08-11151

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEMARQUIS LADELL WILLIAMS,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary in this case. The record is short, and the issues can be resolved based on the record and established law. Accordingly, the United States believes that oral argument would not significantly aid the Court in its decisional process. *See* Fed. R. App. P. 34(a)(2)(c).

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STATEMENT OF JURISDICTION

This is a direct appeal from a sentence in a criminal case. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. Williams's notice of appeal was filed timely, and this Court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291. (R. 66-7.)[1] Fed. R. App. P. 4(b).

[1]The record consists of two volumes. Volume one is cited as (R. ___.). Volume two, the transcript of Williams's sentencing hearing, will be cited as (Tr. ___.). All record citations are to the "USCA5" page numbers. The sentencing materials not included in the record volumes, such as the Presentence Report ("PSR"), will be cited according to their titles.

STATEMENT OF THE ISSUES

1. Was the application of a four-point enhancement under § 2B1.1(b)(2)(B) harmless error where the 60-month sentence received by Williams is within the advisory guideline range that would result from not applying the enhancement and the court's comments indicated it would have chosen 60 months in any event?

2. Did the district court clearly err in calculating, for sentencing purposes, the amount of loss resulting from Williams's theft of 547 credit card numbers?

STATEMENT OF THE CASE

On March 5, 2008, the grand jury charged DeMarquis Ladell Williams and three co-conspirators in a one-count indictment with conspiracy to traffic in and use authorized access devices, in violation of 18 U.S.C. § 371 (18 U.S.C. § 1029(a)(2)). (R. 7-11.) Williams pled guilty without a plea agreement. (R. 4/Docket Sheet.) The district court sentenced Williams to 60 months' imprisonment and three years' supervised release. (R 57-8.) He timely filed a notice of appeal on December 9, 2008. (R. 56-7.)

STATEMENT OF FACTS

Facts of the Offense

In June 2007, DeMarquis Williams was working as a tollbooth operator at Dallas-Fort Worth International (DFW) Airport. (PSR ¶ 27.) According to Williams's factual resume filed in the district court, in late June or early July 2007, a black man driving a green Jaguar drove up to Williams's tollbooth, identified himself as "D," and spoke to Williams "about making some extra money." (R. 32.) The man, whom Williams later identified as co-conspirator Curtis Davis, gave Williams a credit card skimming device and explained how to "swipe [Williams's] customers' credit cards through it." (*Id*.; PSR ¶ 27.) "D" explained to Williams that the skimmer "took a picture" of each customer's credit card information. (R. 32.)

After receiving the skimmer from "D," Williams began to swipe the credit cards of airport customers passing through his tollbooth. (PSR ¶ 43.) When an airport customer gave Williams his credit card for payment of parking fees, Williams quickly would swipe the card through the skimmer before handing the card back to the customer. (*Id*.) After swiping credit cards for approximately one month, Williams met "D" at the employee parking lot of DFW Airport and handed over the skimmer in exchange for $2,000. (*Id*.)

On August 3, 2007, "D" drove to Williams's tollbooth at DFW Airport and returned the skimmer to Williams. (PSR ¶ 44.) Williams resumed the scheme of swiping the credit cards of unsuspecting airport customers through the skimmer. (*Id*.)

While investigating a group of credit card fraud cases, Citigroup's fraud department informed law enforcement that all of the cases had a common point of compromise: the credit cards had been used to pay parking fees at DFW Airport. (PSR ¶ 27.) On August 7, 2007, DFW Airport Police arrested Williams with a skimmer in his possession. (*Id*.) Williams admitted to skimming between 500 and 600 credit card numbers. (*Id*.) Investigation by federal agents revealed that Williams had swiped 547 individual credit cards by the time of his arrest, ultimately victimizing 63 various banking and credit card companies. (PSR ¶ 34.) Williams admitted to the probation officer assigned to his case that he "continued to commit this offense until [he] was arrested on August 7, 2007." (PSR ¶ 44.)

The PSR and its Objections

Prior to Williams's sentencing hearing, the probation officer prepared a PSR. (PSR ¶ 48.) It found that, pursuant to USSG § 2B1.1, the base offense level for conspiring to traffic in and use unauthorized access devices was six. (PSR ¶ 22.) The offense level was increased by 18 based upon an intended loss of $2,649,287.25. This loss amount was computed using the total of the known

credit limits of 339 of the 547 credit cards swiped by Williams ($2,545,287.25), and assigning the remaining 208 credit cards a limit of $500 each, pursuant to § 2B1.1, comment n. 3(F)(i), for an additional loss figure of $104,000. (PSR ¶ 35.) The probation officer also recommended a four-level enhancement due to the number of victims involved (more than 50), and a two-level enhancement because the offense involved the trafficking of unauthorized access devices. (PSR ¶ 50.) After applying a two-level reduction for acceptance of responsibility, the total offense level was 28. (PSR ¶ 55-6.) Based on this offense level and a Criminal History Category of I, Williams's advisory guideline range was 78 to 97 months. (PSR ¶ 96.) Recognizing that the statutory maximum for a violation of 18 U.S.C. § 371 was 60 months, the probation officer recommended a guideline sentence of 60 months. (*Id.*)

Williams objected to the PSR on two principal grounds. First, he contested the calculation of the intended loss amount, arguing that it should not include the known credit limits for 339 of the 547 cards because there was no evidence that Williams intended to use the cards up to their maximum limits. (Def.'s Objections to PSR at 2-4.) Williams argued that the proper loss amount under § 2B1.1(b)(1) was the actual loss amount on those cards with known credit limits ($53,138.22), added to the total for the 208 cards with unknown limits ($104,000), for a total loss figure of $157,138.22. (*Id.*)

Second, Williams argued that the four-level increase for the offense involving more than 50 victims was improper because only eight of the 63 banks and credit card companies victimized by Williams had reported an actual loss. (*Id*. at 4-5.)

The probation officer rejected both of Williams's objections. (Add. to PSR at 2-3.) She reiterated that intended loss was the appropriate measure in this case because the loss Williams intended to inflict exceeded the actual loss sustained by the victims due to the arrest of the conspirators before all of the cards swiped by Williams could be used. (*Id*. at 2.) The probation officer noted that once Williams had swiped the credit cards on the skimmer and the skimmer was downloaded, the maximum credit limit for each card could be accessed. (*Id*. at 2.)

The probation officer also did not accept Williams's objection to the four-level enhancement for more than 50 victims. (*Id*. at 4.) Defining a victim as "a person or entity that suffered a harm," she noted that 63 financial institutions had been compromised by Williams's skimming of credit cards at DFW Airport, and thus were victims of the crime. (*Id*.)

The Addendum to the PSR also recommended that two levels credited to Williams for acceptance of responsibility be withdrawn because Williams had

admitted his continued use of marijuana while on pretrial supervision.[2] (*Id*. at 5.) Thus, the resulting total offense level was 30, and the new advisory guideline range was 97 to 121 months. (*Id*. at 7.) The probation officer again noted the statutory maximum for Williams's offense was 60 months, and thus a guideline sentence would be 60 months. (*Id*.)

The Sentencing Hearing

At sentencing, Williams orally objected to the 18-level enhancement for loss amount pursuant to § 2B1.1(b)(1) and the four-level enhancement for the number of victims under § 2B1.1(b)(2). (Tr. 9:7-12:2.) The district court overruled these objections, left the credit for acceptance of responsibility undisturbed, and concluded that Williams's offense level was 28 and his Criminal History Category was I, making the advisory guideline range 78 to 97 months. (Tr. 15:4-16:11.) After allocution, the court sentenced Williams to 60 months' imprisonment, the statutory maximum for his conspiracy offense. (Tr. 22:6-10.)

[2] Williams's release was revoked on November 25, 2008, due to his use of marijuana while on pretrial supervision. (R. 49-51.)

SUMMARY OF THE ARGUMENT

First, although Williams improperly received a four-level enhancement for victims that did not suffer actual losses, this error was harmless and does not require remand. The 60-month sentence received by Williams is within the advisory guideline range that would have resulted if the enhancement were not applied, and the record adequately demonstrates that the district court would have imposed the same sentence absent the guidelines error.

Second, the district court did not clearly err in calculating the loss amount. In determining the intended loss from an offense, courts focus on the dollar amount placed at risk by the defendant's conduct. Here, the evidence demonstrated that Williams placed the credit limits of the affected credit cards at risk by skimming the cards and providing their information to a co-conspirator. Moreover, contrary to Williams's assertion, his intent to cause the loss was demonstrated by (1) his admission that he understood that the skimming device was capturing the credit card information of DFW Airport customers; (2) his transfer of the skimming device with hundreds of credit card numbers to a co-conspirator in exchange for $2,000; and (3) his possession of a skimming device when arrested, indicating his involvement in the offense was not complete. Under these circumstances, the district court did not err in determining the loss, and it certainly did not clearly err.

ARGUMENT AND AUTHORITIES

1. The application of a four-level victim enhancement to Williams was harmless error and does not require reversal because the 60-month sentence still falls within the properly calculated guideline range and is reasonable.

Standard of Review

In reviewing a sentencing decision, this Court first considers whether the district court committed a significant procedural error, such as improperly calculating the guideline range, treating the guidelines as mandatory, or selecting a sentence based on clearly erroneous facts. *Gall v. United States*, __ U.S. __, 128 S.Ct. 586, 597 (2007). If the sentence is procedurally sound, this Court then considers the "substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id*. In this bifurcated review process, a district court's interpretation and application of the guidelines is reviewed *de novo* and its factual findings for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008).

This Court has held that not all errors in determining a defendant's guideline sentence require reversal. *United States v. Bonilla*, 524 F.3d 647, 656 (5th Cir. 2008). A procedural error is harmless if "the error did not affect the district court's selection of the sentence imposed." *United States v. Delgado-Martinez*, __ F.3d __, 2009 WL 902390, at *2 (5th Cir. Apr. 6, 2009) (quoting

Williams v. United States, 503 U.S. 193, 203, 112 S.Ct. 1112 (1992)). The party seeking to uphold the sentence must point to evidence in the record that the district court "had a particular sentence in mind and would have imposed it, notwithstanding the error made in arriving at the defendant's guideline range." *United States v. Huskey*, 137 F.3d 283, 289 (5th Cir. 1998).

Discussion

A. The application of a four-level victim enhancement to Williams's base offense level was harmless error.

The government concedes that it was error for Williams to receive a four-level enhancement under § 2B1.1(b)(2)(B). This enhancement applies when an offense involves 50 or more "victims."[3] In the application notes to § 2B1.1, "victim" is defined to include "any person who sustained any part of the *actual loss* determined under subsection (b)(1)." USSG § 2B1.1, comment. (n.1) (emphasis added). "Actual loss" is "the reasonably foreseeable pecuniary harm that resulted from the offense." *Id*. (n.3(A)(i)). "Pecuniary harm" means "harm that is monetary or that otherwise is measurable in money." *Id*. (n.3(A)(iii)). Here, only eight of the 63 financial institutions that had issued the credit cards improperly skimmed by Williams suffered an "actual loss" of $53,138.22 before law enforcement ended the criminal conspiracy. (PSR ¶¶ 36-41.) Thus, only those

[3] Williams's advisory guideline range was calculated using the November 1, 2007 edition of the Sentencing Guidelines. (PSR ¶ 48.)

eight financial institutions would qualify as "victims" under the plain language of § 2B1.1, and it was error for all 63 banks to be counted in calculating the four-level enhancement for more than 50 "victims." *See*, *e.g.*, *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008) (recognizing that, under language of § 2B1.1, "actual loss" must be suffered to qualify as a "victim" under § 2B1.1(b)(2)).

This error, however, was harmless and does not require reversal, for two reasons. First, the 60-month sentence received by Williams is within the advisory guideline range that would have resulted if the enhancement were not applied. Without the four-level victim enhancement, Williams's base offense level would have been 24, with a prescribed guideline range of 51-63 months. While not dispositive, the fact that Williams's actual sentence falls within the properly calculated guideline range, and is three months less than the maximum sentence under that range, is relevant to the harmless-error analysis. *See Delgado-Martinez*, __ F.3d __, 2009 WL 902390, at *3.

Second, the record adequately demonstrates that the district court would have imposed the statutory maximum absent the guideline error. Recognizing Williams's importance to the conspiracy to traffic in and use unauthorized access devices as the person improperly skimming credit card information, the district court noted that "the loss could not have occurred but for [Williams's]

participation." (Tr. 17:20-1.) In its sentencing colloquy, the district court again noted the seriousness of Williams's crime:

> Obviously this is a serious crime because of the magnitude. Any crime involving identity theft, potential identity theft, is serious because of the consequences to the victims and what can happen. But this is a crime of the magnitude, when you are dealing with over 500 cards that were skimmed improperly, that is why the Guidelines are so high, and I think this qualifies as a serious offense.

(Tr. 20:19-21:1.) After observing that Williams's guideline range was 78-97 months, the district court also commented that Williams "received a break" by pleading guilty to a conspiracy charge with its 60-month maximum, rather than an underlying violation of 18 U.S.C. § 1029 that would have exposed him to a sentence in the 78-97 month range. (Tr. 20:14-15; 21:14-18.) Finally, the district court also referred to the "magnitude" of Williams's offense when stating that the proposed guideline range of 78 to 97 months was "reasonable" and "appropriate":

> So I think the Guideline range is reasonable in light of the conduct that is involved here, the type of crime, and the magnitude of the crime, considering the factors of [§] 3553, so I think the Guideline range is appropriate.

(Tr. 22:2-5.)

This case differs in an important respect from the recent decision in *Delgado-Martinez*. In that case, the Court determined that an error in the defendant's guidelines calculation was not harmless where the district court

"specifically noted that it found 'a fair and reasonable sentence to be at the *bottom* of the guidelines, 30 months incarceration.'" *Delgado-Martinez*, __ F.3d __, 2009 WL 902390, at *3. Here, in contrast, there is no indication in the record that the district court "consciously selected from the low end of what it believed to be the available range." *Id*. Instead, the district court commented on the seriousness and magnitude of Williams's crime, noted that the guideline range of 78-97 months was "reasonable" and "appropriate," and suggested that the 60-month sentence imposed was below that range only because of the statutory maximum. Given these indicators of the court's intent to impose the statutory maximum regardless of the guideline range, the error was harmless, and remand of this case for resentencing is unnecessary.

2. The district court did not clearly err in calculating the loss amount.

Standard of Review

Williams objected to the loss calculation at sentencing. (Tr. 9:11-11:16.) Therefore, this Court reviews the loss amount, which is a factual finding, for clear error. *United States v. Tedder*, 81 F.3d 549, 550 (5th Cir. 1996). "In order to satisfy this clear error test[,] all that is necessary is that the finding be plausible in light of the record as a whole." *United States v. Edwards*, 303 F.3d 606, 645 (5th Cir. 2002).

Although Williams claims that he is challenging the district court's application of the Guidelines, and thus is entitled to *de novo* review, his appeal focuses solely on the alleged lack of evidence supporting his intent to cause a loss on the stolen credit cards, which is a question of fact. *United States v. Hill*, 42 F.3d 914, 919 (5th Cir. 1995).

Discussion

Williams argues that there is insufficient evidence of his subjective intent to cause the intended loss to the credit cards he skimmed. This assertion is based on his belief that (1) this case does not have the "essential facts" that supported this Court's holding in *United States v. Sowels*, 998 F.2d 249 (5th Cir. 1993), regarding subjective intent to cause intended loss; (2) the district court supported its loss calculation by considering "potential victim risk" without connecting this risk to Williams's subjective intent; and (3) the district court erroneously transferred the subjective intent of co-conspirator "D" onto Williams to support its determination of the intended loss amount. (Brief at 10-17.)

Williams's argument lacks merit because it underestimates the evidence against him, which showed that he understood the skimmer was capturing the credit card information of DFW Airport customers, and that he gave the skimming device to a co-conspirator in exchange for $2,000 after skimming 547 credit cards of airport customers. Williams also admitted that he continued to skim credit

cards until his arrest on August 7, 2007. Based on this evidence, the district court did not clearly err in including the credit limits of the stolen credit cards in the loss figure.

A. District courts determine an intended loss in credit card cases by focusing on the total available credit limit of the cards placed at risk, and reasonable estimates are sufficient.

Under USSG § 2B1.1, a district court is directed to estimate the amount of loss involved in a defendant's economic offense, increasing the base offense level as the amount of loss increases. *See* USSG § 2B1.1; *United States v. Harms*, 442 F.3d 367, 379 (5th Cir. 2006). The section provides that "loss is the greater of actual loss or intended loss." USSG § 2B1.1, comment. (n.3(A)). Intended loss is at issue in this case, and it "(i) means the pecuniary harm that was intended to result from the offense; and (ii) includes intended pecuniary harm that would have been impossible or unlikely to occur (*e.g.*, as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." USSG § 2B1.1, comment. (n.3(A)(ii)).

When determining intended loss in cases involving stolen credit cards, this Court looks to the total available credit limit of the cards placed at risk by a defendant's conduct – not the amount actually taken or obtained. *Sowels*, 998 F.2d at 251. In *Sowels*, the defendant stole mail containing credit cards and stipulated to previously stealing and using other credit cards from the mail. *Id*. at

250. The district court used the credit limits of the stolen cards to determine the loss amount, and this Court affirmed. *Id.* at 250-51. In doing so, the Court relied on *United States v. Mordi*, No. 92-1675, 992 F.2d 323 (5th Cir. 1993) (unpublished), which also involved stolen credit cards and used the credit limits to determine loss amount because that was the amount the defendant put at risk: "Because 'Mordi put his victims at risk for the aggregate amount of the unused balances of all of the credit cards' limits,' we did not consider dispositive the fact that he did not actually use the entire credit limit." *Id*. at 251, *quoting Mordi*, No. 92-1675 at 9. Applying *Mordi*, this Court determined that "the district court's loss calculation is plausible in light of the record as a whole." *Id*.

The holding in *Sowels* is supported by other Fifth Circuit precedent calculating the intended loss for stolen or fraudulently obtained property, including credit cards. *See*, *e.g.*, *United States v. Smith*, 46 Fed. Appx. 225 (5th Cir. 2002) (unpublished) ("Under our cases, when a defendant has stolen a credit card, the total available credit limit of the card may be used as a measure of intended loss, even when the defendant has not used the card and does not know its credit limit"); *United States v. Isibor*, No. 94-10072, 1994 WL 684561, at *1 (5th Cir. Nov. 15, 1994) (unpublished) ("This Court has expressly approved the use of the combined credit limits of stolen credit cards when determining the amount of loss for sentencing purposes"); *United States v. Wimbish*, 980 F.2d

312, 315-316 (5th Cir. 1992), *abrogated on other grounds*, *Stinson v. United States*, 508 U.S. 36 (1993) (holding that the face value of stolen and forged checks was properly used as an intended loss because the victims were put at risk for the full face value of their checks).

This Court applies deferential standards in evaluating the district court's loss calculation. Like any other factual findings made by a court at sentencing, the amount of loss need only be proven by a preponderance of the evidence. *United States v. Loe*, 262 F.3d 427, 437 (5th Cir. 2001). The district court does not have to determine a loss amount with precision; rather, it can make a "reasonable estimate given the available information." *United States v. Edwards*, 303 F.3d 606, 645 (5th Cir. 2002); *see* USSG § 2B1.1, comment. (n.3(c)). Furthermore, because "[t]he sentencing judge is in a unique position to assess the evidence and estimate the loss based on that evidence[,] ... the court's loss determination is entitled to appropriate deference." USSG § 2B1.1, comment. (n.3(c)).

B. Williams's conduct and admissions support the district court's determination of loss.

Given the standards discussed above, the district court certainly did not clearly err in agreeing with the PSR and its addendum that the amount of intended loss was $2,649,287.25. (Tr. 15:4-16:11; PSR ¶ 35.) The evidence before the court showed that: (1) Williams was instructed in the use of a credit card skimmer

by a co-conspirator, and he admitted in his factual resume that he understood the skimmer was capturing the credit card information of DFW Airport customers; (2) after skimming 547 credit cards of airport customers, Williams transferred the skimming device with the credit card information to a co-conspirator in exchange for $2,000; and (3) Williams was in possession of a skimming device when arrested, and admitted to the probation officer that he "continued to commit this offense until [he] was arrested on August 7, 2007." (R. 32-3; PSR ¶ 27, 34, 43-4.) By skimming the customers' credit cards and providing them to a co-conspirator, Williams certainly evidenced a subjective intent to cause a loss to each card. *See United States v. Brophy*, 22 F.3d 1093 (5th Cir. 1994) (unpublished) (defendant's criminal intent can be inferred from his actions regarding the fraud). Williams' counsel recognized as much when he admitted at sentencing that, "Mr. Williams skimmed these credit cards knowing they would probably be wrongfully used. . . ." (Tr. 17-18.) Given this evidence, the district court properly concluded that Williams's theft of the credit card information using the skimming device demonstrated a subjective intent that the cards be used, including up to their maximum available credit limits. (Tr. 15:8-15.)

1. Williams's attempt to distinguish *Sowels* factually is unavailing.

Williams argues that the district court's supposed reliance on this Court's decision in *Sowels* to calculate the intended loss was misplaced because the "essential facts supporting the *Sowel*s court's subjective intent findings are not present here." (Brief at 12.) This assertion ignores that the two key facts supporting the *Sowels* Court's finding that the defendant subjectively intended to cause the loss also are present here. First, as in *Sowels*, Williams sold credit card information to another person, which "'increased the likelihood that the credit cards could have been charged to the maximum credit limit.'" *Sowels*, 998 F.2d at 251. Moreover, like *Sowels*, this case "involves an uncompleted offense," *id*. at 252, as Williams was arrested in possession of a skimming device and admitted that he had been skimming credit cards up until his arrest. (PSR ¶ 44.) Thus, the evidence of Williams's intent to cause the credit card loss in this case is bolstered – not undermined – by consideration of *Sowels*.

2. The district court did not rely on "potential victim risk alone" to determine intended loss.

Williams also asserts that the district court improperly relied on the "potential risk that Williams's offense posed to the victims" when calculating the intended loss. (Brief at 14-5.) However, as explained above, this Court has held that it is proper to look to the total available credit limit of the cards placed at risk

by a defendant's conduct when calculating intended loss. *Sowels*, 998 F.2d at 251. In addition, Williams's own conduct and admissions – including intentionally skimming more than 500 credit cards of DFW Airport customers and then selling this information to a co-conspirator – provided sufficient evidence of his intent to cause loss to the skimmed credit cards. As the district court noted, "The loss could not have occurred but for his participation" in the conspiracy. (Tr. 17:20-1.) Contrary to Williams' assertions, there was obvious proof of his intent to cause the loss, and thus the district court did not err.

3. The district court did not errantly transfer the co-conspirator's intent onto Williams in calculating the intended loss amount.

Finally, Williams argues that the district court erroneously supported its intended loss determination by "apparently" imputing the intent of Williams's co-conspirator "D" to Williams himself. (Brief at 16.) Although the district court presumably was referring to Williams and his co-conspirator when he noted that "[t]hey were stealing information . . . . 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," this indicates only that the district court believed – as any factfinder reasonably would – that both Williams and his co-conspirator "D" had the subjective intent to steal credit card numbers for unauthorized use. (Tr. 15:12-23.) As explained previously, this conclusion

regarding Williams's subjective intent to cause the intended loss is supported by his own conduct and admissions, and thus does not constitute clear error.

* * *

In sum, the district court's determination of intended loss is not clearly erroneous. Williams's conduct and admissions constitute adequate evidence of his subjective intent to cause the intended loss to the credit card numbers he skimmed.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 20, 2009, two copies of this brief and an electronic copy were mailed to Peter Smythe, 211 Record Street, Suite 400, Dallas, Texas 75202.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN FED. R. APP. P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS:

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STEPHEN FAHEY
Assistant United States Attorney