No. 85103

IN THE
MISSOURI SUPREME COURT

SCOTT D. BARMORE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of St. Charles County, Missouri
The Honorable Nancy Schneider, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate judgment and sentence under Supreme Court Rule 24.035 in the Circuit Court of St. Charles County. The conviction sought to be vacated was for first degree robbery, §569.022, RSMo 2000[1], and second degree robbery, §569.030, for which appellant was given a suspended imposition of sentence and probation. Subsequently, after appellant violated the terms of his probation, he was sentenced to twenty years on the first degree robbery and ten years on the second degree robbery, said terms to run concurrently. The Missouri Court of Appeals, Eastern District, affirmed appellant's conviction and sentence. ***Barmore v. State***, No. ED80470 (Mo.App.E.D., November 26, 2002). It denied appellant's motion for rehearing on January 27, 2003.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri. On April 1, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this case was transferred to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Article V, §10, Missouri Constitution (as amended 1982).

[1]All statutory citations are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

Appellant, Scott D. Barmore, was charged by information with one count of first degree robbery and one count of second degree robbery (LF 3, 8-9). On October 30, 1998, appellant appeared in the Circuit Court of St. Charles County before the Honorable Grace M. Nichols and entered a plea of guilty (LF 4, 10; SPTr. 1).[2]

The prosecution stated that on May 4, 1998, appellant forcibly stole U.S. currency from Eric Parson and in doing so, displayed what appeared to be a deadly weapon (SPTr. 4) and that on May 9, 1998, appellant forcibly stole U.S. currency from Elaine Mayberry (SPTr. 4).

Appellant understood the charges against him and the range of punishment on both charges (LF 12; SPTr. 4-5). Appellant acknowledged that he committed both crimes (SPTr. 8-10). Appellant understood that he had a right to a jury trial and all other rights appurtenant thereto (SPTr. 5-6).

At the plea hearing, the prosecutor said that pursuant to the plea negotiation, the state was recommending sentences of ten years on the first degree robbery count and five years on the second degree robbery count (SPTr. 7). The state took no position as to whether the sentences should run concurrently or consecutively (SPTr. 7). The state also took no position as to whether or not appellant should receive a suspended imposition or suspended execution of sentence or 120 day call back (SPTr. 7). If probation were to be granted, the state recommended that appellant do 90 days shock incarceration (SPTr. 7). Also, as a condition of probation, the state recommended that appellant pay restitution, earn his G.E.D., and perform 150 hours of community service (SPTr. 8). Appellant stated that that was his understanding of the plea agreement as well (SPTr. 8; LF 13).

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[2]The supplemental plea transcript is cited as "SPTr." The supplemental sentencing transcript is cited as "SSTr."

Appellant understood that other than the plea agreement, no other promises or agreements had been made, and if anyone other than the prosecutor had made promises or suggestions, they had no authority to do so (LF 14). Appellant knew that the trial court could accept or reject the plea agreement and that if the court rejected the plea agreement, the court would give him the opportunity to withdraw his plea (LF 14). If there is no plea agreement, appellant understood that the sentence he received would be a matter solely within the control of the judge (LF 14). The trial court accepted appellant's plea and deferred sentencing so that a pre-sentence investigation could be made (SPTr. 10-11).

The Honorable Nancy L. Schneider presided at the sentencing hearing (SSTr. 1). She explained to appellant that if he violated his probation, she would be able to sentence him to the maximum, thirty years or life (SSTr. 17, 19). The court granted appellant a suspended imposition of sentence and placed him on probation for five years (LF 5, 22-24; SSTr. 20).

On March 13, 2000, appellant's probation was revoked and appellant was sentenced to 20 years on count one and 10 years on count two, said sentences to run concurrently (LF 6-7, 25-26).

Appellant timely filed a *pro se* motion for postconviction relief under Supreme Court Rule 24.035 (LF 28, 30-35). Appointed counsel subsequently filed an amended motion on appellant's behalf (LF 28, 36, 40-47). In his amended motion, appellant pled that his plea was involuntary, unknowing, and unintelligent because his attorney failed to tell him that if the court revoked his probation, he could be sentenced under the full range of punishment for each count (LF 43-44). The motion court denied appellant's request for an evidentiary hearing and issued findings of fact and conclusions of law denying appellant's motion for postconviction relief (LF 29, 50-52).

Appellant appealed the motion court's denial of his postconviction motion (LF 29). The state, in respondent's brief, conceded that the case should be remanded for an evidentiary hearing. However, the Court of Appeals, Eastern District, affirmed the denial of appellant's motion without an evidentiary hearing, finding that appellant's factual allegations, if true, did not warrant relief because the trial court's sentencing options after appellant violated his probation were not direct consequences, but rather collateral consequences, of his guilty plea. ***Barmore v. State***, No. ED80470, slip op. at 4 (Mo.App.E.D., November 26, 2002). The Court of Appeals, Eastern District, denied appellant's motion for rehearing or transfer to the Supreme Court on January 27, 2003. On April 1, 2003, pursuant to Supreme Court Rules 30.27 and 83.04, this Court granted appellant's motion to transfer the case to this Court.

ARGUMENT

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S RULE 24.035 MOTION IN WHICH HE ALLEGED THAT HIS PLEA WAS INVOLUNTARY BECAUSE COUNSEL FAILED TO TELL HIM THAT HE WOULD BE SUBJECT TO THE FULL RANGE OF PUNISHMENT IF HIS PROBATION WERE REVOKED. COUNSEL WAS NOT REQUIRED TO TELL APPELLANT ABOUT THE COURT'S SENTENCING OPTIONS IF APPELLANT'S PROBATION WERE REVOKED BECAUSE THIS WAS A COLLATERAL OR INDIRECT CONSEQUENCE OF APPELLANT'S PLEA.

Appellant contends that the motion court clearly erred in denying, without an evidentiary hearing, his Rule 24.035 motion in which he alleged that his plea was involuntary because counsel had not explained to him that if he violated the terms of his probation, he would be subject to being sentenced within the entire range of punishment, as opposed to within the recommendations made by the state as part of the plea agreement.

A. Standard of review.

The motion court is not required to grant a movant an evidentiary hearing unless (1) the movant pleads facts, not conclusions, which if true would warrant relief, (2) the facts alleged are not refuted by the record, and (3) the matters complained of resulted in prejudice to the movant. ***Coates v. State***, 939 S.W.2d 912, 913 (Mo. banc 1997). Appellate review of the denial of a post-conviction motion is limited to the determination of whether the findings of fact and conclusions of law are "clearly erroneous." ***State v. Tokar***, 918 S.W.2d 753, 761 (Mo. banc 1996), *cert. denied* 117 S.Ct. 307 (1996). Findings of fact and conclusions of law are clearly erroneous only if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made. ***State v. Taylor***, 929 S.W.2d 209, 224 (Mo. banc

1996), *cert. denied* 117 S.Ct. 1088 (1997). On review, the motion court's findings and conclusions are presumptively correct. ***Wilson v. State***, 813 S.W.2d 833, 835 (Mo. banc 1991).

To show ineffective assistance of counsel, appellant must show that his counsel "failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances," ***Strickland v. Washington***, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984), and that he was prejudiced by his counsel's failure to competently perform. ***Id.*** Prejudice exists when there is a reasonable probability that, but for counsel's ineffectiveness, the result would have been different. ***Strickland,*** 466 U.S. at 694, 104 S.Ct. at 2068. Counsel is presumed to be effective; it is appellant's burden to overcome this presumption by a preponderance of the evidence. ***State v. Tokar, supra***. Where a defendant pleads guilty, claims of ineffective assistance of counsel are only relevant as they affect the voluntariness and understanding with which the plea was made. ***Hicks v. State***, 918 S.W.2d 385, 386 (Mo.App. E.D. 1996). To show prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. ***State v. Coates***, 939 S.W.2d 912, 914 (Mo.banc 1997).

B. Facts.

At appellant's plea hearing, he was told and he stated that he understood the full range of punishment for the charges he faced (SPTr. 5). The prosecutor explained the terms of the plea agreement as follows:

> [T]he recommendation is as follows. Count I, robbery in the first degree, ten years in the Missouri Department of Corrections. Count II, robbery in the second degree, five years in the Missouri Department of Corrections, but the

> State is taking no position whether they should run concurrent or consecutively to each other. The State is also taking no position as to whether or not the defendant should receive an SIS or SES or one hundred twenty day callback. If probation is granted, ninety days shock. As a condition of probation, restitution, GED and one hundred fifty hours of community service.

(SPTr. 7-8).

Both defense counsel and appellant agreed that the agreement was as stated by the prosecutor (SPTr. 8). Appellant also signed an 11-page plea of guilty, which stated in pertinent part as follows:

> The agreement reached by the parties is that if I plead guilty, the Court will sentence me as follows: robbery-1st 10 years; robbery 2nd 5 years; no position concurrent or consecutive; no position SIS or SES or 120 day callback; if probation 90 day shock; restitution; GED; 150 hr. community service.

(LF 13).

Sentencing was deferred until a later date so that a presentence investigation could be completed (SPTr. 11). At the sentencing hearing, the trial court told appellant that if he violated his probation, the court would be able to sentence him to thirty years to life in prison (SSTr. 17, 19). The trial court then suspended imposition of sentence and placed appellant on probation (SSTr. 19-21).

Subsequently, appellant violated his probation and was sentenced to 20 years and 10 years, the sentences to run concurrently (LF 25-26).

B. Appellant's Rule 24.035 pleadings.

In his amended motion, appellant pled that his plea was involuntary, unknowing, and unintelligent because appellant's attorney did not explain probation procedures to appellant (LF 43). Appellant pled that he did not know at the time of his plea that if he violated his probation he could be sentenced under the full range of punishment for each count (LF 43). Appellant pled that his plea bargain and the state's recommendation was for the minimum on each count, and that if he had known at the time of his plea that he could be sentenced under the full range of punishment if his probation were revoked, he would not have pled guilty but would have insisted on going to trial (LF 43).

C. Motion court findings.

The motion court found as follows with regard to this particular claim:

> Movant next claims that at the time of his plea he was not aware that if he violated his probation, he could be sentenced under the full range of punishment on each count. On the date of Movant's guilty plea, the full range of punishment was explained to him by the prosecutor. Movant indicated that he understood that range of punishment (guilty plea transcript p. 5, line 2-11). Further, when Movant was granted a suspended imposition of sentence, following a presentence investigation, the court explicitly told Movant that he could receive life in prison if he violated the terms of his probation (Sentencing transcript p. 19, line 3-9). Movant never expressed any confusion on that point, nor did he seek to withdraw his plea of guilty. The files and records of this conclusively show that Movant is entitled to no relief on t his claim. Accordingly, this claim is DENIED without an evidentiary hearing [Missouri Supreme Court Rule 24.035(h)].

(LF 52).

D. Direct consequences vs. indirect or collateral consequences.

Appellant contends that his plea was involuntary because his attorney "did not educate him about the significance of receiving a suspended imposition of sentence." (App.Br. 17-18). Appellant fails to address, however, the threshold question: whether counsel was obligated to "educate him" about the possible consequences if appellant violated the terms of his probation.

The validity of a guilty plea depends on whether it was made voluntarily and intelligently which means that the defendant must enter the plea with knowledge of the direct consequences of the plea. ***Reynolds v. State***, 994 S.W.2d 944, 946 (Mo.banc 1999) *citing* ***Brady v. United States***, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970).

Missouri caselaw has long held that counsel, while required to inform a defendant of the direct consequences of his plea, is not required to inform the defendant of the indirect or collateral consequences. ***Reynolds, supra; Morales v. State,*** No.ED81803 (Mo.App.E.D., April 29, 2003); ***Carter v. State***, 97 S.W.3d 563 (Mo.App.S.D. 2003); ***Copas v. State***, 15 S.W.3d 49 (Mo.App.W.D. 2000); ***Sadler v. State***, 965 S.W.2d 3899, 391 (Mo.App.E.D. 1998). Failure of counsel to inform his client of collateral consequences of his guilty plea does not constitute ineffective assistance of counsel. ***Redeemer v. State***, 979 S.W.2d 565, 572 (Mo.App.W.D. 1998).

This distinction between direct consequences and indirect consequences or, as they are sometimes called, collateral consequences is important because, without such distinction, there would be no end to the possible matters of which a defendant could complain that he had not been informed and that his plea was thus involuntary.

Direct consequences are defined two ways in Missouri. Some caselaw holds that the information of which Supreme Court Rule 24.02(b) instructs the court to inform the

defendant are "direct" results, and that consequences that do not appear within the Rule do not constitute direct consequences of which a defendant must be informed in order for his plea to be found to be knowing, voluntary, and intelligent. ***Morales v. State, supra*** (informing a defendant regarding the Sexually Violent Predator law is not direct consequence contemplated in Rule 24.02(b))***;*** ***Brown v. State***, 67 S.W.3d 708 (Mo.App.E.D. 2002) (finding that informing defendant regarding probation provisions is not direct consequence contemplated in Rule 24.02(b))***;***; ***Weston v. State***, 2 S.W.3d 111 (Mo.App.W.D. 1999) (Rule 24.02 does not require defendant be informed about victim's right to make a statement); ***Redeemer v. State***, 979 S.W.2d 565 (Mo.App.W,D, 1998) (informing defendant about credit for time served is not direct consequence under Rule 24.02); ***Drone v. State***, 973 S.W.2d 897 (Mo.App.W.D. 1998) (parole is not direct consequence contemplated in Rule 24.02); ***State v. Hasnan,*** 806 S.W.2d 54 (Mo.App.W.D. 1991) (Rule 24.02 makes no mention of deportation proceedings, thus not direct consequence under Rule); ***see also Copas, supra; Johnson v. State***, 5 S.W.3d 588 (Mo.App.W.D. 1999) ***Huffman v. State***, 703 S.W.2d 566 (Mo.App.S.D. 1986).

Thus, under Rule 24.02(b), the defendant must be told the nature of the charge, the mandatory minimum and maximum possible penalties provided by law, and that he has a right to representation by an attorney, the right to plead not guilty and the right to a jury trial and the other rights appurtenant thereto. Moreover, "[g]iven the mandatory nature of this rule, it is also logical to conclude that this list exclusive and that all 'direct results' are stated therein." ***Hasnan, supra***, at 55.

Caselaw also holds that "direct consequences" are those which *definitely, immediately, and largely automatically* follow the entry of a plea of guilty. ***Weston, supra***, at 115-116; ***Morales, supra; Brown, supra; Copas, supra; Johnson, supra; Redeemer,***

supra; Huth v. State, 976 S.W.2d 514 (Mo.App.E.D. 1998); ***Rollins v. State***, 974 S.W.2d 593 (Mo.App.W.D. 1998); ***Hasnan, supra; Huffman, supra.*** Thus, a "collateral consequence" of a guilty plea is one which does not definitely, immediately, and largely automatically follow the entry of a plea of guilty. ***Sadler, supra.***

In ***Huffman v. State***, 703 S.W.2d 566, 568 (Mo.App.S.D. 1986), the defendant argued that his plea was involuntary because he was not advised "of the nature of the power of the court upon revocation of a probation." The Court of Appeals determined that the "sentencing alternatives open to the trial court should the defendant violate his parole" were collateral consequences of which the defendant need not be informed. ***Id.*** ***Brown v. State***, 67 S.W.3d 708, 710, n. 1 (Mo.App.E.D. 2002), also acknowledges that an example of collateral consequences includes sentencing after probation revocation, citing to ***Huffman***.

The sentencing options open to the court after probation revocation are collateral consequences. They are not included within the provisions of Rule 24.02(b) and they do not "definitely, immediately, and automatically" follow from a defendant's guilty plea. For example, in the present case, it was not definite that appellant would *ever* be sentenced, having received a suspended imposition of sentence. It cannot logically be maintained that a possible consequence which *may never happen* is a consequence that follows "definitely, immediately, and automatically." Ultimately imposing a sentence at all, let alone the court's option to sentence appellant up to the maximum allowed did not definitely, immediately, or automatically follow from appellant's guilty plea. Sentencing appellant arose only after *and because of* an intervening event – appellant's violation of his probation, and such violation was neither definite, immediate, or automatic. A consequence which arose only because of an intervening event cannot logically be a direct consequence of a plea. In cases such as appellant's, imposition of sentence is a direct consequence of appellant's violation of

probation. If appellant had successfully completed his probation, there never would have been a sentence whatsoever. Indeed, the very language of appellant's motion demonstrates the collateral nature of his claim, in that his concern was about a consequence of his possible probation revocation, not a consequence of his guilty plea.

Because the court's sentencing options in the event appellant did not complete his probation were a collateral consequence of appellant's plea, counsel was not required to inform appellant of these consequences. Failure of counsel to inform his client of collateral consequences of his guilty plea does not constitute ineffective assistance of counsel. ***Redeemer v. State, supra.***

E. Appellant's argument.

In his substitute brief, appellant does not address the question of whether counsel had any obligation to inform him of the potential consequences of the revocation of his probation. Instead, appellant tries to circumvent the whole issue of direct versus indirect or collateral consequences by addressing his claim as merely a mistaken belief about his sentence based on some representation in the record (App.Br. 14-15, 17-18).

Appellant may now try to dress his claim in terms of a "mistaken belief," but the fact remains that his real claim is that counsel did not tell him what might happen if he failed to abide by the terms of his probation and his probation were thus revoked. As discussed above, this is a collateral consequence. A collateral consequence will invalidate a plea only where trial counsel has affirmatively misinformed a defendant about the collateral consequence. ***Reynolds, supra***; ***Patterson, supra; Hao v. State***, 67 S.W.3d 661, 662 (Mo.App. 2002); ***Beal v. State***, 51 S.W.3d 109, 111 (Mo.App.W.D. 2001); ***Copas, supra***. Appellant has not pled or claimed that counsel *misinformed* him about anything. Rather, his claim is now and

has always been that counsel failed to tell him about the collateral consequence. This failure by counsel does not render appellant's plea involuntary.

Furthermore, respondent disputes appellant's characterization of the plea agreement As reflected in the plea transcript, the prosecutor said that pursuant to the plea negotiation, the state was *recommending* sentences of ten years on the first degree robbery count and five years on the second degree robbery count (SPTr. 7). The state took no position as to whether the sentences should run concurrently or consecutively (SPTr. 7). The state also took no position as to whether or not appellant should receive a suspended imposition or suspended execution of sentence or 120 day call back (SPTr. 7). If probation were to be granted, appellant would do 90 days shock incarceration (SPTr. 7). Also, as a condition of probation, appellant would pay restitution, earn his G.E.D., and perform 150 hours of community service (SPTr. 8). Nothing in the plea agreement said anything about sentencing caps if the trial court chose not to sentence appellant but rather suspend imposition of sentence.

Appellant now argues as though he were denied his bargain. On the contrary, appellant received the absolutely best, most lenient outcome possible – plea agreement or no plea agreement – in that the trial court gave him a suspended imposition of sentence. The prosecution's recommendation was made in contemplation of appellant not receiving probation at all. Under the plea agreement, the state hoped that appellant would walk out of the sentencing hearing with, at a minimum, a ten and five year sentence; appellant in fact received a suspended imposition of sentence and, had appellant completed his probation, would have walked away without a conviction at all. The prosecution and the plea agreement never set out terms or recommendations as to what the prosecution felt would be an appropriate sentence if appellant in fact received probation and subsequently violated probation. The record is silent as to this collateral consequence, with the exception of the

court's discussion thereof with appellant at the sentencing hearing, at which time the court explained if appellant violated the terms of his probation, he would face sentencing under the full range of punishment allowed.

Appellant also relies on ***State v. Boyd***, 10 S.W.3d 597 (Mo.App.E.D. 2000). In ***Boyd***, the court sentenced the defendant to a term greater than that recommended by the state in a plea agreement after the defendant failed to appear for sentencing. The Court of Appeals held that the defendant had not been told prior to acceptance of his plea that the agreement would be rejected if he failed to show for sentencing, and thus the defendant should have been given the opportunity to withdraw his plea when the court decided not to follow the terms of the plea.

The present case is distinguishable because appellant did receive a disposition contemplated under the plea agreement – probation, and thus the plea agreement was never rejected and the court's sentencing options in the eventuality that appellant violated probation were a collateral consequence of his plea. Thus, unlike the defendant in ***Boyd***, appellant in the present case did receive the benefit of his bargain and the court did follow the terms of the plea agreement. Furthermore, ***Boyd*** dealt with a direct consequence – the sentence that definitely was going to be imposed while in the present case, appellant would never have had any sentence imposed had he not violated his probation

Finally, appellant argues that, at a minimum, he should have been allowed to withdraw his plea under Supreme Court Rule 24.02(d), which provides that a defendant shall be allowed to withdraw his plea if the trial court rejects the plea agreement (App.Br. 19-21). Prior to transfer to this Court, appellant has *never* pled or argued that he should have been allowed to withdraw his plea because the trial court had allegedly failed to follow the plea. Supreme Court Rule 24.035(d) states that the movant, in his motion to vacate, shall acknowledge that

he has waived any claim for relief known to him but not listed in the motion. The effect of this rule is to bar all claims not raised in a timely pleading. ***State v. Evans***, 992 S.W.2d 275, 295 (Mo.App.S.D. 1999). "A point raised on appeal after a denial of a postconviction motion can be considered only to the extent that the point was raised in the motion before the trial court. ***Id.*** "The point cannot be raised for the first time on appeal." ***Id.*** Thus, appellant's claim is procedurally waived and unreviewable. ***State v. Johnson***, 968 S.W.2d 686, 696 (Mo. 1998); ***State v. Shafer***, 969 S.W.2d 719, 740 (Mo. 1998). "An appellate court is without jurisdiction to consider an issue not raised before the motion court." ***Id.***

Procedural bars aside, the fact remains that the trial court did follow the plea agreement. In fact, the trial court, in suspending imposition of sentence and placing appellant on five years probation, disposed of the case in the most lenient manner possible within those options contemplated by the plea agreement, in that under the agreement, the state would remain silent as to whether or not probation was appropriate and appellant would be free to advocate therefor. The plea agreement never set out terms or recommendations as to what the prosecution felt would be an appropriate sentence if appellant in fact received probation and subsequently violated probation and thus it cannot be said that the trial court "rejected" the plea agreement in sentencing appellant as it did upon appellant's violation of the terms of his probation..

In short, it cannot be said that the trial court clearly erred in denying appellant's claim without an evidentiary hearing because appellant's claim, that his plea was involuntary because counsel did not fully explain what would happen if he violated the terms of his probation, was without merit because counsel is not required to inform defendants of the indirect or collateral consequences of their guilty pleas. Consequences of violating one's probation are not direct consequences of a guilty plea in that they do not immediately,

directly, and largely automatically follow from the guilty plea. Nor are they included among the information listed in Rule 24.02 that the trial court's are required to tell a defendant prior to taking a plea in order to insure that the plea is voluntary. The trial court disposed of the case within the terms contemplated by the plea agreement. Indeed, appellant received an extremely favorable disposition when he received a suspended imposition of sentence and five years probation on a class A and class B felony. Appellant's ultimate sentence *never* would have occurred but for the sorry fact that appellant violated the trust placed in him by the judicial system and failed to abide by the terms of his probation. Appellant's claim is without merit and should be denied.

CONCLUSION

In view of the foregoing, respondent submits that the denial of appellant's Rule 24.035 motion without an evidentiary hearing be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b)/Local Rule 360 of this Court and contains _____words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of May, 2003.

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