08-11151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

DEMARQUIS LADELLE WILLIAMS

Defendant/Appellant.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division
Case No. 3:08-CR-069-P (04)

BRIEF FOR THE APPELLANT, DEMARQUIS LADELLE WILLIAMS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

United States of America
Party

DeMarquis Ladell Williams
Party

Mr. Stephen Fahey
Assistant United States Attorney

Mr. Jordan Konig
Assistant United States Attorney

Ms. Susan Cowger
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Co-Defendant

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Respectfully submitted,

_/s/_____
Peter Smythe
Attorney of Record for the
Appellant

RECOMMENDATION ON ORAL ARGUMENT

Williams requests oral argument. This appeal deals with the significant sentencing issue of whether intended loss in a credit card case may be determined by the naked potential losses to the victims or whether it must be tethered to a defendant's actual or subjective intent. The heightened focus of oral argument will assist the Court in deciding this appeal.

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STATEMENT OF JURISDICTION

This is an appeal from a sentence rendered in the Northern District of Texas, Dallas Division, pursuant to a conviction of one count of Conspiracy to Traffic In and Use Unauthorized Access Devices, a violation of 18 U.S.C. § 371 and 18 U.S.C. § 1029(a)(2). The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. 3742. Notice of appeal (R. 66-67) was timely filed in accordance with RULE 4(b) of the FEDERAL RULES OF APPELLATE PROCEDURE.

STATEMENT OF THE ISSUES

I. The trial court erred by applying a 4-point § 2B1.1(b)(2)(B) enhancement to Williams's Base Offense Level because only eight victims suffered actual loss.

II. The trial court erred by using a flawed methodology to determine intended loss.

A. The trial court misapplied *Sowels* as a bright-line rule.

B. Potential victim risk alone cannot support enhancements.

C. The trial court errantly transferred the co-conspirator's subjective intent onto Williams for the intended loss amount.

STATEMENT OF THE CASE

Nature of the Case

On 5 March 2008, the grand jury returned a one-count indictment charging DeMarquis Williams with one count of Conspiracy to Traffic In and Use Unauthorized Access Devices in violation of 18 U.S.C. § 371 & 18 U.S.C. § 1029(a)(2). (R. 7-16.) After arraignment, on 15 July 2008, Williams entered an open guilty plea to the indictment.[1] (*See* R. 38-40.)

Trial Court

District Court, Northern District of Texas, Dallas Division, The Honorable Jorge Solis presiding.

Trial Court's Disposition

On 3 December 2008, upon hearing, Williams was sentenced to 60 months imprisonment and ordered to pay $53,138.22 in restitution. (R. 56-65; Tr. 16:6-18.) The district court also ordered a term of supervised release of three years. (R. 58; Tr. 16:22-23.)

Citations

The record consists of 2 volumes. Volume one is cited as (R. ___.). Volume two, the sentencing hearing transcript, is cited as (Tr. ___.). The transcript references reflect the original transcript pagination. The Presentence Report is cited as "PSR" and the Presentence Report Addendum is cited "PSR Add."

[1] At sentencing, the trial court referred to a plea agreement, but the defendant's guilty plea was not part of a plea agreement. (*See* Tr. 15:14 to 16:1.)

STATEMENT OF FACTS

Factual Background

DeMarquis Williams worked as a tollbooth operator at DFW Airport, Fort Worth, Texas. In late June or early July 2007, a black male driving a green Jaguar drove up to his tollbooth, identified himself as "D," and spoke to Williams about "making some extra money." (R. 32.) "D" gave Williams a credit card skimmer and told him to swipe his customers' credit cards through it before giving the cards back to them. (R. 32.) "D" explained to Williams that the skimmer "took a picture" of the customers' credit card information. (R. 32.)

Williams took the skimmer and began his credit card customers' cards through the machine. "D" later returned and gave Williams $2,000.00 in exchange for the skimmer. (R. 32.)

Williams was arrested after Citigroup Fraud Department reported that 22 credit card fraud cases under investigation had a common point in compromise in Williams. (PSR ¶ 27.) Williams was arrested with a skimmer in his possession. (PSR ¶ 27.) Williams admitted to skimming between 500 to 600 credit cards for "D."[2] (PSR ¶ 27.) Williams cooperated with the investigation and identified Cameron Davis, a co-defendant, as the individual identified as "D." (PSR ¶ 27.)

Sentencing Hearing

Williams's Presentence Report ("PSR"), prepared by the Probation Office, calculated a Base Offense Level of 6 under U.S.S.G. § 2B1.1(a).

[2] The Presentence Report noted that the exact total was 547 credit cards. (PSR ¶ 34.)

(PSR ¶ 50.) The Probation Office recommended that the district court apply an 18-level enhancement based upon an intended loss of $2,649,287.25 and another 4-level enhancement based upon a calculation of more than 50 victims. (PSR ¶ 50, PSR Add. IV.) The PSR also applied a 2-level enhancement for the use of the credit card skimmer for a subtotal Offense Level of 30. (PSR ¶ 50.) The PSR advised a guideline imprisonment range of 78 to 97 months after deduction of 2 points for Acceptance of Responsibility.[3] (PSR ¶ 96.) Recognizing that the statutory maximum for the offense was 60 months, the PSR prescribed a guideline sentence of 60 months. (PSR ¶ 96.)

Sentence

Williams objected to the 18-level and 4-level enhancements. (Tr. 3:7 to 9:2.) The court overruled the objections and calculated an Offense Level of 28 and a Guideline range of 78 to 97 months. (Tr. 9:3 to 10:11.) The court determined that the PSR's guideline range was appropriate (*see* Tr. 14:14 to 16:7), but recognized that the statutory maximum sentence for the offense was 60 months. The court sentenced Williams to the statutory maximum and ordered restitution in the amount of $53,138.22. (Tr. 16:6-14.)

[3] The PSR Addendum recommended a take-away of the two-point reduction, but the trial court restored the two points by sustaining the defendant's objection at sentencing. (*Compare* PSR Add. ¶ 47 *with* Tr. 16.4-8.)

SUMMARY OF THE ARGUMENTS

1. The trial court erred in applying U.S.S.G. § 2B1.1(b)(2)(B)'s 4-level victim enhancement to William's Base Offense Level. Although the overall offense involved 63 financial institutions, only eight suffered any actual loss. Since § 2B1.1(b)(2)(B)'s enhancement requires actual losses of 50 or more victims, the trial court erred in adding the victim enhancement on the basis of relevant conduct.

2. The trial court erred by misapplying this Court's holding in *United States v. Sowels*[4] as a bright-line rule for intended loss. *Sowels* applied, rather than supplanted, the rule that intended loss need be anchored by the defendant's subjective intent. The record is bereft of the necessary factual predicate of Williams's subjective intent to max out the skimmed credit cards and the court erred in transferring the co-conspirator's subjective intent relative to loss onto Williams, who had no knowledge of the larger conspiracy. Finally, the naked potential risk to victims cannot support the intended loss amount.

[4] *United States v. Sowels*, 998 F.2d 249 (5th Cir. 1993).

ARGUMENT

I. The trial court erred by applying a 4-point § 2B1.1(b)(2)(B) enhancement to Williams's Base Offense Level because only eight victims suffered actual loss.

The PSR pegged 63 financial institutions as victims of Williams's crime. (PSR ¶ 36.) The PSR acknowledged that, out of the 63, only eight banks and credit card companies sustained an actual monetary loss. (PSR ¶ 36.) It justified a 4-point victim enhancement under U.S.S.G. § 2B1.1(b)(2)(B), however, based on relevant conduct. The PSR Addendum averred:

> The credit card companies and banking institutions that issued the credit cards are the victims in this case. A victim is a person or entity that suffered a harm. The defendant compromised 63 institutions. Pursuant to USSG § 2B1.1, comment (n. 3(A)), "actual loss" is the reasonably foreseeable pecuniary harm which has a monetary measure that the defendant knew or should have known was a potential result of the offense. The defendant and codefendants were unable to use all of the credit cards prior to arrest to incur a loss, but that does not negate that the 63 institutions are not victims. Eight of the 63 institutions have supplied a loss; however, the case agent was unable to determine the loss amount sustained by other institutions due to the vast number of credit card numbers compromised. Furthermore, pursuant to USSG § 1B1.3(a)(1)(A) and (B), the defendant's acts of swiping at least 63 credit cards issued by different institutions is covered under relevant conduct.
>
> (PSR Add. V.)

At sentencing, Williams objected to the victim enhancement, arguing that numbering § 2B1.1(b)(2)(B) victims based on relevant conduct, rather than actual loss, was error. The trial court overruled the objection. (Tr. 5:17 to 6:2; 9:24 to 10:3.)

Standard of Review

A district court's interpretation or application of the Guidelines is reviewed *de novo* and its factual findings for clear error. *United States v. Conner*, 537 F.3d 480, 489-90 (5th Cir. 2008). As the classification of "victims" under U.S.S.G. § 2B1.1(b)(2)(B) involves an application of the Guidelines, the review is *de novo*.

Argument

The trial court erred by applying section 2B1.1(b)(2)(B)'s 4-level enhancement to Williams's Base Offense Level when only eight of 63 credit card companies or financial institutions involved suffered any actual loss.

Section 2B1.1(b)(2)(B) calls for a 4-level enhancement to a defendant's Base Offense Level if the offense involved 50 or more "victims."[5] "Victim" is defined to include "any person who sustained any part of the actual loss determined under *subsection (b)(1)*." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n. 1 (2007) (emphasis added). "Actual loss" is the "reasonably foreseeable pecuniary harm that resulted from the offense." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n. 3(A)(i) (2007). "Pecuniary harm" means "harm that is monetary or that otherwise is readily measurable in money" and "does not include emotional distress, harm to reputation, or other non-economic harm." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. 3(A)(iii) (2007).

[5] The November 1, 2007 edition of the Guidelines were used to calculate Williams's advisory Guideline. (PSR ¶ 48.)

The PSR acknowledged that only eight financial institutions incurred a pecuniary loss as that term is defined in the Application Notes. (PSR ¶ ¶ 36, 41.) Under a plain reading of the Application Notes, the financial institutions that did not report any actual losses cannot be classified as victims under § 2B1.1(b)(2)(B). *See United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008); *see also United States v. Icaza*, 492 F.3d 967, 970 (8th Cir. 2007) (only corporate parent that sustained actual loss was a victim); *United States v. Yagar*, 404 F.3d 967 (6th Cir. 2005). Since the Government offered no other evidence of actual losses,[6] the trial court erred in applying the enhancement.

The district court's misapplication of the § 2B1.1(b)(2)(B) requires vacation and remand, even without reaching the issue of reasonableness. *See United States v. Duhon*, 440 F.3d 711, 716 (5th Cir. 2006), (*citing United States v. Villegas*, 404 F.3d 355, 362 (5th Cir. 2005)). The Presentence Report calculated a Total Offense Level of 28 that prescribed a sentencing range of 78 to 97 months. (PSR ¶ 96.) While that range exceeded the statutory maximum of 60 months, if Williams's objection had been sustained the Total Offense Level would have been reduced to 24 with a prescribed range of 51-63 months. *See* ROGER W. HAINES, JR., FRANK O. BOWMAN III, JENNIFER C. WOLL, *Federal Sentencing Guidelines Handbook* Sentencing Table (Thomson West 2007 ed.). Though the reduced guideline range overlaps the statutory maximum, the trial court's error was not harmless. *See United States v.*

[6] *See Conner*, 537 F.3d at 491-92 (the Government bears the burden of proving facts supporting an enhancement).

Ahmed, 324 F.3d 368, 374 (5th Cir. 2003) (not harmless even if Guideline ranges overlapped one another). The trial court opined that a guideline sentence was appropriate (Tr. 16:2-5) and there is no evidence in the record that the trial court would have selected a 60-month sentence with a prescribed guideline range of 51 to 63 months. *See United States v. Surasky*, 976 F.2d 242, 247 (5th Cir. 1992) (*quoting Williams v. United States*, 503 U.S. 193, 203, 117 L. Ed. 2d 341, 112 S. Ct. 1112 (1992)). Thus, the trial court's error requires vacation and remand.

II. The trial court erred by using a flawed methodology for determining intended loss.

Williams objected to the PSR's use of this Court's holding in *Sowels*[7] as a bright-line rule for determining the intended loss amount. (*see* Tr. 3:11 to 5:16.) The trial court overruled the objection (Tr. 9:24-25) and employed the PSR's flawed methodology to include an 18-level enhancement to his Base Offense Level. The court's flawed methodology for determining intended loss requires vacation and remand.

Standard of Review

The district court's factual findings of loss amount are reviewed for clear error. *United States v. Conner*, 537 F.3d 480, 489-90 (5th Cir. 2008). The court's adoption of *Sowels*, however, as a bright-line rule for determining loss in credit card schemes and its derivative use of constructive intent, implicates an application of the Guidelines which is reviewed *de novo*. *See United States v. Saacks*, 131 F.3d 540, 542-43 (5th Cir. 1997); *United States v. Krenning*, 93 F.3d 1257, 1270 (5th Cir. 1996).

A. The trial court misapplied *Sowels* as a bright-line rule.

The PSR failed to make any findings as to Williams's subjective criminal intent relative to intended loss. Instead of tethering its assessment of the guideline enhancement to factual evidence of intent, the PSR concluded that he intended to cause a loss of $2,649,287.50 on the bare fact that the offense involved credit cards. The PSR held:

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[7] *United States v. Sowels*, 998 F.2d 249 (5th Cir. 1993).

> According to U.S. v. Sowels, 998 F.2d 249 (5th Cir. 1993), if the credit card was obtained by theft, the proper measure of loss is the credit limit of the stolen credit card. Of the 547 devices swiped, the credit limit was determined on 339 of the credit card numbers. The limit for the credit cards known was $2,545,287.25. The limit for the 208 remaining credit cards were given the value of $500 pursuant to USSG § 2B1.1, comment. (n.3(F)(i)), which states that in a case involving any counterfeit access device, loss includes any unauthorized charges made with the counterfeit access device and shall not be less than $500 per access device. Therefore, the credit card limits determined on the 208 credit card numbers total $104,000. Thus, Williams is held accountable for an intended loss amount of $2,649,287.25.[8] (PSR ¶ 35.)

The trial court failed to make any additional findings of Williams's subjective or actual intent to max out the skimmed credit cards. Indeed, at sentencing the court showed its hand in using the PSR's factually untethered "proper measure of loss" rule when it said:

> Well, and I have read your memorandums, but I think Probation has it right. *That is typically the way we approach loss amounts in these kinds of cases.* That is . . . the greater of the actual loss versus intended loss. . . . *And we don't know exactly what they knew or didn't know about these cards.* They were stealing information. *And the intent certainly could have been there to use their cards to their maximum*, and that is established by the facts surrounding the stealing and scheme. (Tr. 9:4-15.) (emphasis supplied.)

The trial court's reliance on *Sowels's* holding as a bright-line rule for blindly employing the aggregate limits of the credit cards as "the proper measure of loss" "in these kinds of cases" is misplaced. *Sowels* applied, rather than supplanted, the rule that intended loss must be

[8] The PSR Addendum, while asserting that its loss amount calculation was based on intended loss, errantly substituted the definition of actual loss, U.S.S.G. § 2B1.1, cmt. n.3(A)(iv), for intended loss. *See* PSR Add. IV *and compare United States v. Goss*, 549 F.3d 1013, 1016 (5th Cir. 2008) (definitions of actual and intended loss).

anchored by a defendant's subjective intent. *See United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003). *Sowels* presented a "unique" case where the sentencing judge was confronted by a defendant with a storied history of stolen credit cards, an identifiable modus operandi, and a conspicuous plan to steal and give away stolen credit cards. *Sowels*, 998 F.2d. at 252. Based upon the substantial amount of facts before it and the fact that Sowels's interception of the cards from the mail wholly deprived the owners of their use, the court rightly found that Sowels possessed the subjective intent to use all the available credit on the cards.[9] *Id*. at 250 ("the intended loss *undoubtedly* was the credit available under the credit cards" (emphasis added)).

The essential facts supporting the *Sowels* court's subjective intent findings are not present here. *Cf. United States v. Say*, 923 F.Supp. 611, 614-15 (D. Vt. 1995) (dearth of information as to defendant's knowledge of larger conspiracy would lead to speculative intended loss). Unlike the defendant in *Sowels*, Williams was a first-time offender who did not invent the scheme, who did not recruit others into the scheme, who did not present the court with a past of credit card abuse, and who did not subjectively set out to sell or give away credit cards to others. There was no evidence adduced in the PSR or at the sentencing that Williams subjectively intended to max out any of the subject cards or that he was subjectively aware of the larger conspiracy. *See Sanders*, 343 F.3d at

[9] The PSR Addendum refers to "maximum credit limit" when *Sowels* stands for the "available credit limit." *Compare* PSR Add. IV *with Sowels*, 998 F.2d at 250. It is unclear whether the PSR's verbiage means "the maximum available credit."

527 (it is the government's burden to prove subjective intent for enhancement). The evidence demonstrates that Williams's offense was complete when he was paid $2,000.00 and turned the skimming machine back over to "D."[10]

A sentencing judge may find sufficient facts to hold the aggregate of available credit limits as the intended loss, but he cannot assess that measure while casting a blind eye to the defendant's subjective or actual intent. *Cf. United States v. Hill*, 42 F.3d 914 (5th Cir. 1995) (inclusion of full amount of loan appropriate when facts indicated defendant intended a loss of face value). Indeed, a court's speculative ideas as to what a defendant "could have intended" are not sufficient to support a sentencing enhancement. *United States v. Lee*, 427 F.3d 881, 893 (5th Cir. 2005) ("A sentencing judge . . . may not speculate about the existence of a fact that would permit a more severe sentence."). In the absence of facts indicating Williams's subjective knowledge of the larger conspiracy or intent to max out the available credit, the presumed or actual loss at the time of his transfer of the skimming machine to "D" should control.[11]

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[10] The *Sowels* court recognized the presence of completed offenses within the larger conspiracy. *See Sowels*, 998 F.2d at 252.

[11] The special rule of U.S.S.G. § 2B1.1, cmt. n.3(F)(i) would apply in such a situation. *See, e.g., United States v. Carralero*, 195 Fed. Appx. 874, 878 (11th Cir. 2006) (unpublished per curiam) *and United States v. Say*, 923 F.Supp. 611, 613-15 (D. Vt. 1995).

B. Potential victim risk alone cannot support enhancements.

As justification for the 18-level enhancement, the trial court pointed to the potential risk that Williams's offense posed to the victims. The court said:

> And he chose to accept that $2,000, but *he put at risk* over 500 different accounts, and that is a decision that he made for whatever reasons, so he has to bear responsibility for the *potential consequences* of that conduct. (Tr. 12:2-5.) (emphasis supplied.)
>
> As we stated earlier, this Defendant, by skimming cards of innocent people that passed through the toll booth at D/FW airport *put at risk* over 500 people that used cards at the airport. And if this conspiracy had not been stopped where it had been, all of those people *potentially could have been victimized*. We believe a Guidelines sentence of 60 months is appropriate. (Tr. 14:5-11) (emphasis supplied.)
>
> I have had two others that were sentenced to less. One of them was involved with actually providing the skimmer, but I think he was involved with like 30 something cards. The other individual was 18, and in this one we have 547, so the magnitude just is not comparable, what Mr. Williams did compared to what those individuals did. That is why they received lower sentences, because they didn't *put at risk* as many individuals as occurred here where we have over 500 individuals *being placed at risk*. So I think the Guideline range is appropriate in this case. (Tr. 21:2-12.) (emphasis supplied.)

The trial court's methodology of gauging the potential risk to victims to calculate the proper guideline is flawed. Under Application Note 3 of Section 2B1.1, "intended loss" is defined as the "pecuniary harm that was intended to result from the offense." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n. 3(A)(ii) (2007). The Guidelines' term of intended loss refers solely and specifically to the defendant's

subjective expectation and not to the naked potential risk of loss to which he might have exposed his victims. *See United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003) (loss determination must be supported by actual intent); *see also United States v. Yeaman*, 194 F.3d 442, 460 (3rd Cir. 1999).

The PSR, with its bright-line *Sowels* rule, failed to identify or connect any potential risk of loss of the victims to Williams's subjective intent. The trial court's sentencing colloquy belies the fact that its analysis of potential consequences or risks to the victims was divorced from a factual basis of subjective or actual intent. (*See* Tr. 9:4-15.) Without the anchor of subjective intent, the intended loss assessed was determined in error.

C. The trial court errantly transferred the co-conspirator's subjective intent onto Williams for the intended loss amount.

Working as a tollbooth operator at DFW Airport, Williams was approached by a man who identified himself only as "D" who offered him a chance to "make some money." "D" gave Williams a small plastic box and told him to push a button on the box until a light turned green and thereafter swipe his customers' credit cards through the box. "D" advised Williams that the box took pictures of the credit card information. (PSR ¶¶ 32, 43, 44.) Williams accepted D's offer and skimmed his customers' credit cards for the sum of $2,000.00, a sum directly paid by "D." Significantly "D" did not explain to Williams what

his intentions were with regard to the small plastic box, the skimmed credit card information, or the larger conspiracy.

The trial court, in justifying the guideline enhancement regarding intended loss, apparently subsumed "D"'s subjective intent onto Williams:

> *And we don't know exactly what they knew or didn't know about the cards.* They were stealing information. *And the intent certainly could have been there to use their cards to their maximum*, and that is established by the facts surrounding their stealing scheme. So I don't think it is after-the-fact determination.
>
> The $500 is simply to give us some guidance in the cases where we see no information. We don't know what the credit balance is. We don't receive any information, so there is an arbitrary amount that is used, $500, *because obviously there was some intent in each of these cards when they were stealing them to use them and to utilize those cards to obtain property that wasn't theirs.* (Tr. 9:11-23.) (emphasis supplied.)

The court's theory of Williams's intended loss appears to be that Williams intended to engage in a conspiracy, thus satisfying the element of intentionality in the phrase "intended loss," and then, by operation of the relevant conduct guideline, became chargeable with the foreseeable conduct and intentions of "D" regardless of whether he actually desired "D" to act as he did or even foresaw that "D" might have. *See* ROGER W. HAINES, JR., FRANK O. BOWMAN, III, JENNIFER C. WOLL, *Federal Sentencing Guidelines Handbook* 348 (Thomson West 2007 ed.). This theory of loss determination is invalid as this Court has consistently held that intended loss must be supported by the defendant's own subjective or actual intent. *United States v. Hill*, 42 F.3d 914, 919 (5th

Cir. 1995); *see also United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003). The court's flawed methodology of determining intended loss without consideration of the defendant's subjective intent requires vacation and remand, even without visiting the issue of the reasonableness of the sentence. *See United States v. Duhon*, 440 F.3d 711, 716 (5th Cir. 2006)

PRAYER

The defendant prays that this Court vacate his sentence and remand the case for a new sentencing hearing consistent with the issues presented in this appeal.

Respectfully submitted,

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Certificate of Service

I, Peter Smythe, certify that today, __ March 2009, a copy of the brief for Appellant, a copy of the record excerpts, and the official record in this case were served upon Ms. Susan Cowger, by hand delivery, at 1100 Commerce, Suite 300, Dallas, Texas 75243.

/s/
Peter Smythe

CERTIFICATE OF COMPLIANCE

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Peter Smythe
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