United States v. Ortiz-Ortiz, 57 F.3d 892, 895 (10th Cir. 1995)("entire car smelled strongly of perfume" one factor that led to a finding of sufficient evidence to convict for possession of marijuana); United States v. Sanchez-Lopez, 879 F.2d 541, 555 (9th Cir. 1989)(perfume masking the odor of drugs "highly relevant" to establish knowledge of the existence of the drugs); United States v. Guitierrez-Espinosa, 516 F.2d 249, 250 (9th Cir. 1975)(strong odor of room deodorizer in car relevant circumstantial evidence of possession of marijuana); State v. Reynaga, 643 So.2d 431, 437 (La. Ct. App. 1994)(three to four air fresheners concealing odor of marijuana); State v. Hernandez, 964 P.2d 825, 828 (N.M. Ct. App. 1998)(odor of silicone used to conceal the odor of drugs in false compartment); Fields v. State, 932 S.W.2d 97, 104 (Tex. App. 1996)(air freshener in car matched the air freshener masking the drugs). Therefore, the use of masking agents to cover up the smell of illegal drugs is evidence of a defendant's knowledge of the presence of the drugs.

In the case at bar, the car appellant was driving contained a strong odor caused by pepper and other spices dumped one to two inches deep in the fenders, poured under the back seat, and surrounding the drugs (Tr. 165, 170, 171). The smell of pepper was extremely strong (Tr. 170). Because of the very strong smell of the pepper and other spices, this case leads to the inference that "[t]he vehicle had a strong odor of [spices] that likely would lead a naive passenger to question its presence" Ojeda, 23 F.3d at 1476. The jury could reasonably infer from the strong smell of pepper in the car that appellant knew or should have known that the purpose of the pepper in the car was to mask drugs. The presence of the masking agents thus connects appellant to the drugs and establishes that appellant knew the drugs were in the car. Driving from Phoenix, Arizona, to Atlanta, Georgia, in a car reeking with pepper, spices, and air freshener, substances commonly used to mask the smell of drugs, provided the jury a reason to believe that appellant knew that the methamphetamine was in the car. The strong odor of masking agents is sufficient evidence to show that appellant knew about the methamphetamine.

Further, appellant's remaining in the car, with an strong odor of pepper that a "naive passenger" would have questioned, leads to a reasonable inference that not only did appellant know the drugs were in the car, but that appellant chose to remain in the car with the drugs and become part of the criminal enterprise. The jury could reasonably infer that appellant, in choosing to remain in a car with drugs and in driving that car, had control over the drugs. Control also is shown by the fact that appellant was being paid to drive the car from Phoenix to Atlanta (Tr. 273).[3] Therefore, the existence

[3]Appellant consistently states that he was paying the owner of the car for a ride. However, this

of the masking agents shows that appellant constructively possessed the drugs and that he knew that the car contained drugs.

3. Appellant's false story indicates a consciousness of guilt

Appellant testified that he was going from Phoenix, Arizona, to Atlanta, Georgia (Tr. 247). Appellant also told this story to the police (Tr. 273). This story is incredulous because Callaway County, Missouri, is not on or near any direct route from Phoenix to Atlanta. A direct route from Phoenix to Atlanta would pass through New Mexico, Texas, Arkansas or Louisiana, Alabama, Mississippi, and Georgia, but not mid-Missouri. Appellant's story on its face is not in line with the fact that appellant was arrested in Callaway County, Missouri. False stories or other false statements given are evidence of consciousness of guilt. State v. Hibbert, 14 S.W.3d 249, 253 (Mo.App., S.D. 2000); State v. Smith, 11 S.W.3d 733, 737 (Mo.App., E.D. 1999); State v. Revelle, 957 S.W.2d 428, 439 (Mo.App., W.D. 1998). The fact that appellant made this incredulous statement to the police and to the court only further exhibits his consciousness of guilt. Hibbert, *supra*; Smith, *supra*; Revelle, *supra*. Appellant's incredulous story buttresses an inference of his knowledge and control of the drugs.

4. Appellant's nervousness indicates a consciousness of guilt

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contention is not in the light most favorable to the verdict and thus should be disregarded. State v. O'Brien, 857 S.W.2d 212, 216 (Mo. banc 1993).

In addition to the masking agents, courts have held that "visible nervousness is one incriminating fact that will support a conviction if consistent with the totality of the circumstances." State v. Davis, 982 S.W.2d 739, 743 (Mo.App., E.D. 1998). Further, visible nervousness "supports an inference of awareness of a controlled substance." State v. Powell, 973 S.W.2d at 559; State v. Hernandez, 880 S.W.2d 336, 339 (Mo.App., W.D. 1994).

In the case at bar, appellant was visibly nervous when Corporal Scism stopped his car. However, as the following testimony shows, the nervousness was not just due to the traffic stop.

> Q. [Prosecutor] Yes. Why did you decide that you wanted to do that ? What circumstances about which interaction caused you to want to [search the car]?
>
> A. [Corporal Scism] There were several things which I'll refer to as indicators of illegal activity. The demeanor of both the occupants. Both seemed extremely nervous. There were certain body mannerisms they were exhibiting that led me to believe that something was wrong other than the initial violation that I stopped them for.
>
> Q. Now, did these continue after the time in which you issued your warning?
>
> A. Yes.
>
> Q. Is it your experience that that's common when you warn people for traffic violations that that type of nervousness continues afterwards?
>
> A. No. It's not uncommon for people to have somewhat of a heightened anxiety level when I initially stop them, but as that process goes on, and especially when they find out they're just getting a warning, that starts to diminish. They become a little more relaxed, realizing that I'm not a bad guy, I'm not going to hurt them, they're going to get a

warning and things. In this instance, he knew I was going to give him a warning, but as our contact continued, his anxiety level continued to go up.

Q. And which person are you referring to as "he"?

A. Actually, both occupants, but specifically the driver, Alejandro.

(Tr. 163-64). As this testimony shows, appellant's nervousness level continued to increase *after* the traffic portion of the stop was concluded. Nervousness such as this "supports an inference of awareness of a controlled substance." Powell, *supra*. Appellant's nervousness thus supports appellant's guilt.

5. Appellant's flight from the crime scene indicates a consciousness of guilt

The law is well settled that "a defendant's flight is admissible as tending to demonstrate a consciousness of guilt." State v. Davis, 982 S.W.2d 739, 743 (Mo.App., E.D. 1998); State v. Tracy, 918 S.W.2d 847, 851 (Mo.App., W.D. 1996); State v. Duncan, 958 S.W.2d 97, 101 (Mo.App., S.D. 1994). As appellant states, it is true that flight does not establish a defendant's guilty knowledge of a particular crime in comparison to other possible charges and is insufficient in and of itself to support a conviction. State v. Schwartz, 899 S.W.2d 140, 145 (Mo.App., S.D. 1995). However, as the Southern District pointed out in the next sentence, "flight ... can be a circumstance to be considered in connection with other evidence of the commission of a crime ... and shows a consciousness of guilt contrary to a theory of innocence." Id., citing State v. Dulany, 781 S.W.2d 52, 55 (Mo. banc 1989). "Coupled with other evidence, flight can be considered in support of a conviction." Id.

In this case, appellant fled from the Officer Scism *only after* Officer Scism had found the drugs. Appellant chose to flee by running across four lanes of interstate freeway. If appellant had

wanted to flee, as appellant suggests, merely for being an illegal alien, he could have fled at any time after the officer began to search the car. However, he did not. He fled only after the officer found the drugs and was about to put him under arrest for that crime. It is a reasonable inference from the evidence that appellant knew at that point that Officer Scism had found the drugs.

Further, the nature of the flight is indicative of guilt. Without audible communication[4], appellant and the passenger jumped up at the same time and ran in different directions so that the officer could not follow them both. This type of behavior suggests that they both knew about the drugs and the results of the officer's search. For these reasons, appellant's flight in this case operates to establish, in part, appellant's guilt.

6. The duct tape, along with other factors, shows appellant's consciousness of guilt

The drugs were found wrapped in duct tape (Tr. 182-83), and a roll of duct tape was found under the front passenger seat of the car that appellant was driving (Tr. 171). The arresting officer testified that "duct tape is commonly found to be an item which is used to wrap contraband in. I've found it wrapped around marijuana, cocaine, methamphetamine, all kinds of drugs" (Tr. 171). The presence of duct tape is a factor, like nervousness, which needs to be considered with the totality of the circumstances to determine guilt. See State v. Davis, 982 S.W.2d 739, 743 (Mo.App., E.D. 1998)(nervousness and totality of the circumstances). The presence of the duct tape shows that

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[4] Appellant contends that passenger José Efraín Amador told him to run. However, this contention is not in the light most favorable to the verdict and thus should be disregarded. State v. O'Brien, 857 S.W.2d 212, 216 (Mo. banc 1993).

appellant had the instrumentality needed to wrap the drugs hidden in the back seat of the car. Alone, the duct tape cannot prove guilt, but combined with the other factors in this case, its presence allows a reasonable juror to find appellant guilty beyond a reasonable doubt.

7. All factors in this case, taken together, provide sufficient evidence of appellant's guilt.

As discussed above and shown in the record, appellant constructively possessed the methamphetamine because he had control and access to it when he was driving the car. In addition, five factors buttress the inference that appellant possessed methamphetamine: the odors of masking agents inside the car, appellant's incredible story, nervousness that increased after the officer was going to let appellant off with a warning, flight from the scene of the traffic stop, and a roll of duct tape, the instrumentality used to package the 1,113.08 grams of methamphetamine, was under the front seat. These factors, taken together, would allow a reasonable juror to infer that appellant was in possession of the methamphetamine.

Appellant cites to State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999), State v. Smith, 33 S.W.3d 648 (Mo.App., W.D. 2000), 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) for the proposition that appellant never was in actual possession or control of the drugs and thus could not have been convicted (App. Sub. Br. 20-23). These cases do not aid appellant because all of these cases deals with situation where the defendant's only connection to the drugs and/or drug manufacturing apparatus was being in the same location as the drugs or the manufacturing apparatus. Withrow, *supra*, at 81 ("nothing beyond being truly present in the room truly

connects defendant to the manufacturing apparatus or the jar [of methamphetamine] in the closet."); Smith, *supra*, 33 S.W.3d at 653, 655 (no one had seen the defendant with the methamphetamine supplies or the substances used to manufacture methamphetamine and that defendant had not had exclusive possession of any of the facilities where the supplies were found); Condict, *supra*, at 786 ("this 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 of control of such items"); Janson, *supra*, at 554-55 (same holding); McClain, *supra*, at 226-27 (same holding); State v. Wiley, 522 S.W.2d 281, 292 (Mo. banc 1975)(same holding). In contrast, in the case at bar, factors, such as masking agents, nervousness, and flight, exist to show that appellant knew that the car he was in had methamphetamine in it. These additional factors tend to show that appellant had possession and control over the methamphetamine. These or any other additional factors were not present in Smith, Condict, Janson, and McClain. Therefore, Smith, Condict, Janson, and McClain are inapposite to the case at bar.

In the case at bar, in contrast to the above cases, the evidence shows that appellant was driving a car reeking with pepper, spices, and air freshener, which commonly mask drugs, and with duct tape, which was used to package the 1,113.08 grams of methamphetamine hidden in the back seat, under the front seat. The reasonable inference is that appellant knew that drugs were in the car. Appellant progressively exhibited more nervousness after the trooper gave him a warning. The reasonable inference is that appellant was guilty of a greater crime than the traffic infraction. Finally, appellant fled the scene, darting on foot across four lanes of I-70, only after the trooper found the drugs. These facts,

taken together, indicate that appellant was in constructive possession of the drugs. As such, the evidence is sufficient to sustain appellant's conviction and his point must fail.

CONCLUSION

For the foregoing reasons, respondent asks this Court to affirm appellant's conviction and sentence.

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 Rule 84.06 of this Court and contains 5,094 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, using Norton Anti-virus software, 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 ___ day of _____, 2002, to:

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