NO. 2004-1500

United States of America
First Circuit Court of Appeals

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH MONROIG a/k/a JOSE GONZALEZ

Defendant/Appellant

BRIEF OF APPELLANT

APPEAL FROM CONVICTION IN THE NEW HAMPSHIRE DISTRICT COURT

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STATEMENT OF JURISDICTION

The First Circuit Court of Appeals has jurisdiction of this case pursuant to 28 U.S.C. § 1291.

The defendant was charged in the United States District Court for the District of New Hampshire with distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1), and distribution of heroin, in violation of 21 U.S. C. § 841(a)(1).

Mr. Monroig's motion for suppression of evidence was denied. Accordingly, on November 12, 2003, he plead guilty and a finding of guilty was entered (*Joseph DiClerico, Jr.*, J.).

Mr. Monroig was sentenced on February 17, 2004 to a term of imprisonment for 10 years on each count, to run concurrently (with a recommendation of drug treatment), a term of supervised release of 3 years, and a special assessment of $200.

A notice of appeal was filed on April 6, 2004.

STATEMENT OF ISSUES

1. The police recorded a portion of Mr. Monroig's interrogation, but purposely neglected to record the portion containing exculpatory statements. Audio tapes with gaps are admissible in evidence as long as they are not misleading. Did the court err in denying Mr. Monroig's motion to suppress the tape of the interrogation in violation of the rules of evidence and his constitutional rights?

2. Mr. Monroig ingested heroin and painkillers shortly before he was arrested. The federal magistrate was unable to arraign him because of his condition, but the police claim their interrogation – close in time – was untainted by intoxication. Did the court err in allowing into evidence the tape of Mr. Monroig's confession in violation of his constitutional rights?

3. Mr. Monroig was initially charged with distribution of drugs with death resulting, but during his sentencing the Government withdrew its allegation that Mr. Monroig's drug activities caused a death. The law allows sentencing based only on facts found by a jury or admitted by the defendant. Upon Mr. Monroig having denied his culpability for the resulting death, did the court err in nonetheless augmenting his sentence based on it?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Joseph Monroig was arrested on June 12, 2001 on an outstanding warrant unrelated to the charges involved in this case. Mr. Monroig had heard that the police were looking for him, and thus got rid of heroin and painkillers in his possession by ingesting them.

At the time of his arrest, shortly after ingestion, he was passed-out and had to be awaked by the police. He was then brought to the Manchester, New Hampshire police station, where members of the City police department recognized his name as being associated with a drug-related death some years earlier. 5/6/03 *Trn*. at 20.

Mr. Monroig was placed in the station lock-up. When the police came to question him, he was again sleeping, and again had to be coaxed awake. To the police, Mr. Monroig appeared sleepy, was yawning, and had droopy eyelids and a waning voice. Ignoring these clues of intoxication, the police nonetheless subjected him to interrogation, claiming he was lucid.

The first 45 minutes of the interrogation not tape-recorded, but the last half-hour was. The police claim that during the un-recorded portion of the interrogation, in addition to making exculpatory statements, Mr. Monroig confessed to being involved in the 1997 drug-related death. During the recorded

portion, Mr. Monroig made only the inculpatory statements. Based on the information he divulged while intoxicated, Mr. Monroig was later indicted for causing the death by providing drugs which allegedly induced an overdose.

After his interrogation, Mr. Monroig was questioned by a booking officer and interviewed by a probation officer for bail purposes, who noted his current heroin addiction.

Later, he was assigned a CJA attorney, who reported that Mr. Monroig was too intoxicated to provide information to be represented at his arraignment. Early in the afternoon, the Court attempted to arraign Mr. Monroig. The Magistrate, ***sua sponte*** found that Mr. Monroig too obviously intoxicated to stand arraignment. The hearing was thus aborted and scheduled for a later date.

Mr. Monroig was then taken to a county jail. There he was placed in a holding cell due to his intoxicated condition. Several days later, no doubt concerned that Mr. Monroig's intoxication was overlooked, and knowing he was represented by counsel, the police visited Mr. Monroig in jail and had him reiterate his inculpatory statements.

After his motion to suppress was denied, Mr. Monroig plead guilty to the drug distribution only, but not the resulting death. Mr. Monroig was sentenced to 10 years incarceration based, in part, on the death.

This appeal followed.

SUMMARY OF ARGUMENT

Mr. Monroig first notes that tape recordings of confessions which inadvertently do not contain an entire statement are inadmissible when the missing portions make the tape misleading. He then reports the facts of his case, and points out that the police were careful to record the portion of his interrogation in which he confessed, but purposely neglected to record the portion in which he made exculpatory statements. He thus argues that the entire tape should have been suppressed. He also argues that when the police purposely do not record an interrogation, the tape should be automatically suppressed.

Mr. Monroig then discusses his intoxicated condition during the interrogation. He notes that although the police claim he was lucid, all the other evidence suggests he was too intoxicated to meaningfully waive his rights. He thus argues that his confession should have been suppressed.

Finally, Mr. Monroig notes that although he did not admit to causation in the 1997 drug-related death, his sentence was augmented because of it, and his sentence is therefore illegal.

ARGUMENT

I. Partial Tape Should Have Been Suppressed

A. Misleading Audio Tapes Get Suppressed

When an interrogation is taped, but due to malfunction or happenstance portions of the recording are inaudible, this Court determines admissibility on whether the remainder is misleading. *Gorin v. United States*, 313 F.2d 641, 652 (1st Cir. 1963); *United States v. Jadusingh*, 12 F.3d 1162, 1167 (1st Cir. 1994) ("The decision to admit or exclude an audiotape rests with the trial judge, who must decide whether the inaudible parts are so substantial as to make the rest of the tape more misleading than helpful.") (quotations omitted).

This standard essentially implements the federal rules of evidence, which provide that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of . . . misleading the jury." FED. R. EVID. 403. It may also implement constitutional requirements.

B. The Police Purposely Neglected to Record Exculpatory Portions of Mr. Monroig's Interrogation

Under the *Gorin* standard and Rule 403, the tape in Mr. Monroig's case should have been suppressed.

Mr. Monroig was arrested on a warrant unrelated to the charges here on appeal on June 12, 2001, at 8:55 a.m. 5/6/03 *Trn.* at 5-6; 52, 92, 94-95. He was

taken to the Manchester police station and placed in the lockup. About an hour after his arrest, the police began interrogating him. 5/6/03 *Trn*. at 77.

The initial portion of the interrogation lasted 45 minutes, and the police choose to not record it. 5/6/03 *Trn*. at 38, 44, 79, 88. After the police heard what they liked, they began tape- recording the rest of the interrogation. This second, recorded, portion lasted just a half-hour. 5/6/03 *Trn*. at 44, 47, 79, 88. Thus most – about 60 percent – of the one-and-a-half hour interrogation was purposely non-recorded; only the remaining 40 percent was recorded. At the end of recorded portion, the police transported Mr. Monroig to court for arraignment. 5/6/03 *Trn*. at 52.

Without a tape-recording of the first 45 minutes of the interrogation, there is no sure way to know what was said. Both the Government and the defendant, however, agree that the non-recorded portion of the interrogation contained exculpatory statements.

According to the police, during the non-recorded portion of the interrogation, Mr. Monroig told the police that although he had procured the heroin that proved fatal, another person, who he named, had injected it into the body of the man who ultimately died. 5/6/03 *Trn*. at 40-42, 45, 82-83. Mr. Monroig gave the police a full account of who did what on the fatal day, complete with who came

and went, other people who were present, and who injected the dead man with the heroin. *Id.* These statements did *not* show up on the tape during the recorded portion of the interrogation. 5/6/03 *Trn*. at 117-18, 120. Although the police conveniently called this an attempt at "minimization," they acknowledged that the statements were exculpatory. 5/6/03 *Trn*. at 119.

The police testified that during the non-recorded portion of the interrogation, although he added some details, 5/6/03 *Trn*. at 45-46, 114, Mr. Monroig largely confirmed what the police already knew from others who were involved. 5/6/03 *Trn*. at 22, 40, 80; 8/18/03 *Trn*. at 12. Mr. Monroig was apparently initially unwilling, as he first told the police he did not want to talk to them, but after some leading questions he said "yes, yes, yes" to the police's version of the event. 5/6/03 *Trn*. at 59.

The police admitted they used their specialized interrogation techniques on Mr. Monroig. 5/6/03 *Trn*. at 117, including deception and leading questions, based on information from other sources. 5/6/03 *Trn*. at 55, 117. They testified that as a result, Mr. Monroig gradually changed the nature of his statements from denial, then minimization, until finally he "evolved" to admission of culpability. 5/6/03 *Trn*. at 81, 119.

These nuances, however, all occurred during the non-recorded portion of the interrogation. By the time the tape was turned on, the police had brought Mr. Monroig around to their version of the event. The exculpatory statements, of course, did not make it onto the tape. 5/6/03 *Trn*. at 117-18, 120.

Capturing only the evidence the police want was a calculated maneuver. During the non-recorded portion of the interrogation, the police took notes of the final things Mr. Monroig said. Then during the recorded portion, the police used the notes to lead Mr. Monroig through his inculpatory statements. 5/6/03 *Trn*. at 118.

The tape is thus a piece of evidence concocted by the police for the purpose of convicting Mr. Monroig. By purposely neglecting to tape the portion of the interrogation in which Mr. Monroig frames the entire event, the police selectively recorded only those statements which reflect most poorly on him.

By purposely capturing only those statements they liked, the tape is inherently misleading. It is of no use to Mr. Monroig trying to defend himself, of little use to the Government whose job it is to ensure only those guilty of crimes are convicted, and misleading to a jury searching for the truth. It is thus more misleading than helpful, and therefore does not meet event the most generous test of admissibility.

C. Tape Was Not Authenticated

The federal rules of evidence provide that evidence be authenticated to ensure that the item is what its proponent claims. FED. R. EVID. 901. Authentication requires "proof that the tape recording accurately reflects the conversation in question." *United States v. Doyon*, 194 F.3d 207, 212 (1st Cir. 1999).

In Mr. Monroig's case, only 40 percent of the conversation was recorded. The recorded portion does not contain the exculpatory statements which the defendant and Government agree were made during the unrecorded portion of the interrogation. Thus, the tape does not "accurately reflect[] the conversation" and must therefore be suppressed.

D. Deliberately Misleading Evidence Should Be Suppressed

The *Gorin* standard – whether the tape is misleading – only applies to interrogations that are non-recorded inadvertently or through happenstance. *United States v. Brassard*, 212 F.3d 54 (1st Cir. 2000) (initial moments of conversation between defendant and undercover agent destroyed when detective made copy of tape); *United States v. DiSanto*, 86 F.3d 1238, 1253 (1st Cir. 1996) (tape had "segments of poor audio and static"); *Jadusingh*, 12 F.3d at 1162 (tape of phone conversation between co-conspirators intermittently drowned out by television noise); *United States v. Font-Ramirez*, 944 F.2d 42, 47 (1st Cir. 1991)

(portions of tape inaudible); *United States v. Carbone*, 798 F.2d 21, 25 (1st Cir. 1986) (portions of tape inaudible due to background noise); *Gorin*, 313 F.2d at 652 (portions of tape inaudible).

When the police *deliberately* edit material portions of the tape, or *deliberately* neglect to record portions of the conversation such that the completeness of the recording is undermined, the tape is suppressed. *United States v. Wardlaw*, 977 F.supp. 1481 (N.D. Ga. 1997) (tape suppressed when police deliberately edited out material portions); *United States v. Doyon*, 194 F.3d 207, 213 (1st Cir. 1999) (tape not suppressed because there was no "suggestion that the government chose to cut off portions of the conversation or that it was doing anything other than its best to obtain a complete recording"); *State v. Barnett*, 789 A.2d 629 (N.H. 2001) (in order to admit tape in evidence, tape must contain entire interrogation). *See also Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (unexcused failure to electronically record custodial interrogation violates state due process right); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (requiring on non-constitutional grounds recording of all custodial interrogations); *State v. Cook*, 847 A2d 542 (N.J. 2004) (in response to suggestion that all custodial interrogations be recorded, study committee created to explore advisability of practice).

In Mr. Monroig's case the recorded portion of the interrogation has him admitting criminal liability in his own voice – an effective prosecution tool. But

the Government deliberately failed to record most of the interrogation. The missing portions contain exculpatory statements, explanations of his admissions, and the pressurized context in which Mr. Monroig made the admissions. Without the non-recorded portions, Mr. Monroig is left unable to effectively defend himself in violation of his due process rights. U.S. CONST. amd. 14. Moreover, the purpose of the suppression rule is to prevent police misconduct, *Miranda v. Arizona*, 384 U.S. 436 (1966), such as creating deliberately misleading evidence. Accordingly, the partial tape should have been automatically suppressed without regard to the *Gorin* substantiality determination of the non-recorded portions.

II. Mr. Monroig's Confession Was Tainted by Intoxication

A. Confessions Are Not Voluntary When Defendant's Will is Overborne by Intoxication

Juries are not allowed to hear a confession involuntarily made. *Jackson v. Denno*, 378 U.S. 368 (1964). To prosecute using a confession, the Government has a "heavy burden" to show it was voluntary, *Tague v. Louisiana*, 444 U.S. 469, 470 (1980), and free from coercion. *Colorado v. Connelly*, 479 U.S. 157 (1988). A confession is not voluntary if in making it the defendant's "will was overborne" or if his confession was not "the product of a rational intellect and a free will." *Townsend v. Sain*, 372 U.S. 293, 307 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

A defendant's will is overborne when confessions are made an hour after he was injected with morphine, *Beecher v. Alabama*, 408 U.S. 234 (1972), under the influence of pain medication, *Mincey v. Arizona*, 437 U.S. 385 (1978), or when given a "truth serum" drug. *Townsend v. Sain*, 372 U.S. at 308.

B. Mr. Monroig's Will Was Overborne by Intoxication

1. Aborted Arraignment

There is no doubt that at the 2:00 PM appearance before the federal magistrate, Mr. Monroig was too intoxicated to be arraigned. Mr. Monroig later testified about the aborted arraignment that he was passed out on the table, recalled

nothing about it, and didn't know who his appointed lawyer was or what he looked like. 5/6/03 *Trn*. at 105-06. Upon aborting the arraignment, the magistrate said:

> For the record, note that the defendant is obviously dozing off right in front of me. I would like to advise him of his constitutional rights but it seems in fact it's not getting through. I understand from pre-trial services that he is in the process of de-toxing right now and that his counsel . . . has been concerned he's not been able to communicate with [counsel]. . . . I'm not going to even complete the initial appearance because obviously advising him of his rights is not having any effect whatsoever.

TAPE OF ARRAIGNMENT (June 12, 2001).[1] Accordingly, the magistrate ordered temporary detention and scheduled another arraignment for one week later.

2. Intoxication Obvious

Before the arraignment, Mr. Monroig's CJA lawyer Sven Wiberg knew that Mr. Monroig was intoxicated. Attorney Wiberg later testified that the intoxication was "obvious." 8/18/03 *Trn*. at 53. When the lawyer tried to go through his standard bail patter, 8/18/03 *Trn*. at 52, it was clear to him Mr. Monroig was not capable of understanding what the lawyer was saying because

> he was kind of slumped over to the side in his chair with his head leaning to one side or the other and his eyes would roll back in his head or his eyelids were halfway down and then would shut completely. He was obviously having trouble staying awake.

[1]Citation details of the tape, such as the case number and the name of the presiding magistrate, are unknown. It was made part of the appellate record in this case by order of this Court dated November 16, 2004.

8/18/03 *Trn*. at 43. Due to this behavior, the lawyer asked Mr. Monroig why he was dozing. This lead to an admission by Mr. Monroig about having ingested a combination of painkillers and heroin shortly before being arrested that morning. 8/18/03 *Trn*. at 55-56.

In the lawyer's view, Mr. Monroig "was not in any shape to make any decisions, or to be . . . questioned about anything in any meaningful way." 8/18/03 *Trn*. at 44. Corroborating this assessment, the lawyer noted that the next time he saw the defendant, a week later, Mr. Monroig was totally different, did not recall having met the attorney, did not recognize the attorney, and that the attorney had to introduce himself all over again. 8/18/03 *Trn*. at 45-46. Further corroboration is the fact that the county jail, to which Mr. Monroig was taken after the aborted arraignment, placed him in a 24-hour lockup "X9" cell for the purpose of being monitored for medical concerns. 5/6/03 *Trn*. at 157.

Thus, it was obvious that day to a federal magistrate, an appointed lawyer, and a county jail, that Mr. Monroig was too intoxicated to be treated normally.

3. Pre-Trial Bail Report

Just after the police interrogation and just before Mr. Monroig was taken before the magistrate, a pre-trial services officer interviewed Mr. Monroig for the purpose of establishing facts relevant to bail. 5/6/03 *Trn*. at 128. As is routine, a Pre-Trial Services Report was generated. The report in this case notes that Mr.

Monroig "has been a heroin addict for the past two years, snorting two to four bags of heroin a day" and that he also uses crack cocaine. PRE-TRIAL SERVICES REPORT at 2. The Deputy U.S. Marshall who booked Mr. Monroig also understood that Mr. Monroig was a heroin addict. 5/6/03 *Trn*. at 146.

Although it doesn't appear in the report, the pre-trial services officer warned the magistrate that Mr. Monroig might have problems. On the tape of the aborted arraignment the magistrate states: "I understand from pre-trial services that he is in the process of de-toxing right now."

Thus, in addition to the others, the pre-trial services officer also noticed intoxication problems with Mr. Monroig.

4. Intoxication Conveniently Ignored by Police

There was evidence of Mr. Monroig's intoxication during the police interrogation too. Mr. Monroig was asleep when he was arrested at about 9:00 AM. 8/18/03 *Trn*. at 10. When the police came to interrogate him at 10:00 AM, an hour later, they noticed he was asleep in his cell. 5/6/03 *Trn*. at 24, 53, 61; 8/18/03 *Trn*. at 11. The police had to twice call out to rouse him. 5/6/03 *Trn*. at 72; 8/18/03 *Trn*. at 25. During their interrogation, Mr. Monroig was yawning, 5/6/03 *Trn*. at 62, 121-22, and his voice kept waning. 5/6/03 *Trn*. at 87. Mr. Monroig's booking photo shows droopy eyelids. 5/6/03 *Trn*. at 64-65.

Later, Mr. Monroig testified that because of the drugs he took that morning he was blanked out, has no consciousness of what he said to the police, and doesn't remember anything about the interrogation. 5/6/03 *Trn*. at 154-58. Mr. Monroig said that given his experience in the criminal justice system, he is fully aware of his right to maintain silence, and had he been conscious and cognizant of his situation, he would not have said anything. 5/6/03 *Trn*. at 159.

The police nonetheless claim they didn't notice signs of intoxication; that Mr. Monroig lucidly answered all questions; that he corroborated what they already knew about the event; and that although he at first denied involvement, their interrogation techniques smoothly lead Mr. Monroig to admit responsibility for the fatal overdose. 5/6/03 *Trn*. at 3, *et seq.*; 5/6/03 *Trn*. at 68, *et seq.* They tried to excuse their inattentiveness to the defendant's condition by saying they perceived no evidence of heroin withdrawal. 8/18/03 *Trn*. at 16, 34. The police also acknowledged, however, that heroin ***withdrawal*** is not relevant here. 8/18/03 *Trn*. at 19.

The police testified that Mr. Monroig didn't apprize them of his pre-arrest drug cocktail. *Id.* That is not surprising, however. The police informed Mr. Monroig that the interrogation would not involve the charges for which he was arrested that day, 5/6/03 *Trn*. at 34, and due to shame and self-preservation even a

stoned addict knows better than to admit recent drug possession to a cop. 5/6/03 *Trn*. at 158-9.

C. Mr. Monroig Had No Access to Drugs After Arrest

The Government acknowledges, and it is indisputable, that Mr. Monroig had no access to drugs after his arrest. He was searched upon arrested, had no drugs in his possession, was searched several more times during the course of processing, and had no access to drugs between the time of arrest and the time of arraignment. 8/18/03 *Trn*. at 13.

D. Mr. Monroig Intoxicated Confession Should Have Been Suppressed

The police testified that heroin tends to make people sleepy at the beginning of the intoxication, then there is a period of lucidity, and finally withdrawal. 8/18/03 *Trn*. at 19. In denying his motion to suppress, however, the court found that Mr. Monroig got more intoxicated over the course of the day. 8/18/03 *Trn*. at 61. There was no evidence, however, that that is medically possible or routinely observable.

The facts suggest that Mr. Monroig was intoxicated on June 12 from the morning when he was arrested to the afternoon when he was held for medical observation by the county jail. Every government official involved in his

processing was aware, to some extent, of the intoxication. It is not credible that the police were unaware.

Rather, Mr. Monroig's confession was due to a self-ingested "truth serum." *Townsend v. Sain*, 372 U.S. at 293. The police knew and took coercive advantage, *Colorado v. Connelly*, 479 U.S. at 157, by coaxing Mr. Monroig into culpable admissions when he was under the influence of intellect-effecting drugs. *Beecher v. Alabama*, 408 U.S. at 234.

Accordingly, as Mr. Monroig's will was overborne, the motion to suppress should have been granted.

The interrogation at the county jail two days later should be likewise suppressed, as it was tainted by the coercive admissions. *Fellers v. United States*, 540 U.S. 519 (2004); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Oregon v. Elstad*, 470 U.S. 298 (1985).

III. Mr. Monroig's Sentence Was Unlawfully Augmented

Mr. Monroig was initially charged with two crimes. Count 1: Distribution of cocaine, death resulting, in violation of 21 U.S.C. § 841(a)(1). Count 2: Distribution of Heroin, in violation of 21 U.S. C. § 841(a)(1). During his plea hearing, the Government withdrew from Count 1 the "death resulting" language.

Accordingly, at his plea hearing Mr. Monroig specifically did not admit to causing the death of one Carl Connor. *Plea Trn.* at 16 (government acknowledging dispute regarding who injected Mr. Conner with fatal drugs); *Plea Trn*. at 13 (defendant admitting to distribution of cocaine and heroin, but no admission of causing death); *Sent. Trn.* at 4 (defendant's understanding that although Government believed causation of death could be proved, defendant did not admit to causation); *Pre-Sentence Investigation Report* at ¶ 13.

Based on the amount of drugs Mr. Monroig distributed, the United States Sentencing Guidelines sentencing range is 24 to 30 months. *Pre-Sentence Investigation Report* at ¶ 71; *Sent. Trn.* at 7-8.

Due to the death of Carl Connor, however, Mr. Monroig's sentence was departed upward pursuant to U.S.S.G. 5K2.1 ("If death resulted, the court may increase the sentence above the authorized guideline range."); *see Sent. Trn.* at 5-6. Based on a plea agreement, Mr. Monroig was sentenced to a term of 120 months. *Sent. Trn.* at 9-10.

In *Blakely v. Washington*, 542 U.S. __ , 124 S.Ct. 2531 (2004), the Supreme Court held that a sentence cannot be augmented on facts that were not either found by a jury or admitted by the defendant.

Mr. Monroig did not admit to causing the death of Carl Connor. His maximum sentence, therefore, is 30 months. Having been sentenced to 120 months, 90 months of his sentence is unconstitutional. Mr. Monroig's case should thus be remanded for re-sentencing.

CONCLUSION

In light of the foregoing, Mr. Monroig requests that this honorable court reverse the decision of the District Court such that the evidence tainted by the unrecorded and intoxicated interrogation of Mr. Monroig be suppressed, or in the alternative, that this case be remanded for resentencing.

Mr. Monroig requests his attorney be allowed to present oral argument.

Respectfully submitted,
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Dated: November 24, 2004

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I hereby certify that on November 24, 2004, two copies of the foregoing, as well as a computer disk containing the foregoing, formatted by WordPerfect 8, will be forwarded to Mark Howard, Assistant United States Attorney.

Dated: November 24, 2004

Joshua L. Gordon, Esq.

I hereby certify that this brief complies with the type-volume limitations contained in F.R.A.P. 32(a)(7)(B), that it was prepared using WordPerfect version 11, and that it contains no more than 4691 words, exclusive of those portions of the brief which are exempted.

Dated: November 24, 2004

Joshua L. Gordon, Esq.

ADDENDUM