

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-3017
(Cr. No. 05-66)

UNITED STATES OF AMERICA,

Appellee,

v.

WALTER ANDERSON (a/k/a Mark Roth),

Appellant.

UNITED STATES'S MEMORANDUM OF LAW AND FACT IN SUPPORT OF
THE DISTRICT COURT'S ORDER DENYING APPELLANT'S REQUEST
FOR RECONSIDERATION OF CONDITIONS OF RELEASE

Between 1995 and 1999 appellant evaded more than \$200 million in federal and District of Columbia income taxes by *inter alia* hiding his assets in the accounts of controlled foreign corporations and then concealing his ownership of those corporations by using aliases, private mail boxes, and nominee directors and officers (R.M. 4-5).^{1/} Appellant faces one count of corruptly obstructing, impeding, and impairing the due administration of the internal revenue laws (26 U.S.C. § 7212(a)), five counts of tax evasion (26 U.S.C. § 7201), and six counts of first-degree fraud (D.C. Code § 22-3221(a)) (R.M. 6-29).

Appellant challenges the district court's denial of his third request for reconsideration of a previously entered pretrial detention order.

PROCEDURAL BACKGROUND

A. The Initial Detention Order

On March 3, 2005, Magistrate Judge Alan Kay ordered that appellant be detained without bond pending trial (App. 569; R.M. 301). The court found that appellant "has no real contacts . . . with the District of Columbia", i.e., no home that he owns, no "family [or] children" (R.M. 298). Moreover, the government "made a persuasive case that [appellant] has access to monies around the world" to aid him in flight (R.M. 298). These and other factors *inter alia* led the court to find that there were "no conditions or combination of conditions that would . . . assure the appearance of [appellant]" (R.M. 300-01); App. 569-574).

B. Motion for Conditions of Release and Judge Friedman's Order

^{1/} "App. ___" refers to the appendix submitted by appellant at the indicated page; "R.M. ___" refers to the record materials submitted by the government at the indicated page.

On March 16, 2005, Judge Friedman issued an order that appellant be detained pending trial (App. 89-108). Judge Friedman found that appellant “potentially could spend most of the remainder of his life in prison if convicted” (App. 93). The types of offenses charged, the court found, “demonstrate[d] [appellant’s] substantial familiarity” with foreign commerce, “sophistication in arranging international financial transactions and in moving money across borders, and a facility for concealing the existence and location of significant quantities of money and other assets” (App. 94). Some assets, the court found, had been moved overseas “after [appellant] learned he was the target of this investigation” (App. 106). This behavior “clearly suggests [appellant] is a flight risk” (App. 94). Additionally, appellant’s “use of aliases and false identities” and “lack of candor and good faith” with the government gave the court “serious doubts about its ability to assure [appellant’s] appearance at trial” if not detained (App. 94).^{1/} The court considered many options short of detention but concluded that “[n]one of these conditions, separately or in combination, are sufficient to provide reasonable assurance of [appellant’s] presence at future proceedings” (App. 104-107).

C. Appellant’s First Request for Reconsideration and Judge Friedman’s April 1 Order

On March 21, 2005, appellant filed a motion requesting that Judge Friedman reconsider his March 16 Order (App. 109). In that motion, appellant requested that he be released and confined in his apartment, at appellant’s expense, by guards hired by a private firm with GPS monitoring (R.M. 4-5). The government noted a number of objections to this proposal in two written submissions to the court (R.M. 59, 65-67). The court denied the motion for reconsideration on April 1, 2005, citing the plan’s numerous flaws (App. 109-12).

D. Appellant’s Second Request for Reconsideration and Judge Friedman’s August 12 Order

^{2/} Judge Friedman noted that in a post-arrest interview, appellant stated that he controlled thirty to fifty million dollars in funds located overseas (App. 18). See David S. Hilzenrath, Carol Loenig, and Yuki Noguchi, Tax Case Defendant Says Money Was to do Good, Wash. Post, Mar. 4, 2005.

On May 2, 2005, appellant filed a second motion for reconsideration of Judge Friedman's March 16 Detention Order (App. 550). The government filed an opposition (R.M. 111), and the court held an evidentiary hearing on May 7 and 31, and June 1 and 3, 2005 (App. 550).^{1/}

1. The Government's Evidence^{1/}

IRS Special Agent Matthew Kutz testified to the various aliases that appellant had used to remain "well concealed" from the government (App. 142-146; R.M. 371-84), and to appellant's use of drop boxes in London, Amsterdam, and the District of Columbia as addresses for various offshore enterprises (App. 146-153). Kutz described a number of items relevant to the risk of flight issue that had been recovered in the execution of search warrants at appellant's home and office: a bogus "passport" from British Guyana with appellant's picture and a false address (App. 155-156; R.M. 385-96); books on how to use foreign tax havens which appeared to have been read (App. 157-58); books and articles on making fake identification cards and living a covert lifestyle, some of which had been ordered by appellant since the execution of the first search warrant (App. 159-160; R.M. 406-32); an application for citizenship in Granada (App. 163; R.M. 435); and a series of documents describing appellant's dislike for the government (App. 166-169; R.M. 464-70).

^{3/} For purposes of the evidentiary hearing, the district court requested that the government "go back to square one" and demonstrate "by a preponderance of the evidence that there are no conditions or combination of conditions that will reasonably assure [appellant's] appearance for trial" (App. 117).

^{4/} We do not discuss evidence relating to a second home confinement plan that appellant proposed in his motion; appellant later withdrew it due to financial considerations (App. 550).

Although the government is aware that appellant controls bank accounts in Switzerland, Cypress, Spain, and the Cayman Islands, Agent Kutz testified that the IRS has been unable to determine the aggregate balances in those accounts notwithstanding its requests through diplomatic channels (App. 172-73, 354-358).

Between 1998 and 2000, \$20.5 million was transferred by appellant into two Swiss bank accounts, but the government has never been able to trace that money further (App. 180-207).^{1/} And the liquidator for Gold & Appel, one of appellant's companies presently in insolvency, testified that "there are assets out there" for creditors to pursue (App. 386-87).

At the time of appellant's arrest, the government recovered one passport on appellant's person, but other evidence suggests that appellant may be in possession of at least two other U.S. passports (App. 93-99).^{1/} Agents also found on appellant's person a key to an unidentified safe deposit box (App. 100-01), even though appellant had testified under oath in a civil suit that he did not have a safe deposit box (App. 344-45).^{1/}

^{5/} At about the same time that money was transferred, one of appellant's companies purchased a \$5.1 million property in Spain (App. 196).

^{6/} The same day that appellant's passport was taken during the execution of the first warrant, March 19, 2002, appellant applied for another U.S. passport, claiming that his previously issued passport had been "removed from [his] office" with some other papers (App. 45, 336-38; R.M. 471). Then, in December 2003, appellant applied for another U.S. passport, claiming the passport issued in March 2002 had been "thrown out by mistake" (App. 338). And in September 2004, appellant applied for another passport claiming that the passport requested in December 2003 had been "washed by mistake and [was] no longer usable" (App. 338). To date, the passports allegedly "thrown out by mistake" and "washed by mistake" have never been accounted for (App. 342).

^{7/} Before appellant's arrest, the government was also aware that appellant had a safety deposit box in London, but the key appellant was carrying at the time of his arrest did not match that safety deposit box (App. 344-45).

Finally, the government presented evidence that the Correctional Treatment Facility (“CTF”) where appellant was being held, appellant has facilities for meeting with counsel and access to telephones during the day (App. 430-31), and “attorneys have access to their clients 24/7 regardless of the time of night” (App. 448).¹⁷

2. The District Court’s Findings

On August 12, 2005, Judge Friedman issued an order denying appellant’s second motion for reconsideration (App. 549). “[T]he relevant facts remain[ed] substantially unchanged” (App. 551). Appellant still presented “a substantial risk of flight” and “none of the proposed conditions or combinations of conditions would reasonably assure [appellant’s] appearance” (App. 551). Appellant’s use of false identities, and the materials recovered in the two searches evidencing an interest in fabricating documents and establishing a residence overseas, demonstrated that appellant had “the motive and inclination to flee the country if afforded the opportunity,” rather than face the prospect of significant criminal penalties (App. 552-54).

Appellant had not challenged that he “has access to large sums of money overseas,” which showed “the wherewithal to flee the country and escape detection” (App. 555). Although the court found some “uncertainty” as to the extent of such assets, the court found that “millions of dollars in assets controlled at one time by [appellant] remain unaccounted for overseas” and that such assets could “facilitate his flight from prosecution” (App. 557). The unknown contents of safe deposit boxes abroad could also “afford [appellant] additional aid in flight” (App. 558).

E. Appellant’s Third Request for Reconsideration and Judge Friedman’s January 23 Order

On December 15, 2005, appellant filed a third motion for reconsideration of the March 16 Detention Order (R.M. 147). In that motion, appellant claimed that because he was now represented by court-appointed counsel, his “indigence” should alleviate the court’s concern that he posed a risk of flight (R.M. 148-49). Appellant claimed that pre-trial release in which he could have “unrestricted access” to counsel was necessary for his defense (R.M. 151). Appellant also proposed that the homes of several of appellant’s friends and family members be posted as a surety bond (R.M. 158).

The government filed a written response reminding the court of its previous ruling that appellant’s assets were untraceable and may still be accessible to appellant (R.M. 166-67). The government noted that appellant had not been found “indigent,” rather the court found “it is simply beyond the resources of the [district court] at this point . . . to unravel the twisted skeins of [appellant’s] corporate dealings” (R.M. 141;

¹⁷ The defense proffered the testimony of two witnesses. Sheldon Anderson, appellant’s uncle, believed that appellant would not flee if released on conditions and testified that appellant’s family members were willing to post their homes as bond to secure appellant’s pre-trial release (App. 469). Robert Werb, one of appellant’s “business acquaintances,” to whom appellant had given substantial sums of money, believed that appellant had long known of the possibility of an arrest and appellant “never gave any indication that he would try to flee” (App. 470).

R.M. 128-36), and that the Criminal Justice Act mandates erring on the side of appointment (R.M. 141). The government also apprised the court that CTF officials had found appellant in possession of a cellular phone and other contraband in violation of CTF's rules (R.M. 167-68).

Judge Friedman announced an oral ruling on appellant's third motion for reconsideration on January 23, 2006 (App. 79-85). Judge Friedman ruled that all of appellant's latest contentions had been previously considered by the court and, for that reason, denied the motion for the reasons stated in the court's prior rulings (App. 84).

Appellant filed a timely notice of appeal on January 30, 2006 (R.M. 172).

ARGUMENT

I. The District Court Did Not Clearly Err In Finding that Appellant's Third Motion for Reconsideration Presented No New Evidence Warranting Amendment of its Detention Order

A motion to reopen a detention hearing must be based upon "information . . . that was not known to the movant at the time of the hearing" and which has a "material bearing" on the detention issues. 18 U.S.C. § 3142(f)(2); see also United States v. Cisneros, 328 F.3d 610, 614 (10th Cir. 2003) ("reconsideration is permissible under [18 U.S.C. § 3142(f)(2)] only when there is new information that would materially influence the judgment about whether there are conditions of release which will reasonably assure that the defendant will not flee").^{9/}

^{9/} Cf. United States v. Rouleau, 673 F. Supp. 57, 59 (D. Mass. 1987) ("Absent a clear error of law, the detention order of a district judge should not be amended unless the underlying factual circumstances have changed in some significant way."); United States v. Thomas, 667 F. Supp. 727, 728 (D. Or. 1987) (same); United States v. Gallo, 653 F. Supp. 320, 328 (E.D.N.Y. 1986) (same); United States v. Logan, 613 F. Supp. 1227, 1228 (D. Mont. 1985) (same).

Appellant has sought review only of the trial court's denial of his third motion for reconsideration of the March 16 Detention Order (R.M. 172). Thus, the only issue properly raised before this Court is whether the district court clearly erred^{10/} in finding that the evidence proffered by appellant was not new information with material bearing on the detention issues.

Appellant's third motion for reconsideration of the detention order proffered only four reasons for the court to reopen the motion: (1) appellant now had a court-appointed lawyer, (2) appellant did not have the resources to flee, (3) appellant needed release to facilitate trial preparation, and (4) friends and family would post a bond. The district court correctly found that each of these reasons had previously been advanced by appellant and considered by the district court in its three previous detention orders.^{11/}

Thus, the district court did not clearly err in finding the evidence proffered in the third motion for reconsideration gave "no greater assurances that [appellant] isn't a flight risk than before, and nothing has changed from before" (App. 85). Such a finding was amply supported in the record and could not, therefore, constitute clear error. Vortis, 785 F.2d at 329.

II. Assuming the Merits of the Detention Order are Before the Court, the District Court Did Not Clearly Err in Finding that Appellant was a Flight Risk

A. Standard of Review

^{10/} United States v. Vortis, 785 F.2d 327, 329 (D.C. Cir. 1986) (finding that defendant posed risk of flight reviewed for clear error).

^{11/} At the time of the August 12 Order, the district court was aware that appellant would need a court-appointed lawyer because he allegedly could not pay his legal bills (App. 550). The court had heard and rejected appellant's claims that he lacked the financial resources to flee (R.M. 78-90; App. 555-57), that pretrial release was necessary for adequate trial preparation (R.M. 53-54, 335-36; App. 455-58), and that a bond posted by appellant's friends and family members would reasonably assure appellant's appearance (App. 105-06; R.M. 101-02).

Under 18 U.S.C. § 3142(e), if a judicial officer finds, after a detention hearing, that “no condition or combination of conditions will reasonably assure the appearance of the person as required . . . such judicial officer shall order the detention of the person before trial.” Factors to be considered include the nature and circumstances of the offense charged, the weight of the evidence against the person, and the history and characteristics of the person. 18 U.S.C. § 3142(g)(1)-(3). Where, as here, pretrial detention is based on appellant’s risk of flight, that determination must be supported by a preponderance of the evidence. See United States v. Xulam, 84 F.3d 441, 442 (D.C. Cir. 1996) (quoting United States v. Simpkins, 826 F.2d 94, 96 (D.C. Cir. 1987)). On appeal, a district court’s factual finding that a defendant presents a risk of flight is reviewed for clear error. Vortis, 785 F.2d at 329.

B. Discussion

Judge Friedman did not clearly err in finding that appellant posed a risk of flight. Ample evidence certainly supported Judge Friedman’s findings that based on the nature of the offenses charged and appellant’s characteristics there were no conditions of release that would reasonably assure appellant’s appearance (App. 91-92, 551-52). 18 U.S.C. §§ 3142(g)(1), 3142(g)(3).

Appellant does not dispute on appeal that the nature and circumstances of the charged offenses weigh against his pre-trial release (Brief for Appellant at 10-18). Indeed, the twelve counts for which appellant has been indicted involve sophisticated criminal conduct that requires familiarity with international travel, moving funds across borders without detection, and concealing assets (R.M. 1-29). The district court correctly found that such characteristics “clearly suggest [appellant] is a flight risk” (App. 94).^{1/}

^{12/} See United States v. Townsend, 897 F.2d 989, 994 (9th Cir. 1990) (nature and circumstances of the charged offense “weigh[ed] against bail” where defendant was charged with “sophisticated criminal conduct, whose successful completion required the ability to travel internationally, to adapt easily to foreign countries, and to move assets and individuals quickly from one country to another”); United States v. Hollender, 162 F. Supp. 2d 261, 266 (S.D.N.Y. 2001) (for purposes of detention analysis “maximum possible weight” given to the nature and circumstances of the crime where defendant was charged in a \$2 million fraud scheme involving the use of aliases and bogus corporations).

Additionally, consideration of the nature of the offenses charged involves consideration of the penalties. Townsend, 897 F.2d at 995. Appellant, who is fifty-one years old, faces a potential federal sentence in excess of twenty years’ incarceration (App. 92), and the D.C. Code offenses carry an additional maximum sentence of sixty years. D.C. Code § 22-3322(b). The gravity of the offenses and the potential prison term created a considerable incentive for appellant to flee the jurisdiction. United States v. Geerts, 629 F. Supp. 830, 831 (E.D. Pa. 1985) (defendant facing prospect of fifty years’ incarceration was risk of flight). Indeed, such circumstances make Xulam, on which appellant relies, (at 15) readily distinguishable. Xulam, 84

The district court also properly found that appellant's history and characteristics demonstrated that appellant was a flight risk. The evidence demonstrated that appellant was experienced in the use of aliases and false identities and had possessed numerous materials "with little plausible purpose" other than concealing appellant's identity while living abroad, such as blank forms for international identification cards (R.M. 403-05), blank identification badges (R.M. 399-402), numerous passport photos (R.M. 433-34), books and pamphlets on identity concealment (R.M. 406-32), and an apparent forged personal identity document (App. 96, ; R.M. 397). See United States v. Powell, 813 F. Supp. 903, 910 (D. Mass. 1992) (use of aliases supports detention based on risk of flight); United States v. Rodgers, 738 F. Supp. 156, 158-59 (E.D. Pa. 1990) (use of fictitious names for utility services supports detention).

Additionally, the district court heard evidence that appellant had sufficient financial resources to flee the country. Appellant himself admitted in a post-arrest newspaper article that he controlled between thirty and fifty million dollars in funds located overseas (App. 106). The government has been unable to trace \$20.5 million that appellant transferred into Swiss bank accounts between 1998 and 2000 (App. 180-207). In 2001, more than \$9 million of Gold & Appel assets were moved out of the United States which have not been located (App. 136, 556-57). And after the first search warrant was executed in March 2002, appellant opened or attempted to open additional bank accounts in Cyprus and the Cayman Islands, although the amounts of money in those accounts are unknown (App. 105-06, 556; R.M. 476-78).

Several other important facts supported the district court's finding that appellant was a risk of flight. Appellant had been issued two U.S. passports that had not been surrendered to the authorities and could be used to aid in his flight (App. 557). Appellant owned multiple safe deposit boxes abroad which might conceal assets or documents that could aid appellant in flight (App. 558). Appellant had a documented history of dislike for the government and its agencies (R.M. 464-70; App. 166-71). Appellant had evidenced a lack of candor in his dealings with the government and the judicial system (App. 95, 100-01).^{13/} And appellant has never married, has no known children, and owns no property in the District of Columbia (App. 99-100).

^{13/} Judge Friedman noted two instances: appellant's representation to Judge Hogan during the grand-jury investigation that he could not appear to provide a handwriting exemplar because he was traveling in Europe, when appellant was actually in the British Virgin Islands forming another corporate entity (R.M. 46-47), and appellant's less than candid representation on his passport application that his passport recovered during execution of the March 2002 search warrant had been "taken from [his] office" (R.M. 299). The record also reveals that appellant violated the rules at CTF by obtaining a contraband cellular phone (R.M. 167). And appellant testified in a deposition that he did not possess any safe deposit boxes, when in fact he did (R.M. 474-75; App. 343-44).

Thus, Judge Friedman's findings that appellant was a risk of flight and that no conditions of release could reasonably assure appellant's appearance were reached through application of the statutory factors (nature and circumstances of the offense and the characteristics of the defendant) and amply supported in the record and, therefore, were not erroneous — and certainly not clearly erroneous. Vortis, 785 F.2d at 329 (affirming finding of risk of flight where government presented evidence *inter alia* that defendant possessed identification documents and passports for thirteen other persons in a safe deposit box and may have been familiar with manufacture of false identification documents).

Appellant attempts (at 12-15) to dismiss the substantial evidence that he is a flight risk by calling the evidence "speculative" and "hyperbolic atmospherics."^{14/} To the contrary, appellant was not found to be a risk of flight merely on the basis of an eccentric interest in aliases, possession of fake passports, and identity concealment. The government actually presented evidence, and the district court found, that appellant had the knowledge and ability to make false identification documents — a search of his home even revealed blank forms for creating identification cards and a forged travel document in the name "William Prospero" (App. 96-99, 552-53; R.M. 397-405). As a matter of law, appellant's use of aliases and his knowledge of international identity concealment were sufficient for the district court to find appellant to be a risk of flight. United States v. Stewart, 19 F. App'x 46, 49 (4th Cir. Sept. 6, 2001) ("Given Stewart's use of aliases in the past and his extensive knowledge of ways to evade the government, it is not likely that any condition or combination of conditions would reasonably assure his appearance.")^{15/}

^{14/} Appellant makes claims wholly unsupported in the record or directly contradicted by the record, when he asserts that he has "never even traveled" with his British Guyana passport, "never attempted to live underground," and "never adopted a different identity or used fake identification to travel" (Brief for Appellant at 13-14, 16). Rather, the record and the indictment reveal appellant's repeated use of aliases to conceal his assets and avoid government detection (App. 141-52; R.M. 4).

^{15/} Fourth Circuit Local Rule 36(c) permits citation of the court's unpublished opinions so long as a copy of the opinion is attached to the party's submission. For the court's convenience, a copy of the Stewart opinion is attached hereto as Exhibit A.

More importantly, the district court found that appellant had hidden millions of dollars of his assets in overseas accounts — some of which were secreted out of the country while appellant knew that he was under investigation (App. 556).^{1/} This access to an unknown amount of hidden assets further solidified the district court's risk-of-flight finding. See Stewart, 19 F. App'x at 49 (affirming risk of flight finding where government had been unable to trace \$51 million of profits from white collar defendant's Ponzi scheme); Geerts, 629 F. Supp. at 830 (defendant from Netherlands facing fifty years' incarceration was risk of flight where the amount of his net worth was unknown thereby precluding district court from setting appropriate surety bond).^{1/}

^{16/} Appellant's suggestion (at 16) that he is “essentially bankrupt” finds no support in the record (App. 386-87; R.M. 141).

^{17/} For the same reasons, the evidence demonstrated more than appellant's “mere opportunity” to flee (Brief for Appellant at 15-16). Rather, the district court found that appellant had the knowledge, ability, and incentive to flee prosecution (App. 106-08). Moreover, in United States v. Himler, 797 F.2d 156 (3d Cir. 1986) — on which appellant relies — did not involve crimes with the gravity of the offenses as the case at bar (R.M. 1-29).

Nor are the conditions of release appellant proposes (at 18-19) adequate to assure appellant's appearance. As the trial court found, electronic monitoring would be inadequate (App. 105). See United States v. Orena, 986 F.2d 628, 632 (2nd Cir. 1993) (noting that surveillance systems can be circumvented by the "wonders of science and of sophisticated electronic technology," and that monitoring equipment can be rendered inoperative). A bond from friends and family would provide scant protection — indeed, there would be nothing to guarantee that appellant's friends or family could not be reimbursed by appellant.¹⁷ United States v. Koenig, 912 F.2d 1190, 1193 (9th Cir. 1990) (evidence concerning defendant's lack of substantial ties to community, his foreign contacts, and his employment history supported determination that defendant presented risk of flight precluding pre-trial release, despite evidence that defendant's parents had offered to post a bond). A waiver of extradition rights may be unenforceable — or simply impossible to enforce. United States v. Stroh, 2000 WL 1832956 at *5 (D. Conn. Nov. 3, 2000) (rejecting extradition waiver as condition of release because there is "a substantial legal question as to whether any country to which [defendant] fled would enforce any waiver signed under the circumstances" or enforcement of waiver may be "a difficult and lengthy process and, at worst, impossible"). And, in the circumstances of this case, having appellant surrender his passport would do little to guard against the prospect that appellant could use other travel documents that may be hidden in locations such as safe deposit boxes (App. 558), or could use his skills in identity concealment to manufacture other documents (App. 96-98, 552-53).¹⁷

^{18/} At the evidentiary hearing on June 1, appellant elected not to call these persons as witnesses. The government proffered to the court that at least one of those persons already owes one of appellant's companies millions of dollars (App. 527-28).

^{19/} Appellant's claim (at 19-20) that his trial preparation is inconvenienced by his detention raises a subject wholly separate from whether detention is warranted. See United States v. Logan, 613 F. Supp. 1227, 1229 (D. Mont. 1985) (concerns about defendant's conditions of confinement while in prison irrelevant to whether defendant posed a flight risk). None of the cases cited by appellant suggest that inconvenience to defense counsel should trump the government's interest in securing a defendant's appearance at trial. Appellant's counsel even conceded below that a court can permissibly order a defendant held despite the inconvenience it may pose for counsel. (R.M. 290: "Some Courts find that persuasive. Some don't. Some say, 'That's your problem, Lawyer. Figure out how to defend your client.'")

In any event, appellant has not established that the record before this Court demonstrates that his concerns cannot be accommodated by seeking relief before the district court. Indeed, the government did not oppose appellant's request to be temporarily released from CTF to inspect certain documents at the IRS that

could not be copied (R.M. 126-27). And the evidentiary record reveals that appellant's lawyers have liberal access to appellant (App. 448).

WHEREFORE the United States requests that the Court affirm the detention order entered by the district court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of March, 2006, I caused a copy of the foregoing memorandum of law and fact to be served by hand delivery upon counsel for appellant:

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