No. SC86201

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

HELEN SEVERS,

Appellant.

APPEAL FROM CAPE GIRARDEAU COUNTY CIRCUIT COURT
THIRTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE JOHN P. HEISSERER, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, and Rules

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the Cape Girardeau County Circuit Court convicting her of one count of the Class B felony of conspiracy to commit murder, for which she was sentenced to five years imprisonment. Following the issuance of a per curiam order and memorandum opinion by the Missouri Court of Appeals, Eastern District, affirming Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

Appellant appeals her conviction in Cape Girardeau County Circuit Court of one count of the Class B felony of conspiracy (§ 564.016, RSMo 2000). The State charged Appellant with one count of conspiracy to commit murder based on her efforts to obtain a gun to use to murder her daughter's son-in-law. (L.F. 6-7). Appellant was tried by a jury on April 2, 2003, with Judge John P. Heisserer presiding. (L.F. 3). Appellant does not contest the sufficiency of the evidence to support her conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed that:

Appellant and her daughter, Linda Myers, planned to kill Myers's son-in-law, Michael Ravellette, by shooting him. (Tr. 214, 243). The agreement to kill Ravellette was prompted by Myers's and Appellant's belief that Ravellette, who was married to Myers's daughter, had molested his wife's three-year-old daughter (Myers's granddaughter). (Tr. 130-131; State's Ex. 19).

Appellant gave her daughter money to purchase the gun to shoot Ravallette with. (Tr. 243). Myers approached Glenda Phillips, with whom Myers had been incarcerated, seeking to purchase a gun. (Tr. 130-131). Myers told Phillips that the gun was going to be used to kill Ravellette. (Tr. 131). Phillips wanted no involvement in the

plan, but Myers kept calling and approaching her about buying a gun. (Tr. 131). After Myers called Phillips on August 25, 2002, Phillips contacted the police. (Tr. 132).

Phillips told police about Myers's plan and an undercover officer, Sergeant Terry Mills, went to Phillips's home. (Tr. 133). Sergeant Mills, pretending to be the person selling the gun, placed a recording device on Phillips's phone to record conversations involving Myers. (Tr. 148; State's Ex. 13 and 14). During several recorded phone conversations, Myers talked about wanting a gun to kill her son-in-law. (State's Ex. 13-14). She told Mills that she had $75 to buy the gun. (State's Ex. 13). Sergeant Mills tried to get her to pay more, but she told him that $75 was all she had. (State's Ex. 13). Myers also told the officer that she needed six or seven bullets. (State's Ex. 15). Myers and Mills agreed to meet near the Taco Bell at the mall for the exchange. (State's Ex. 15).

Mills sent Sheriff Joe Crump to meet Myers and deliver the gun (Tr. 155, 200). Crump met Myers and they exchanged the money and the gun. (State's Ex. 17; Tr. 202-203). Crump gave Myers a nine millimeter semi-automatic gun and asked her if she had ever shot one before. (State's Ex. 17; Tr. 202). Myers told him that her mom (Appellant) was going to be the one to use the gun. (State's

Ex. 17; Tr. 202). Myers was then placed under arrest. (Tr. 160, 205).

After Myers was arrested, the officers focused the investigation on Appellant. (Tr. 162). They decided to place a telephone call to Appellant who was in Illinois waiting for the gun to be delivered. (Tr. 162). They called Appellant and pretended that Myers never showed up with the money. (State's Ex. 19; Tr. 162-163). Appellant was upset and stated that Myers "better not have taken my money and spent it". (State's Ex. 19). Appellant asked the officer if he knew anything about a silencer because Ravellette lived near a police station. (State's Ex. 19; Tr. 195). She talked about making a homemade silencer and practicing shooting the gun out in the country (State's Ex. 19).

Appellant was arrested the next day. (Tr. 164). She waived her Miranda rights and agreed to talk with the police. (Tr. 165-167). Appellant admitted to them that she was getting the gun to kill Ravellette. (Tr. 167-172, 243-244).

At trial, Appellant testified that she was trying to get a gun for protection (Tr. 258-259). Appellant claimed that she told the interrogating officers that she was getting the gun to kill Ravellete because that was what they wanted to hear (Tr. 274).

At the close of the evidence and arguments of counsel, the jury found Appellant guilty of conspiracy (L.F. 25). The court sentenced her to five years imprisonment (L.F. 29-31). This appeal follows.

ARGUMENT

The trial court did not err in accepting the jury's verdict because the verdict was not inconsistent on its face in that the jury's verdict found Appellant guilty of conspiracy to commit murder and assessed punishment of five-years imprisonment, which was within the range of punishment provided; and the trial court properly treated as surplusage language in the verdict asking for a suspended imposition of sentence, which was nothing other than a plea for leniency.

Appellant claims that the trial court erred in accepting the jury's verdict in this case because the verdict was inconsistent on its face in that the jury found Appellant guilty, but also recommended that Appellant be given a suspended imposition of sentence (SIS). The trial court did not err because the verdict was not facially inconsistent in that the jury found Appellant guilty and assessed a five-year sentence. The language asking for an SIS was simply a request for leniency, which the trial court properly treated as surplusage.

A. The circumstances surrounding the jury's verdict.

The verdict-directing instruction (Instruction No. 6) instructed the jury that if it found the elements of the crime charged, then it should find Appellant guilty of conspiracy to commit murder. (L.F. 18). The final paragraph of this instruction told the jury that if it found Appellant guilty, then it must assess a term of imprisonment of

"not less than five years and not to exceed fifteen years." (L.F. 18). The jury was also instructed (Instruction No. 7) that if it had a reasonable doubt whether Appellant conspired to murder Michael Ravellette, then it must find her not guilty. (L.F. 19).

During its deliberations, the jury sent three notes to the trial court. The first note asked for a transcript of Appellant's recorded conversation with the undercover officer. (L.F. 22). Without objection, the trial court delivered that transcript (State's Ex. 19) to the jury. (Tr. 327-28; L.F. 22).

The second note asked: "Does she [Appellant] have to serve the entire 5 year minimum sentence; or will she be eligible for parole or reduced sentence?" (Tr. 329; L.F. 23). Again without objection, the court responded: "I am sorry but the law does not permit me to answer this question." (Tr. 329; L.F. 23).

The third note asked: "Could we offer a 5 year suspended sentence?" (L.F. 24). Apparently, along with this note the jury returned the verdict form finding Appellant guilty of conspiracy to commit murder. (L.F. 25). In the verdict form, the jury assessed the punishment at "5 years with suspended imposition sentence [sic]." (L.F. 25; Tr. 330). Below the foreperson's signature line, which contained an instruction telling the jury to insert in the blank a term

of imprisonment of at least five years but not more than fifteen years, the jury wrote "see above requested sentence," referring to the suspended-sentence language that had already been inserted. (L.F. 25; Tr. 330).

The prosecutor argued that the suspended-imposition-of-sentence language was a request for leniency that could be ignored by the trial court. (Tr. 330-32). Appellant's attorneys requested that the trial court send back a new verdict director with a note telling the jury that it was bound by the sentencing guidelines contained in the instruction. (Tr. 336-37). While trying to determine how the jurors arrived at a five-year suspended imposition of sentence–something not mentioned in any instruction–the attorneys and the court discussed the testimony of the State's first witness, Glenda Phillips.

When asked during cross-examination if she had ever been convicted of endangering the welfare of a child, Ms. Phillips responded that she had received "an SIS." (Tr. 141). The prosecutor objected to the next question on the ground that Appellant's attorney "should know an SIS is not technically a conviction." (Tr. 141). After an off-the-record bench conference, Appellant's attorney again asked Ms. Phillips if she had been convicted of endangering the welfare of a child:

Q. So you do not have a conviction for the endangering the welfare of a child?

A. Not on an SIS. I understood it wasn't supposed to be a conviction.

Q. But you did plead guilty to endangering the welfare of a child?

A. I don't remember. It's been so many years ago. My daughter was there when he beat me up.

(Tr. 141-42).

Following the discussion had between the trial court and attorneys after the jury returned the verdict form, the trial court proposed, without objection, that the verdict form be returned to the foreperson and that the jury be called in and asked if it had reached a verdict. (Tr. 340). The trial court asked the foreperson if the jury had reached a verdict, and the foreperson said that it had and handed the verdict form to the bailiff. (Tr. 340-41). The court then polled the jurors, each of whom agreed that it was his or her verdict. (Tr. 341-42).

During the sentencing hearing, the trial court commented on the witnesses that had testified on Appellant's behalf during the hearing and stated that it was "very impressed with the reputation" Appellant

had built in the community. (Tr. 375). The court then expressed the difficulty it was having in deciding on punishment: whether to impose a prison sentence or place Appellant on probation:

> It's a very difficult decision for me to make. I have a very difficult time reconciling what I hear from your witnesses today, who I think are all very supportive, very honest; I don't disagree at all with what they say; it's obvious that you earned your reputation there; but I have a difficult time reconciling that with the voice on your tape arranging to purchase the gun to kill this man. It is a very serious crime. And while I recognize that what your lawyer says is correct, that the legislature does provide for probation in cases, including this one, to place you–just completely place you on probation after you've been convicted by a jury of this, sends I think a horrible message to the public that you can conspire to murder someone and not pay much of a price for it. I don't think it's the right thing to do. I think really the only fair thing to do in this case is to impose the sentence the jury recommended . . . . I have no doubt as I sit here that but for the intervention of the police in this case, that Michael Ravellette would be dead today. I have no doubt in my mind. It was clear to me from your own voice.

(Tr. 376-77). The trial court then imposed a five-year sentence on Appellant, noting that "it will be a relatively short time before you are released, given your age" and credit for time served. (Tr. 377-78).

B. The trial court did not err in accepting the verdict.

Appellant contends that the trial court erred in accepting the verdict because it was inconsistent on its face in that the jury found Appellant guilty, but recommended a five-year suspended imposition of sentence. This contention is simply incorrect since the verdict form is not facially or inherently inconsistent. The jury found Appellant guilty of the crime charged (conspiracy to commit murder) and assessed a five-year term of imprisonment, which was within the range (5 to 15 years) provided for by the verdict-directing instruction. The trial court properly treated the recommendation for a suspended imposition of sentence as a plea for leniency and disregarded it as surplusage.

1. The suspended sentence request was a plea for leniency.

Missouri courts have consistently treated pleas for leniency or mercy contained in a jury's verdict as surplusage that can be ignored by the trial court.

In *State v. Churchill*, 299 S.W.2d 475 (Mo. 1957), the jury returned a verdict finding the defendant guilt of robbery and assessing

punishment of five years imprisonment "with leniency." *Id.* at 479. The trial court polled the jurors, each of whom agreed it was his or her verdict, but the court did not send the jury back for further deliberations. The supreme court held that the trial court did not err in accepting the verdict since the "recommendation of 'leniency' was surplusage." *Id.*

Similarly, in *State v. Lynch*, 659 S.W.2d 618, 619 (Mo. App. E.D. 1983), the jury returned guilty verdicts on two counts. *Id.* at 619. The verdict for Count I assessed punishment of one year in the county jail along with the phrase "and recommend probation." *Id.* The verdict for Count II also assessed punishment of one year along with the phrase "and recommend probation and the sentences run concurrently." *Id.* The trial court accepted the verdicts after announcing that it considered the recommendation for probation as surplusage. *Id.* On appeal, the defendant argued that the jury should have been sent back for further deliberations. The court of appeals disagreed:

> Defendant's argument neglects the fact that a jury's recommendation of mercy amounts to mere surplusage so long as the verdict properly contains a finding of guilt and an assessment of punishment. Thus, the trial court correctly

> disregarded the jury's recommendation of probation, and would have been justified in ignoring the jury's recommendation that the sentences run concurrently.

Id. (citations omitted).

In *State v. Merriett*, 564 S.W.2d 559 (Mo. App. K.C.D. 1978), the jury's guilty verdict assessed punishment of two years imprisonment, but included the phrase "and the jury recommends leniency." *Id.* at 560-61. Similar to Appellant's argument, the defendant in *Merriett* argued that the verdict "was an obvious compromise and equivocal." *Id.* at 561. But the court of appeals disagreed and held that the reference to leniency in the verdict was "surplusage." *Id.* *See also State v. Keck*, 389 S.W.2d 816, 819 (Mo. 1965) (holding that phrase "subject to parole or probation at six months for good behavior" following guilty verdict assessing punishment of one year in jail was a recommendation for clemency or leniency and should be disregarded); *Compare State v. Ball*, 654 S.W.2d 336, 340 (Mo. App. W.D. 1983) (holding that trial court did not plainly err by failing to strike phrase "without parole" from a guilty verdict assessing punishment of a fine and one year in jail).

Nothing on the face of the jury's verdict showed any inconsistency requiring further deliberations. The jury found

Appellant guilty and recommended a sentence of five years, which was within the range provided. The request for an SIS was simply a plea for mercy that was properly disregarded by the trial court.

2. Guilt can be found without a conviction.

Although Appellant contends that the jury did not want Appellant to suffer a conviction, nothing in the verdict itself supports such speculation. Rather than looking to the face of the verdict to support her claim, Appellant instead relies on the brief testimony of one of the State's witnesses on a collateral matter to reach the speculative conclusion that the jury didn't want to convict Appellant. But a finding of guilt and a conviction are two entirely different things. The jury instructions didn't ask the jury to "convict" Appellant, rather they instructed the jury to find Appellant "guilty" if each element of the crime was proved. Even the testimony relied on by Appellant arguably implies that the witness (Ms. Phillips) was found guilty, but nevertheless did not have to report that she suffered a conviction.

A suspended imposition of sentence is not a conviction under Missouri law. *See Yale v. City of Independence*, 846 S.W.2d 193, 194-95 (Mo. banc 1993). A conviction requires a final judgment; and in a criminal case a final judgment requires that a person be sentenced.

Id. If a person receives a suspended sentence, even though guilt has been established by a guilty plea or finding of guilt, that person is not considered to have been convicted of a crime under Missouri law. *Id.* at 195.

By permitting courts to suspend the imposition of a sentence after a finding of guilt, the legislature's goal was to allow defendants to avoid the lifetime stigma and collateral consequences resulting from a criminal conviction. *Id.* But before a sentence may be suspended, a defendant must be found guilty of a crime. The power to suspend the imposition of a sentence is simply "a tool for handling offenders worthy of the most lenient treatment." *Id.*

In this case, the jury's request that Appellant be given a suspended imposition of sentence was simply a plea for leniency. This view is consistent with this Court's holding in *Yale*. Contrary to Appellant's argument, the power to suspend the imposition of a sentence has never been deemed to be synonymous with a finding of innocence.

Appellant contends that the only way the jury knew about an SIS was from the testimony of the State's witness. Although the discussion after the jury returned its verdict centered on this testimony, Appellant's argument completely overlooks the possibility

that one or more of the jurors may have known about a court's ability to suspend the imposition of a sentence. "Jurors do not come to a courtroom bereft of the experiences of life and are expected to use them as jurors." *State v. Lane*, 629 S.W.2d 343, 346 (Mo. banc 1982). Four of the twelve jurors (Huffman, Windisch, Thomas, and Duerkson) had relatives who had committed crimes.[1] (Tr. 48-49, 50, 89-90, 96-97). During voir dire, Juror Huffman stated that he had "a DUI" thirteen years ago, (Tr. 48), and Juror Thomas revealed that he was a volunteer chaplain in the jail. (Tr. 89-90). It is conceivable that both of these jurors may have been aware that courts can issue suspended sentences. Appellant completely ignores the possibility that the jurors may have known about an SIS apart from the testimony they heard in this case.

Appellant also contends that the trial court was required to send the jury back for further deliberations after receiving the verdict in this case. Although it has been suggested that this may be the

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[1]The twelve jurors selected in this case, identified when the jury was polled after returning the verdict, were Haupt, Kelley, Thomas, Huffman, Windisch, Vickery, Hudson, Hileman, Major, Duerkson, McKenzie, and Coomer. (Tr. 341-42).

preferable procedure, this principle has never been seen as an absolute requirement in dealing with verdicts containing surplusage, or even those that are irregular on their face. To the contrary, "[i]t is well established in Missouri that although its form may be irregular, a verdict is good if the intent of the jury may be ascertained." *Ball*, 654 S.W.2d at 340; *see also State v. McCarthy*, 336 S.W.2d 411, 417 (Mo.1960).

Appellant relies on *State v. Wood*, 199 S.W.2d 396 (Mo. 1947), in arguing that the trial court here was required to send the jury back for further deliberations. In *Wood*, the jury returned a guilty verdict assessing punishment at two years "with clemency." *Id.* at 398. The trial court told the jury that no instruction had been given permitting this phrase and sent the jury back for further deliberations and to return a proper verdict. *Id.* The supreme court held that the trial court acted properly and the "verdict as amended, which did not contain the clemency language, was in effect the same" as the one the jury had first returned. *Id.*

Nothing in the court's opinion, however, suggests that the trial court was required to send the jury back for further deliberations. In fact, the court's finding that the amended verdict was the same as the initial verdict demonstrates that it was unnecessary for the trial court

in *Wood* to have sent the jurors back to the jury room. Moreover, one might argue that sending the jury back with those instructions prejudiced the defendant in that it sent the jury a message that the trial court was looking for a particular result or that the jury's plea for clemency was contrary to what the trial court believed was a just result. *See State v. Peters*, 855 S.W.2d 345, 349 (Mo. banc 1993).

In *State v. Marks*, 376 S.W.2d 116 (Mo. 1964), the jury found the defendant guilty, assessed punishment, but also requested that he be given a mental examination. *Id.* at 117. Although the court held that the request for a mental examination was surplusage in light of the fact that the jury rejected an insanity defense, it cautioned courts against inquiring into the reasons the jurors returned the verdict they did. *Id.* at 118.

3. Missouri has rejected jury nullification.

Although Appellant argues that the verdict was unclear because the jurors allegedly didn't understand what an SIS really was, what she actually wanted in this case was not clarification, but an acquittal. Appellant contends that the jurors may have acquitted Appellant if they had known she might be sent to prison. App. Br. at 27. In other words, despite the overwhelming evidence of her guilt, including tape recordings of her conspiring to kill the intended

victim, and the jury's verdict finding her guilty, Appellant suggests that the plea for leniency contained in the verdict form should have been used as a vehicle to permit the jury to return to the jury room and vote to acquit a guilty defendant simply to prevent the trial court from sentencing her to prison.

This concept, known as jury nullification, is a principle not accepted in Missouri. *See State v. Hunter*, 586 S.W.2d 345, 347-48 (Mo. banc 1979) ("[T]he practice [of jury nullification] is not encouraged in either Missouri or federal courts."); *State v. Simpson*, 610 S.W.2d 75, 78 (Mo. App. S.D. 1980).

Moreover, contrary to the concept of jury nullification, Missouri courts presume that jurors follow the court's instructions, and that they find the defendant guilty before deciding the issue of punishment. Even though a jury might consider punishment concurrently with guilt, this does not "compel the conclusion that a jury would decide to convict . . . not on the basis of guilt, but on the basis that it could control the assessment of punishment." *Hunter*, 586 S.W.2d at 348; *see also State v. Burke*, 809 S.W.2d 391, 394 (Mo. App. E.D. 1990) ("Presuming the jury followed this [verdict-directing] instruction compels the conclusion that the jury decided guilt before punishment, and, therefore, the jury's ostensible control over

punishment did not cause it to compromise its decision on guilt."). In *Grannemann v. State*, 748 S.W.2d 415 (Mo. App. E.D. 1988), the defendant argued that his counsel was ineffective in advising him to waive a jury trial on charges of selling marijuana because the jury could have used its "powers of jury nullification to refuse to convict" based on the absurdity of the marijuana laws. *Id.* at 416. The court rejected this claim on the ground that jurors are presumed to follow the court's instructions. *Id.* at 417.

The jury followed the court's instructions and found Appellant guilty of conspiracy to commit murder. Although it was instructed to return a not guilty verdict if it wasn't convinced beyond a reasonable doubt of Appellant's guilt, the jury instead returned a guilty verdict and recommended a five-year suspended sentence. Rather than following years of precedent teaching that such pleas for leniency are to be ignored as surplusage, Appellant proposes a new rule that would give the jury an opportunity to acquit guilty defendants simply out of fear that the punishment for crime they committed may be too harsh. Requiring a rule that opens the door for jurors to engage in the practice of jury nullification is contrary to the principles of criminal justice.

4. Further deliberations were unnecessary.

Even in cases in which the verdict is facially inconsistent–a situation not present here–Missouri courts have not uniformly required that the verdict be rejected and the jurors sent back for further deliberations.

In *State v. Lovitt*, 147 S.W. 484 (Mo. 1912), the jury was instructed on felony assault and the lesser-included offense of misdemeanor assault, but returned a verdict simply finding the defendant "guilty" and assessing punishment at 2 years in the penitentiary. *Id.* at 487. The court held that because only the felony assault charge authorized imprisonment in the penitentiary, it was obvious the jury found him guilty of the felony assault charge. *Id.*

In *State v. McCarthy*, 336 S.W.2d 411 (Mo. 1960), the defendant admitted that he was guilty of stealing, but at trial he disputed the value of the stolen goods. *Id.* at 418. If their value was less than $50, he was subject to only a fine and jail sentence; but if the value was $50 or more he was subject to imprisonment in the Department of Corrections. *Id.* The jury's verdict, however, simply found the defendant guilty of stealing and assessed punishment of two-and-one-half years imprisonment in the Department of Corrections; it didn't indicate the value of the stolen goods. *Id.* at 417. The court, however, looked to the punishment imposed and determined that the

jury had found the defendant guilty of the higher offense. *Id.* at 418.

In *State v. Bucklew*, 973 S.W.2d 83 (Mo. banc 1988), the jury verdict on the finding of aggravating circumstances differed from the instructions the jury had been given. *Id.* at 94. This Court found no plain error because the jury's intent could be determined despite the verdict not being in proper form. *Id.* at 94-95

Although the court in *State v. Hibler*, 21 S.W.3d 87 (Mo. App. W.D. 2000), suggested that "if an inconsistency is found in the verdict . . . the trial court is required to reject it and return the jury for further deliberations," this has not been uniformly required as discussed above. *Id.* at 95. Moreover, in *Hibler* the court held that the trial court did not err in returning the jury for further deliberations after it returned a guilty verdict that failed to specify an exact term of punishment. Thus, in addition to the fact that the verdict in *Hibler* was improper for not specifying a term of punishment, the *Hibler* court's statement that the jury must always be returned for further deliberations was dictum.

The cases on which Appellant relies to support his argument that the trial court erred in not returning the jury for further deliberations involve situations in which the verdict on its face revealed an inconsistency or ambiguity.

For instance, in *State v. Lashley*, 667 S.W.2d 712 (Mo. banc 1984), the jury in a capital case returned a verdict form on the finding of an aggravating circumstance that said "no evidence to disprove [the defendant] entered house to obtain money." *Id.* at 715. The court held that the trial court properly sent the jury back to the jury room to return a verdict finding the aggravating circumstance in the proper form. *Id.* The court in *Bucklew* distinguished that case from *Lashley* by describing the verdict in *Lashley* as "nonsensical." *Bucklew*, 973 S.W.2d at 95.

In *State v. Dorsey*, 706 S.W.2d 478 (Mo. App. E.D. 1986), it was not discovered until appeal that the jury foreperson had signed both the guilty and not guilty verdict forms for the stealing charge, but had signed only the not guilty form on the burglary charge. *Id.* at 480. The court of appeals held that because of "the obvious inconsistency and ambiguity in the verdict forms" it was error for the jury not to have been polled and for the trial court to have found the defendant guilty of stealing. *Id.* at 480-81.

In Appellant's case, the verdict was not inconsistent or ambiguous on its face. The jury made a finding of guilt and assessed a punishment within the range provided. The jury's request for a suspended imposition of sentence was simply a plea for leniency and

the trial court properly treated this language as surplusage. The trial court did not err in accepting the verdict or in failing to return the jury for further deliberations.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 5026 words, excluding the cover, the signature block, this certification, and any 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 on October 22, 2004, to:

Nancy McKerrow
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