

2003

Utah v. Richard Franklin Norris : Reply Brief

Utah Court of Appeals

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Kris Leonard; assistant attorney general; attorney for appellee.

Elizabeth Hunt; Attorney for Mr. Norris.

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	(not incarcerated)
	:	
RICHARD FRANKLIN NORRIS,	:	
	:	Case No. 20030817-CA
Defendant/Appellant.	:	
	:	

REPLY BRIEF OF APPELLANT

This is the reply brief of appellant in a direct appeal from Mr. Norris' convictions for attempted communications fraud, a class A misdemeanor, in violation of Utah Code Ann. § 76-4-101 and 76-10-1801, entered in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Robin W. Reese, Judge, presiding.

Kris Leonard
Assistant Attorney General
Heber Wells Building
160 East 300 South, 6th Fl.
P O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for State of Utah

Elizabeth Hunt (#5292)
3194 South 1100 East, #202
Salt Lake City, Utah 84106
Telephone: (801)706-1114
Fax: (801)461-4300

Attorney for Mr. Norris

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Kris Leonard
Assistant Attorney General
Heber Wells Building
160 East 300 South, 6th Fl.
P.O. Box 140854
Salt Lake City, Utah 84114-0854

Attorney for State of Utah

Elizabeth Hunt (#5292)
3194 South 1100 East, #202
Salt Lake City, Utah 84106
Telephone: (801)706-1114
Fax: (801)461-4300

Attorney for Mr. Norris

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ARGUMENT

I.
THE COMMUNICATIONS FRAUD STATUTE
IS UNCONSTITUTIONALLY OVERBROAD.

In State v. Norris, 2004 UT App 267, 2004 WL 1794474, this Court held that the communications fraud statute is constitutional, and rejected challenges to its vagueness and overbreadth. Id. at ¶¶ 8-16. The State has filed a letter of supplemental authority with the Court asserting that the Norris decision disposes of the challenges to the communications fraud statute in Norris' opening brief in this case.

The doctrine of horizontal stare decisis generally requires the panels of this Court to follow the decisions of all other panels. See, e.g., Bonneville Asphalt v. Labor Com'n, 2004 UT App. 137, ¶ 16, 91 P.3d 849.

However, the doctrine is not mandatory. If this Court believes that another panel's decision is clearly erroneous, and does not do so lightly, the Court may overrule the

decision of another panel. See, e.g., Manning v. State, 89 P.3d 196 (Utah App. 2004).

The Norris decision is clearly erroneous and should be set aside, because in finding that the communications fraud statute is not constitutionally overbroad, Norris relies on New York Times v. Sullivan, 376 U.S. 254, 279-80 and n.19 (1964), a civil libel case involving a public official. Sullivan does not stand for the proposition propounded by Norris – that all knowing or recklessly-made falsehoods are constitutionally unprotected speech, see Norris at ¶ 11. Rather, Sullivan, which places the burden on a public official to prove knowing falsehood or reckless disregard for the truth in order to obtain a judgment for libel, is premised on the need for free public debate on public figures and their political service, and thus sets a high civil burden for public officials to meet in order to sue someone for libel. See id. In Sullivan, the Court “designed a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation,” Gertz v. Robert Welch Inc., 418 U.S. 323 (1973). Sullivan is thus unique to its context and inapposite to the context of a criminal fraud statute.

Like the Norris decision, the State’s brief in this case relies on Sullivan and I.M.L., 2002 UT 110, 61 P.3d 1038, in arguing that the communications fraud statute appropriately criminalizes fraudulent conduct by requiring proof of at least reckless disregard for the truth. State’s brief at 20. I.M.L. involved a libel statute which the court struck because it failed to satisfy the law and rationale of Sullivan, in failing to define the element of malice in constitutional terms, and in failing to provide truth as a defense.

See id. I.M.L., like Sullivan, is thus inapposite.

The State's reliance on State v. Frampton, 737 P.2d 183 (Utah 1987), State's brief at 20, is likewise misplaced, because Frampton only establishes that acts executed with an intent to defraud are not constitutionally protected, and does not shield the communications fraud statute from constitutionally scrutiny, because the communications fraud statute does not require intent to defraud as a necessary element, but creates criminal liability in cases involving falsehoods uttered intentionally or recklessly to gain something of value, an intent that is present virtually anytime someone intentionally, knowingly or recklessly utters a falsehood. See § 76-10-1801(1).

Frampton, I.M.L. and Sullivan are inapposite to this context, which involves a criminal fraud statute which does not require proof of intent to defraud, but will permit a conviction based on a falsehood uttered with the intent to obtain anything of value, and thus applies to virtually all intentionally or recklessly uttered falsehoods, regardless of whether they are fraudulent. See Utah Code Ann. § 76-10-1801(1).

The State's argument that the statute's requirement of proof of intentional, knowing or reckless falsehood constitutes an element requiring proof of intent to defraud, State's brief at 19, is incorrect. The statute itself does permit a conviction based expressly on dishonest communication in furtherance of a scheme to defraud, but also permits convictions to enter on the basis of a different and far broader theory – communication in furtherance of a scheme to obtain anything of value by means of false pretenses. See §

76-10-1801. It is axiomatic that all statutory language is presumed to have been intentionally adopted by the legislature, and should be given effect by the courts. See, e.g., Norris, at ¶ 10.

The pertinent constitutional decisions in the context of criminal fraud statutes confirm that the Utah communications fraud statute is substantially constitutionally overbroad, because under its plain terms, it makes a second degree felony of any intentional or recklessly uttered falsehood designed to obtain something of value, without requiring any intent to defraud or success in defrauding. See id. Thus, it encompasses a wide array of communicative conduct which is not fraudulent. Compare LaFave, Criminal Law, Chapter 8, § 90 (discussing fraud and other crimes falling under the rubric of false pretenses, which normally have the following elements: “(1) a false representation of a material present or past fact; (2) which causes the victim; (3) to pass title to (4) his property to the wrongdoer, (5) who (a) knows his representation to be false and (b) intends thereby to defraud the victim.”).

The Utah communications fraud statute applies to many kinds of constitutionally protected speech, such as commentary on the functioning of the government,¹ political

¹When national leadership seeks to justify the war in with false allegations of weapons of mass destruction, is this a second degree felony? See, e.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (First Amendment protects “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”).

debate,² religious speech,³ and all manner of interpersonal communications.⁴

Criminal fraud statutes which impinge on First Amendment activities must be drawn with “narrow specificity” so that constitutionally-protected speech is not chilled or punished criminally as a byproduct of or direct application of an overbroad criminal fraud statute. See, Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988).

In Village of Schaumburg, the Court struck on First and Fourteenth Amendment grounds an ordinance punishing organizations for soliciting charitable contributions if those organizations used less than 75% of the donations for anything but the charitable purpose advertised. The government claimed that the ordinance was valid and necessary to protect the public from “fraud, crime and annoyance,” and the Court agreed that these

²When a political candidate falsely promises that she will not raise taxes to garner votes, is this a second degree felony? See, e.g., Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980) (First Amendment protects “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”).

³When a religious leader falsely promises eternal glory to those who will do his bidding in a holy war, is this a second degree felony? See, e.g., Widmar v. Vincent, 454 U.S. 263, 269 (1981) (religious speech and worship protected speech under First Amendment).

⁴If a woman falsely pledges to love a man forever in exchange for physical affection, is this a second degree felony? See, e.g., Provo City v. Willden, 768 P.2d 455, 458 (Utah 1989) (recognizing First Amendment protection of private speech and conduct between consenting adults).

were valid interests. See, id. at 636. However, because many legitimate charitable organizations might use more than 25% of their solicitations for valid purposes other than direct donations to their identified charitable causes, the Court found that the Constitution would not permit the government to label such organizations as fraudulent, or to prohibit them from soliciting funds. Id. at 637. The Court held that the government could serve the interests, but would be required to do so through “narrowly drawn” regulations, concluding, “Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone” Id. at 637, quoting NAACP v. Button, 371 U.S. 415, 438 (1963).

Similarly and to a much greater degree, the Utah communications fraud statute sweeps within its ambit a huge amount of expressive conduct that does not qualify as fraudulent, see, e.g., LaFave, *supra*, and the government’s interest in preventing fraud can and must be met in a far narrower statute than the communications fraud statute. Compare Village of Schaumburg, *supra*. See also Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 961-62, 965-68 (1984) (noting that Court in Schaumburg struck ordinance because there was no connection between fraud and much of the constitutionally protected speech to which the ordinance ostensibly applied, the Court struck a similar law pertaining to charitable solicitation, because there was “no core of easily identifiable and constitutionally proscribable conduct that the statute prohibits” and thus, the statute unnecessarily risked the chilling of free speech); Riley v. National Federation of the Blind of North Carolina, 487 U.S. 781 (1988) (striking statute similar to

that in Schaumborg and Munson after subjecting it to strict scrutiny and concluding that it was not narrowly tailored to the goals of fraud prevention and other related goals in charitable solicitations).

Because the Utah communications fraud statute has “no core of easily identifiable and constitutionally proscribable conduct,” and thus risks the chilling of free speech, and because the goal of fraud prevention can easily be attained by far narrower means, this Court should strike the communications statute on overbreadth grounds. See Schaumborg, Munson, and Riley, *supra*.

II. THE UTAH COMMUNICATIONS FRAUD STATUTE IS UNCONSTITUTIONALLY VAGUE.

In the Norris decision, this Court rejected vagueness challenges to the terms “artifice,” “communicate” and “anything of value” in the communications fraud statute. State v. Norris, 2004 UT App 267, ¶¶ 12-16, 2004 WL 1794474. This portion of Norris should be carefully reconsidered and overruled, because it is premised on the erroneous conclusion that no constitutionally protected conduct is proscribed and chilled by the statute, because the statute requires proof of actual malice and thus comports with New York Times v. Sullivan, *supra*. Norris, 2004 UT App 267, ¶¶ 11 and 12. The State’s brief in this case contains the argument adopted in Norris. State’s brief at 21-24.

The communications fraud statute applies to all manner of constitutionally protected speech, including political debate, religious persuasion, and interpersonal communications. See, e.g., Village of Schaumborg v. Citizens for a Better Environment,

444 U.S. 620, 632 (1980) (First Amendment protects “communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes.”).

As discussed above, Sullivan does not stand for the proposition that all falsehoods uttered intentionally or with reckless disregard for their truth are not entitled to constitutional protection, and is inapposite to this context.

Because the communications fraud statute does apply to constitutionally protected speech and conduct, the Norris decision and the State’s brief are in error in requiring one challenging this statute to prove it ““vague in all of its applications.”” Norris at ¶ 12 (citation omitted); State’s brief at 22.

In discussing the term “artifice,” the Norris Court held that the statute proscribes only those artifices involving an intent to “**inter alia** defraud others.” Norris at ¶ 13 (emphasis added), and essentially adopted the argument in the State’s brief in this case. State’s brief at 22-23.

While the communications fraud statute certainly does proscribe artifices “to defraud another,” it is the “inter alia” portion of the statute that poses the vagueness problem, for whether something is “of value” and qualifies for prosecution under the statute is truly in the eye of the beholder, or police officer, prosecutor, judge or jury charged with applying this incredibly versatile law. But see, e.g., Grayned v. Rockford, 408 U.S. 104, 108-09 (1972) (vagueness doctrine requires laws not only to give citizens notice of proscribed behavior, but also prevents those who are to enforce the laws from

exercising what should be the legislative prerogative in discriminatory application of vague laws).

The Court found that the term “communicate” was not unduly vague just because the definition was broad, but apparently was not presented with, and did not reach the critical aspect of the argument raised in this case – that the statute fails to specify whether one communication uttered to many justifies multiple counts. See Norris, at ¶ 14. In its brief in this case, the State recognizes but does not address the argument about the number of recipients and the number of counts, other than perfunctorily concluding that the number of counts is determined by subsection (5) of the statute. State’s brief at 23, 26-27.

While subsection (5) of the statute does clearly permit a separate charge for each communication, subsection (6) of the statute, which defines the phrase “to communicate,” is ambiguous as to whether communication is determined by the defendant’s act of uttering, or on the defendant’s act in successfully communicating to a recipient.⁵ In the former case, depending on how it is broadcast, one utterance might support one charge or many, and in the latter, one utterance would seem to sustain as many charges as there

⁵Subsection (6) provides,

(6) (a) To communicate as described in Subsection (1) means to bestow, convey, make known, recount, impart; to give by way of information; to talk over; or to transmit information.

(b) Means of communication include but are not limited to use of the mail, telephone, telegraph, radio, television, newspaper, computer, and spoken and written communication.

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were recipients.⁶

In rejecting a vagueness challenge to the phrase “anything of value,” the Norris Court speculated that most communications fraud cases would be prosecuted for schemes designed to obtain “money or property,” and concluded that the statute would thus be “valid in the vast majority of its intended applications.” Id. at ¶ 15, citing Hill v. Colorado, 530 U.S. 703, 733 (2000).

Hill does recognize that courts faced with vagueness challenges should refrain from launching off into unlikely hypothetical applications of statutes, see id. but does not authorize courts to ignore statutory language, and/or to assume that prosecutions will not be brought under theories of prosecution authorized by the plain terms of the statute. See id.

While the Norris Court was disinclined to permit a challenge to the “anything of

⁶In Norris’ instant case, the prosecution’s apparent theory underlying the two counts for each victim was that Norris communicated to each of them twice – once through a newspaper advertisement, and once in personal meetings (R. 9-10); R. 1867 at 221). The evidence at the preliminary hearing arguably involved many more communications, because Norris had ongoing employment relationships with many of the victims. See Norris’ opening brief at 8-10 n.2 (summarizing the preliminary hearing evidence). It was not clear from the preliminary hearing that all of the victims saw separate or unique newspaper advertisements, and it appears that one newspaper advertisement or other communication might be viewed as justifying a separate charge for each person who received the communication. See id. and R. 9-10.

At the preliminary hearing, the prosecutor argued that he could have charged a separate count for each communication received by each victim, including counts for each victim who read a newspaper article, and for each victim who heard Norris speak in a group meeting (R. 1868 at 34).

value” language because Norris was charged with a scheme to defraud people of money in that case, Norris, ¶ 15, in this case, all of the many information filed against Norris alleged that his scheme was designed to obtain money “or anything of value.” See Addendum to Norris’ opening brief (containing informations). Reviewing the evidence at the preliminary hearing confirms that some of Norris’s conduct at issue may have been charged exclusively under the “anything of value” language, given that the goals of his schemes alleged at the preliminary hearing varied from getting people to work for him without paying them as promised in advertisements or oral representations, or suing people for damages after they failed to comply with their contractual obligations. See Norris’ opening brief at 8-10 n.2 (summarizing preliminary hearing evidence).⁷

The Norris decision does not address the aggregation issue, which the State dismisses with the argument that the communications fraud statute clearly requires separate charges for each communication, which are individually classified by level according to the aggregated damages in all counts. State’s brief at 27, 32.

In making this argument, the State does not address the many interpretations of the aggregation and unit of prosecution portions of the statute in this case, which many

⁷The State notes that Norris has not claimed that his conduct was constitutionally protected. Because the government has never been required to provide a bill of particulars or otherwise specify which of Norris’ communications and/or conduct are at issue in this case, Norris is not in a fair position to assert that his conduct is constitutionally protected. At a minimum, under Schaumburg’s recognition that the communication of information is constitutionally protected, Norris’ conduct qualifies for First Amendment protection.

interpretations confirm that because the communications fraud statute is so vague, it can and will be applied in radically disparate fashions, depending on the identity and temperament of the prosecutor, judge or jurors. See Norris' opening brief at 25-27.

Because the communications fraud statute does not give adequate notice of proscribed conduct to citizens, and fails to limit the discretion of those charged with enforcing the statute, this Court should strike the statute on vagueness grounds. See, e.g., Grayned, supra.

III.

THE TRIAL COURT HAD NO JURISDICTION OVER NORRIS' CASE.

The State argues that Norris' argument regarding the trial court's lack of jurisdiction "omits a crucial fact: the misdemeanor appeal was remitted *before* the State filed the May 15 information." State's brief at 36.

Norris did not omit this fact. He acknowledged the May 15 issuance of the remittitur in his statement of facts, and then discussed how the remittitur was recalled as premature and held in this Court until October 30, 1998. Norris opening brief at 5-7. In his argument in the opening brief, Norris relied on Hi-Country Estates Homeowners Ass'n v. Foothills Water Company, 942 P.2d 3035 (Utah 1996) (*per curiam*), because that case demonstrates that if a remittitur issues prematurely, informations filed in the district court are null and void. Norris opening brief at 37-38.

The State claims that Hi-Country is not relevant, supporting or controlling

authority for Norris' position, because the district courts' acceptance of the informations in the district court while the case was on appeal did not affect the parties' rights. State's brief at 38.

This argument fails to account for Norris's repeated arrests and increases in bail, and for the statute of limitations, which would have run before the remittitur issued had the district court not accepted the informations before the remittitur issued properly from this Court.

The State claims that Nielson v. Schiller, 66 P.2d 365 (Utah 1937), condones the actions of the district court in permitting informations to be re-filed before the remittitur issued properly from this Court. State's brief at 37.

Nielson stands for the propositions that when one court has exercised jurisdiction in a case, a second court may not, and that if a second court does so act, the orders of that court are to be vacated and set aside. Id. at 368. Accordingly, the informations signed by Magistrate/Judge Reese while the case was on appeal and pending a motion to dismiss with prejudice before Judge Dever (e.g. R. 10, 56), should be vacated and set aside. See id.

In arguing that there was no violation of the concurrent jurisdiction doctrine, the State claims that "[t]he State filed its action in the district court in the belief that the misdemeanor appeal was completed." State's brief at 39. This assertion is not supported by citation to the record, likely because the record contradicts the assertion. The State

refiled the case twice before the remittitur issued prematurely, and was informed by Judge Palmer that he would not hear the case until the West Valley case was completely disposed of (R. 131), and was informed by Judge Dever that the State could not refile until the remittitur issued (R. 34, 166; R. 1860 at 27). The State not only refiled the case when the remittitur issued prematurely (R. 12-21), and while a motion to dismiss with prejudice was pending before Judge Dever (R. 10, 56), but was informed at the time that Judge Reese permitted the refile and signed the information on May 15, 1997 that it could not proceed until the remittitur arrived (R. 156).

The State's conduct thus does not reflect a good faith belief that the misdemeanor appeal was completed, but reflects disregard for the law of the case as set forth by Judge Palmer that the State could not refile until the West Valley appeal was disposed of, and bad faith forum shopping and violation of Norris' due process rights. But see Mascaro v. Davis, 741 P.2d 938, 946 (Utah 1987) ("one district court judge cannot overrule another district court judge of equal authority."); State v. Atencio, 2004 UT App 93, ¶ 17 n.5; 89 P.3d 191 ("Forum shopping occurs when "a criminal prosecution [is] shuttled from one magistrate to another simply because a county attorney is not satisfied with the action of the magistrate in the precinct whose jurisdiction was first invoked." Brickey, 714 P.2d at 647 (quotations and citation omitted). To eliminate this practice, the Utah Supreme Court held that "when a charge is refiled, the prosecutor must, whenever possible, refile the charges before the same magistrate." Id.").

Contrary to the State's perfunctory and unsupported claim, State's brief at 39-40, permitting the refile in the absence of a validly issued remittitur thus violated, rather than satisfied, the concurrent jurisdiction doctrine

In disputing Norris' claim that the due process violations and prosecutorial vindictiveness constitute subject matter jurisdictional issues, the State seeks to distinguish Blackledge v. Perry, 417 U.S. 21 (1974), by noting that Blackledge's retrial was viewed as vindictive because it appeared that he was being punished for exercising his right to appeal, whereas in this case, it was West Valley City, and not Norris, who took the appeal. State's brief at 42-43

While the West Valley City prosecutors originally took the appeal, West Valley then moved to dismiss it in order to facilitate felony charges by the county (R. 742), and it was Mr. Norris who pursued the appeal, by filing various motions and petitions in this Court, the Utah Supreme Court, and the United States Supreme Court (e.g., R. 41-211-214). Given the accurate history of this case and the substantial increase in charges and bail, Blackledge and the other authorities cited in Norris' opening brief but not addressed by the State establish due process violations defeating the trial court's subject matter jurisdiction. See Norris' opening brief at 45-48

On the merits, the State disputes that there was any due process violation or any prosecutorial vindictiveness, claiming that "the multiple information filings and increase in charges" "represent only the prosecution's good faith attempts to place the prosecution

and the results of an on-going investigation before the appropriate court [.]” State’s brief at 45.

The record contradicts the argument. The record demonstrates that while the original misdemeanor case was pending on appeal, the prosecution refiled the case three times, increasing the charges from four misdemeanors (R. 165, 621-22), to eleven third degree felonies (R. 49-53), to ten third degree felonies (R. 55-58), to twenty third degree felonies (R. 12-21). The informations were twice filed before different judges (Dever and Reese) after the first two judges (Palmer and Dever) ruled that the refiling could not occur until after the West Valley appeal was complete (R. 131, 34. 166, R. 1860 at 27), and at least two of the refiled informations reflected that no prior informations had been refiled (R. 11, 60), when this was not the case. But see, Atencio, supra. The informations were repeatedly based on a police report that should have been expunged (R. 11, 60). The bail increased from \$75,000 to \$150,000 (R. 55, 62).

In support of its continuing investigation claim, the State cites to a memorandum drafted for the signature of deputy district attorney Greg Bown, reflecting that the four misdemeanor charges increased to ten felony charges on the basis of “not only ... the conduct of the defendant as represented by the conduct involved in the Judge Watson case and additional similar conduct involving additional victims which had been discovered subsequently to the filing of the misdemeanors by the West Valley City Prosecutors.” (R. 1788-89). State’s brief at 46. However, this memorandum was never

signed by Mr. Bown or anyone else.

At the hearing on April 14, 1997, counsel for Norris indicated that all of the victims in the felony counts, including those who were not named in the original West Valley charges, were witnesses and potential victims in that original case (R. 1860 at 16). The prosecutor at that hearing, Ernie Jones, did not dispute that claim, or claim that the additional charges were the result of any ongoing investigation, but simply claimed that the additional victims in the refiled counts were not named in the original West Valley counts (R. 1860 at 5-12).

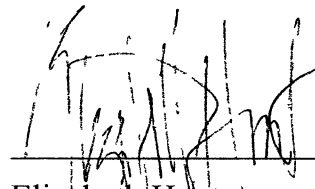
The record and the refiled informations, which are signed and sworn to under oath, all reflect that the charges are based on the same original police report filed in the West Valley case, which police report should have been expunged (R. 9, 49-53, 128, 165, 176-80, 218-223, 281, R. 1860 at 5-10, 12-13, 20). The fact that the same original police report was the basis for these prosecutions counters the unsupported claim that the increased charges were the product of an ongoing investigation.

Thus, the Court should reject the claim that the increase in charges was the result of an ongoing investigation, and should accurately characterize the escalating charges and bail and other improprieties as blatant proof of prosecutorial vindictiveness and violation of due process, which defeated the district court's subject matter jurisdiction over this case.

CONCLUSION

This Court should strike the communications fraud statute on constitutional grounds and/or hold that as a result of its egregious violations of due process of law, the State may not re prosecute Mr. Norris.

Respectfully submitted on August 26, 2004



Elizabeth Hunt

Counsel for Mr. Norris

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing reply brief of appellant to Assistant Attorney General Kris Leonard, Heber Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this August 26, 2004.

