Appellate Advocacy College 2000

Lecture

Effective Reply Briefs

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REPLY BRIEFS

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A. Overview; Functions of the Reply Brief

The reply brief authorized by rules 14 and 16 of the Rules of Court is appellant's first and best opportunity to answer the arguments in respondent's brief. Oral argument presents another opportunity to answer respondent, but by the date of oral argument the court typically has prepared a draft opinion. The reply brief is appellant's chance to refute respondent's arguments *prior* to the writing of the draft opinion.

Appellant should file a reply brief in most cases. It is true a reply brief should not be filed to merely repeat appellant's arguments when there is nothing new to say. But this is seldom the case. Good and bad respondent's briefs alike generally require a reply to accomplish one or more of five basic functions:

1. Refute respondent's arguments and authorities;

2. Concede indisputable points or arguments where appropriate to narrow the focus of the disputed issues;

3. Reformulate or refocus issues based on respondent's argument and any new authorities;

4. Flag what respondent has *failed* to address, and capitalize on it; and

5. Get in the last word, and avoid having appellant's silence on an important point interpreted as a concession.

B. Setting the Stage with a Complete Opening Brief

The content of the reply brief can be traced in part to the opening brief. The ideal opening brief is a complete enough statement of appellant's position that the reply brief can focus on replying to respondent's arguments, rather than saying what should have been said previously.

A complete opening brief always states appellant's basic legal arguments and supporting authorities. But in addition it is often wise to identify and deal preemptively with anticipated respondent's arguments, including adverse authorities. Examples of commonly anticipated arguments include waiver and invited error. Acknowledging and dealing preemptively with anticipated arguments and authorities can effectively steal respondent's thunder and avoid being put in a defensive position in the reply brief. A preemptive argument signals both appellant's forthrightness and counsel's confidence that the adverse point is not fatal to appellant's position. It further demonstrates that appellant's counsel comprehends the "big picture" and makes the opening brief more authoritative by painting that picture.

On the other hand, appellant may choose to omit mention of a potential argument or adverse authority in the opening brief. Tactically, appellant may decide that preemptively thrashing a defeatable counterargument will alert respondent to shift its efforts to developing stronger counterarguments. Omitting a preemptive strike against a weak counterargument may lure respondent into relying heavily on the argument, which the reply brief can then hit out of the park.

Appellant may also conclude a non-obvious counterargument or authority should be omitted in the hope respondent will not discover it. But before making such a tactical omission, appellant should consider: 1) How likely is it both respondent *and the court* will fail to identify the argument or authority appellant has omitted; 2) If the point comes to light, will appellant's counsel appear less than forthright and lose credibility as a result, (credibility can be damaged even by an omission that is entirely ethical[1]); 3) Is the nature of the adverse argument or

[1] ABA Model Rule 3.3(a)(3) provides counsel shall not "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." The ABA Model Rules are not binding on California attorneys, however. California attorneys are prohibited from seeking to mislead a court by "artifice or false statement of fact or law." (Cal. Rules of Prof. Conduct, rule 5-200(B); Bus. & Prof. Code, § 6068, subd.(d).) At least one California decision suggests the duty not to mislead includes a duty to disclose adverse authority. (*Shaeffer* v. *State Bar* (1945) 26 Cal.3d 739, 747-748.) In *Shaeffer*, the court hedged on whether a duty to disclose actually exists, and the decision shed no light on whether any duty to disclose in an appellate court proceeding would be limited to adverse supreme court opinions or would include court of appeal opinions. While the law is thus unclear, the prevailing practice in California courts is to

authority such that the court may be irrevocably persuaded by it, in which case an argument in the reply brief will come too late?

C. Reading Respondent's Brief

It is generally a good idea to reread the opening brief before reading respondent's brief. This allows appellant to see the flow of ideas as a justice or research attorney will, and it better enables appellant to recognize whether particular respondent's points should be disputed, conceded, or not addressed again at all. Rereading the opening brief also helps appellant recognize what respondent has *failed* to say, i.e. those arguments or facts respondent has ignored. As discussed below, flagging what respondent has failed to address is a vital function of the reply brief.

Read the respondent's brief and make an outline of respondent's arguments, major and minor, noting those that require a reply. Also note any important points respondent has failed to address. It is a surprisingly common technique of the Attorney General to simply ignore difficult factual or legal points, apparently in the hope they will be forgotten or go away. Read and shepardize the important authorities respondent has cited, and note those requiring a reply. As to each adverse authority, ask: Has respondent misstated or mischaracterized the authority? (This is not uncommon.) Is the authority directly assailable as overruled, reversed, or simply bad law? Is it wholly inapplicable to the issue appellant has raised? Is it legally applicable, but factually distinguishable from appellant's case? Has respondent taken a proposition or quote from a case out of context? Does the authority actually support appellant's position? Has respondent made an important assertion *unsupported* by authority?

Spend some time examining the cases cited within the cases relied on by respondent, as well as promising-looking cases disclosed by shepardizing. This will often lead appellant to previously undiscovered favorable authorities.

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routinely disclose *direct* adverse authority, but to decide tactically whether to disclose *indirect* adverse authority, such as cases which are distinguishable or only analogously adverse.

D. Drafting the Reply Brief

1. Organization

Avoid boilerplate preambles. There is no need for a standard preamble stating the reply brief is not an attempt to address every point in respondent's brief and that the failure to address points is not intended to be a concession. This is inherent in a reply brief and is understood by the court.

Repeat the issue order of the AOB. For ease of review and comparison with the previous briefs, the reply brief should generally follow the same issue order as the opening brief, with a heading for each main issue. Headings may be identical to those in the opening brief, or they may be rephrased to reflect the primary focus of the reply. Argument subheadings may also be useful, particularly if the issue is complex or if respondent has raised discreet counterarguments, such as that no error occurred and that any error was waived.

If a particular issue requires no reply, list an argument heading followed by a single sentence stating appellant relies on the arguments and authorities set out in the opening brief. If appellant must concede an issue, say so in an argument heading which may stand alone or be followed by any necessary explanation.

Recapitulate the preceding arguments. While it is true a reply brief should not be filed solely to repeat appellant's original argument, some repetition of what has gone before is necessary to insure the reply brief can be understood. The argument heading may be an adequate statement of appellant's basic position; if not, follow the heading with a very concise restatement of appellant's position. Then list or briefly summarize respondent's main counterarguments. Then address each respondent argument in a logical order in separate paragraphs (or, if issue complexity dictates, in separate subsections).

2. Argumentation

Concede as you need, and give credit where due. On rare occasions, respondent's argument or a newly discovered case may convince appellant an argument raised in the opening brief has no merit. If so, the issue should be conceded, both to preserve counsel's credibility and to comply with the obligation not to raise frivolous issues.

While conceding an entire issue is rare, it is frequently appropriate to

concede the correctness of particular points respondent has made. For example, respondent may have accurately summarized the facts or framed an issue. Respondent may have correctly stated a legal principle or case holding (before proceeding to misapply it). Conceding such points, and generally giving credit where due serves two purposes: it aids the court by narrowing the focus of the dispute; and it enhances appellant's credibility by demonstrating that counsel is thoughtful and fair-minded and does not disagree indiscriminately with everything respondent asserts.

Refute respondent's arguments. After recapitulating appellant's core argument and listing respondent's counter-arguments, concisely explain why respondent is incorrect. Has respondent mischaracterized appellant's claim (another frequent occurrence)? For example, the Attorney General's response to a claim of instructional or evidentiary error frequently morphs into an argument the evidence was sufficient to convict, an entirely different issue. Where this occurs, explain how the issue has been mischaracterized, and restate the issue correctly. If respondent has misstated the facts or law, explain and refute. If respondent has relied on wholly inapplicable or distinguishable authority, explain and refute. If respondent has made a contention unsupported by any authority, say so. If respondent's argument in internally inconsistent or illogical, point this out.

Flag what respondent has *failed* to say. Like the proverbial ostrich, respondent will sometimes simply ignore a difficult fact, legal assertion, case, or occasionally an entire argument. The reply brief should point this out and draw whatever inference is fair based on a particular omission. Sneering accusations of incompetence or treachery are generally unnecessary, but pointed commentary is appropriate (e.g "Respondent fails to address...."; "Respondent entirely ignores...."; "Respondent does not dispute....."; "By its silence, respondent apparently concedes....").

Another type of omission occurs when respondent advances an argument that rests on an unspoken assumption or assertion. This is often by design because the unspoken point is weak and difficult to defend. The reply brief should reveal and refute such weak points. (See, e.g., the attached sample reply brief, at p. 3.)

Reshape appellant's claims, but don't raise new issues. The reply brief may reformulate and thereby strengthen appellant's arguments in many ways short of raising a new issue. For example, the reply brief may cite new authorities in support of an argument. A claim initially framed as prosecutorial misconduct may be tweaked on reply to focus on judicial error in failing to rule or admonish jurors correctly in response to the misconduct. If respondent's brief asserts appellant's

claim of evidentiary error was waived because defense counsel's objection at trial was inadequate, the reply brief may argue that any waiver amounted to ineffective assistance (assuming it is arguable from the record that there could be no tactical explanation).[2]

A truly new issue may not be raised in the reply brief. (*Reichardt* v. *Hoffman* (1997) 52 Cal.App.4th 754, 764.) The line between a re-spun issue and a new issue is not always clear. If the new point rests on a separate legal right and/or fairness would require respondent be given an additional chance to respond to the point, then the issue is probably a new one. Appellant may request permission to file a supplemental brief raising a new issue pursuant to rule 14(a) of the Rules of Court.

Focus on important points, not minutiae. Resist the temptation to repeat matters adequately covered in the opening brief unless they are essential to the flow of the reply argument or can be stated in some memorable way for final emphasis. Also resist cataloguing every small mistake respondent has made. A laundry list of minor mistakes may portray respondent as careless or sloppy, but it will portray you as petty and unable to distinguish important from unimportant matters. As one commentator put it:

> A reply brief should be short, punchy, and incisive. Do not file a reply brief, as some lawyers do, that is primarily concerned with correcting minor errors the other side has made. Such a brief is a sign of weakness; it suggests that you have no good answers on the merits, and therefore are nitpicking at the periphery.

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[2] While a very simply fall-back claim of ineffective assistance can often be added to the reply brief, this is a good example of a preemptive argument that usually should be included in the *opening* brief. Caveat: while courts often accept a fall-back IAC claim in the reply brief, at least one published decision criticized appellant's counsel for making this claim for the first time in the reply brief. (*People* v. *Dunn* (1995) 40 Cal.App.4th 1039, 1055.)

(Friedman, Winning on Appeal, 9 Litigation 15, p. 18, fn. 3 (Spring 1983).)

3. Style and Tone

Loosen up. The reply brief may be stylistically looser than the opening brief. Unlike the opening brief, the reply brief is not burdened with the task of educating the reader by proceeding methodically from point to point. This allows more stylistic freedom than the opening brief. Further, once the respondent's brief is filed, a dialogue is established, and this dialogue can be reflected in the reply brief's somewhat more informal, conversational tone. The reply brief may include notes of humor, indignation, disbelief, or disapproval where respondent's arguments are genuinely worthy of such reactions.

The reply brief is a good place to coin or repeat a memorable phrase and to use metaphors and colorful language. Stylistic flourishes that would seem overwrought in the opening brief may sound entirely natural in the reply brief. Exercise moderation, though, and avoid being overly dramatic or strident.

It may be a criminal proceeding, but keep the tone civil. It is an almost universal truth that judges frown on attorneys sniping at each other, verbally or in the briefs. This appears to be true regardless of how good it feels to vent at an opposing counsel who deserves it. To accommodate this judicial sensibility–and to maintain a professional atmosphere that even some *attorneys* enjoy–try to avoid hostile sarcasm and general nastiness. Where respondent has done or said something outrageous or underhanded, highlight this for the court's attention and respond, in strong terms if the misdeed merits them. But use moderation. When in doubt as to whether an argument is too scathing or emotional, try having another attorney read it, or re-read it yourself after a few days of "cooling off."

One therapeutic exercise is to write a draft that expresses all the anger, disgust and sarcasm respondent's brief has generated; then read the zingers to your colleagues, spouse, and anyone else who will listen, before toning the brief down for filing. Finally, do not assume, as many appellate attorneys do, that the briefs are the only method of communicating displeasure with opposing counsel. If you feel compelled to say something personally critical of respondent's counsel, a letter or telephone call permits a level of frank discourse that would be completely inappropriate in a brief filed with the court.

E. Conclusion

The above views on reply brief drafting are not cast in stone. Your own stylistic preferences, as well as the issues and respondent's arguments you confront, will guide you in drafting the most effective reply in a particular case.

SAMPLE REPLY BRIEF

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. G022222
v.	)	
	)	Superior Court
FRANZ KAFKA,	)	No. 97NF2222
	)	
Defendant and Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Aaron A. Lot, Judge

APPELLANT'S REPLY BRIEF

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FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	Court of Appeal
	)	No. G022222
v.	)	
	)	Superior Court
FRANZ KAFKA,	)	No. 97NF2222
	)	
Defendant and Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Aaron A. Lot, Judge

APPELLANT'S REPLY BRIEF

ARGUMENT

THE TRIAL COURT ERRONEOUSLY SENTENCED APPELLANT UNDER THE THREE STRIKES LAW WHEN THE STRIKE ALLEGATIONS WERE NEVER ADMITTED OR PROVED; THE STRIKES MUST BE DEEMED TO HAVE BEEN FOUND NOT TRUE, AND APPELLANT MUST BE RESENTENCED ACCORDINGLY.

As detailed in appellant's opening brief, appellant pled guilty to two narcotics offenses, with no agreement as to sentence, and requested a court trial on the alleged prior felony strikes. No trial was ever conducted on the alleged priors, nor did the court

make a true finding on them. Nonetheless, at sentencing, the court purported to impose two concurrent Three Strikes terms of 25 years to life based on the unadjudicated strike allegations. Appellant contends the Three Strikes sentence is unauthorized because the strikes were never admitted or found to be true, and that the absence of a true finding must be deemed a not true finding.

Respondent makes four contentions: First, appellant's claim on appeal amounts to an attack on the validity of his guilty plea, and therefore his failure to obtain a certificate of probable cause precludes the claim. Second, appellant's claim should be deemed waived because it raises the same "policy concerns" underlying *People* v. *Scott* (1994) 9 Cal.4th 331. Third, while the court made no express finding on the truth of the alleged priors, such a finding should be "implied" from the record. Fourth, even if no true finding can be implied and reversal is required, the prosecution should be allowed a second opportunity to try appellant on the alleged priors. Appellant replies to each argument in turn, as follows.

Appellant's claim attacks his sentence only and not the validity of the plea; thus, no certificate of probable cause is required.

Respondent correctly points out that a certificate of probable cause is required to challenge the validity of a guilty plea on appeal. Respondent characterizes appellant's claim on appeal as an attack on the validity of the plea because the claim stems from the trial court's failure to make any finding on the alleged strike priors. (RB, pp. 5-8.)

Respondent's argument must fail for two reasons. First, appellant does not

challenge the trial court's failure to make findings on the priors, but rather the court's *imposition of sentence* based on those unproved priors. This distinction is critical because, as respondent concedes, an attack on sentencing following a guilty plea does not require a certificate of probable cause.

Second, even if appellant *were* challenging the trial court's failure to make findings on the alleged priors, such a claim would not require a certificate of probable cause because the alleged strike priors *were not part of the plea agreement*. As detailed in the opening brief, the plea provided only for the admission of counts 1 and 2 and the dismissal of count 3, but the alleged strike priors were left to be tried. (See AOB, p. 2; C.T. p. 116; Suppl. C.T. p. 117.) Appellant agreed to a court trial, but that trial never took place. (R.T. pp. 23-24; C.T. p. 125.)

Since the alleged priors were not part of the plea, the claim relating to the priors does not require a certificate of probable cause. Respondent's unspoken assertion is that the entry of a guilty plea on any portion of a criminal case necessitates a certificate of probable cause to appeal matters not encompassed within the guilty plea. This assertion is unsupported by any authority and is an implausible reading of Penal Code section 1237.5. Appellant's claim is thus not barred by the absence of a certificate of probable cause.

Appellant's claim is not waived under *People* v. *Scott.*

Respondent concedes the waiver-by-silence rule of *People* v. *Scott* applies only to claims of error in a sentencing court's discretionary choices or statement of reasons.

Despite *Scott*'s direct inapplicability, respondent argues appellant's claim should be deemed waived because it raises the same "policy concerns" underlying *Scott*. (RB pp. 8-9.) Respondent further argues that appellant's claim of an unauthorized sentence mischaracterizes the error, which is in fact a failure to make a finding on the priors. (*Ibid.*)

Manifestly, the waiver rule of *Scott* cannot be extended to claims attacking an unauthorized sentence because *Scott* itself holds no objection is required to preserve such errors for challenge on appeal. (*Scott*, *supra*, 9 Cal.4th at p. 354.) Respondent essentially asks this court to extend *Scott* in a manner *Scott* itself precludes. This court would be precluded from contravening *Scott* even if it were to agree with respondent's policy argument. (See *Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455 [courts of appeal required to follow holdings of California Supreme Court].) Alternatively, assuming arguendo respondent is correct in characterizing the error as a failure to make a finding on the alleged priors, then the error is not a sentencing error at all. If the error is not a sentencing error, then respondent's claim of waiver under *Scott* becomes even more untenable.

Finally, even if the rule of waiver were extended to errors such as that claimed by appellant, waiver could not be applied retrospectively to errors occurring prior to the establishment of the rule. (See *Scott*, *supra*, 9 Cal.4th at pp. 357-358 [new waiver rule prospective in application only].)

For all the above reasons, appellant's claim he was sentenced for unproved strike

priors is not barred by waiver.

There is no "implied" true finding on the strike priors.

Respondent argues no express true finding on alleged priors is required and that the trial court made implied true findings below. Respondent reasons the trial court's imposition of sentence under the Three Strikes law evidences an implied true finding on the priors.

Even the case authority cited by respondent refutes respondent's argument, holding that while a true finding on priors may be expressed in a variety of words, complete silence at the guilt phase amounts to a failure to make a finding, and this in turn is deemed a not true finding. (*People* v. *Gutierrez* (1993) 14 Cal.App.4th 1425, 1440 and *People* v. *Eppinger* (1895) 109 Cal. 294, both cited at RB p. 10.)

Respondent argues *Gutierrez* is distinguishable because there the trial court merely purported to stay the priors, whereas here the trial court imposed sentence based on the priors. The imposition of a strikes term, respondent argues, implies that the court found the priors true at some earlier time. This attempted distinction must fail, however, because the trial court's stay of the priors in *Gutierrez* suggests the trial court in that case *believed* it had found the priors true at the guilt phase, just as the imposition of a strikes term in appellant's case suggests the court below *believed* it had found the alleged strike priors true at the guilt phase. Yet the court in *Gutierrez* specifically rejected the notion the trial court's actions at sentencing evidenced an "implied" true finding. (*Gutierrez*, 14 Cal.App.4th at p. 1440.)

Another factually indistinguishable case is *People* v. *Anthony* (1986) 185 Cal.App.3d 1114, in which the trial court made no finding as to firearm use allegations, but later purported to impose the enhancements at sentencing. (*Id*. at pp. 1117, 1125.) The Court of Appeal struck the enhancements and held the absence of a finding operated as a not true finding. (*Ibid.*)

The holdings in both *Gutierrez* and *Anthony* make clear that the absence of a finding on a special allegation is deemed a not true finding even where the court later purports to impose sentence based on the allegation. In other words, a sentencing court's apparent belief at sentencing that it found an allegation true at an earlier time cannot cure the absence of a true finding in the guilt phase of the proceedings.

The prosecution is not entitled to a second opportunity to try appellant on the alleged priors, which must be deemed not true.

Respondent's final argument is that even if there was no true finding on the alleged strikes, the prosecution should be allowed another opportunity to try appellant on the priors. Respondent relies on *Monge* v. *California* (1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615] and *People* v. *Bryant* (1992) 10 Cal.App.4th 1584. *Monge* held that double jeopardy does not preclude a retrial on a strike prior after an initial true finding is reversed on appeal for insufficient evidence. In *People* v. *Bryant*, the Court of Appeal allowed a limited retrial on special kidnapping enhancement allegations where the defendant had indicated he would plead no contest to the information, but the trial court failed to obtain an admission to the special allegations.

Monge is inapposite because it merely holds that where a *true finding* on a prior is reversed on appeal for insufficient evidence, double jeopardy does not bar retrial on the prior. *Monge* in no way refutes the rule of *People* v. *Gutierrez*, *People* v. *Anthony*, and *People* v. *Eppinger* that the *absence* of a finding on an allegation operates as a *not true* finding, which does preclude a retrial.

Nor is *People* v. *Bryant* controlling. In *Bryant*, the defendant indicated his intent to plead guilty to the information, which included special kidnapping enhancement allegations. The defendant never indicated any desire for a trial on any allegation. The trial court took the guilty plea, but failed to obtain the defendant's admission of the special kidnapping allegations. (*Id.*, 10 Cal.App.4th at pp. 1591-1593.) At sentencing, the trial court purported to impose sentence on the special allegations. The Court of Appeal reversed the special allegations because the defendant had not admitted them, but held the prosecution was entitled to a remand to resume proceedings on the special allegations. The court explained that double jeopardy did not bar retrial because "some event, such as acquittal" must occur to trigger the bar of double jeopardy. (*Id.* at p. 1597.)

The rule of *Gutierrez*, *Anthony*, and *Eppinger* is precisely that an acquittal, i.e. an implied not true finding, occurs when a trial court fails to make a finding on a special allegation. The court in *Bryant* did not address the arguable inconsistency between its holding and this line of cases. Nor did the court in *Gutierrez*, which was decided a year after *Bryant*, address *Bryant*. To the extent the holding of *Bryant* is inconsistent with

Gutierrez, Anthony, and *Eppinger*, appellant asks this court to follow the latter cases for all the reasons previously set out here and in the opening brief. However, an examination of the procedural postures in the cases suggests *Bryant* is distinguishable rather than inconsistent. In *Bryant*, the defendant indicated his intent to plead guilty to the information and at no point requested a trial on any allegation. He then pled guilty to the substantive offenses, but the court failed to obtain his admission of certain special allegations. (*Bryant*, 10 Cal.App.4th at pp. 1591-1593.) In *Gutierrez, Anthony*, and *Eppinger*, by contrast, the defendants were convicted *by trial*s in which no finding was made on various special allegations. This distinction suggests the holding of *Bryant* is that where the defendant does not elect trial but submits to the guilty plea process, the absence of an admission on an allegation does not amount to a not true finding. This is in no way inconsistent with the rule of *Gutierrez, Anthony*, and *Eppinger* that where a defendant *does* elect to go to trial, the absence of a finding operate as an implied not true finding.

Here, while appellant pled guilty to two substantive counts, he indisputably requested a court trial on the alleged strike priors. (R.T. pp. 22-23; C.T. p. 118.) Accordingly, this case falls squarely under the rule of *Gutierrez, Anthony,* and *Eppinger*: Where a defendant chooses a trial on special allegations rather than submitting to the guilty plea process, the trial court's failure to make a finding on the allegations operates as a not true finding, and retrial is precluded.

For all the reasons set out above, appellant asks that his Three Strikes sentence be

vacated and the case remanded for the limited purpose of resentencing under Penal Code sections 1170 and 1170.1.

Dated: January ____, 2000

Respectfully submitted,

Thomas Jones
Attorney for Defendant and
Appellant