

**IN THE
MISSOURI SUPREME COURT**

—

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
vs.)	No. 85195
)	
JOSEPH GRUBB,)	
)	
Appellant.)	

—

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CARROLL COUNTY, MISSOURI
SIXTH JUDICIAL CIRCUIT
THE HONORABLE WERNER A. MOENTMANN, JUDGE**

—

APPELLANT’S STATEMENT, BRIEF AND ARGUMENT

—

**CRAIG JOHNSTON, MOBar #32191
Assistant State Public Defender
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
(573) 882-9855**

CONTENTS

	<u>Page</u>
QUESTION PRESENTED	2
TABLE OF AUTHORITIES	3
JURISDICTIONAL STATEMENT	4
STATEMENT OF FACTS.....	5
POINT RELIED ON	9
Mr. Grubb was not a Prior Offender	9
ARGUMENT.....	10
Mr. Grubb was not a Prior Offender.....	10
CONCLUSION	16
CERTIFICATE OF COMPLIANCE AND SERVICE.....	17
APPENDIX	A-1 to A-19

QUESTION PRESENTED

Q. Can a court-martial conviction be used in Missouri under its recidivism statutes to remove a defendant's right to jury sentencing?

A. No. A court-martial conviction cannot be used to establish a prior felony conviction under Missouri recidivism statutes. *State v. Mitchell*, 659 S.W.2d 4 (Mo.App. E.D., 1983).

TABLE OF AUTHORITIES

Cases:

<i>Ballew v. Georgia</i> , 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978).....	20
<i>Burch v. Louisiana</i> , 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979).....	21
<i>Jepson v. Stubbs</i> , 555 S.W.2d 307 (Mo.banc 1997)	20
<i>Scharnhorst v. State</i> , 775 S.W.2d 241 (Mo.App. W.D., 1989)	18
<i>State v. Golatt</i> , 81 S.W.3d 640 (Mo.App. W.D., 2002).....	12, 17, 18
<i>State v. McFall</i> , 866 S.W.2d 915 (Mo.App. S.D., 1993)	23
<i>State v. McMillin</i> , 783 S.W.2d 82 (Mo.banc 1990)	12, 19
<i>State v. Merrill</i> , 990 S.W.2d 166 (Mo.App. W.D., 1999)	17, 23
<i>State v. Mitchell</i> , 659 S.W.2d 4 (Mo.App. E.D., 1983)	12, 14, 18, 19, 21, 22
<i>State v. Paxton</i> , 440 P.2d 650 (Kan. 1968)	22
<i>State v. Rumble</i> , 680 S.W.2d 939 (Mo.banc 1984).....	20
<i>State v. Vaught</i> , 34 S.W.3d 293 (Mo.App. W.D., 2000)	16, 17
<i>State v. Wimberly</i> , 787 P.2d 729 (Kan. 1990).....	12, 20

Constitutional Provisions

United States Constitution, Amendment XIV	12, 14, 18
Missouri Constitution, Article I, Section 10	12, 14, 18
Missouri Constitution, Article I, Section 22(a)	12, 21

Statutes:

Section 556.016, RSMo 2000.....	12, 19
Section 557.036, RSMo 2000.....	12, 14, 15, 17
Section 558.016, RSMo 2000.....	12, 14, 16, 17, 18, 19

Rules:

Rule 30.20 Missouri Court Rules (2003).....	12, 16
---------------------------------------------	--------

Miscellaneous:

10 U.S.C. Sections 815-21.....	12, 21
10 U.S.C. Section 816(1).....	12, 20
10 U.S.C. Section 818	12, 21
10 U.S.C. Section 852	12, 21
10 U.S.C. Section 856	12, 21
Manual for Courts-Martial (MCM) (2002 Edition), Rule 501	13, 20
Manual for Courts-Martial (MCM) (2002 Edition), Rule 921	13, 21
Uniform Code of Military Justice (UCMJ), Art. 16(1).....	13, 20
Uniform Code of Military Justice (UCMJ), Art. 18.....	13, 21
Uniform Code of Military Justice (UCMJ), Art. 52(a)	13, 21
Uniform Code of Military Justice (UCMJ), Art. 85.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 86.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 87	13, 22
Uniform Code of Military Justice (UCMJ), Art. 88.....	13, 22

Uniform Code of Military Justice (UCMJ), Art. 89.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 90.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 91.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 92.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 98.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 113.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 115.....	13, 22
Uniform Code of Military Justice (UCMJ), Art. 133.....	13, 22

JURISDICTIONAL STATEMENT

Appellant was convicted following a jury trial in the Circuit Court of Carroll County, Missouri, for two counts of assault in the second degree, Section 565.060.¹ On January 15, 2002, the Hon. Werner A. Moentmann, Judge, sentenced Appellant as a prior offender, Section 558.018, to seven years imprisonment on each count, consecutive to each other. Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo. Const.; section 477.070. However, this Court granted the Appellant's application for transfer in this case, so therefore this Court has jurisdiction. Article V, Sections 3 and 10, Mo. Const. and Rule 83.03.

¹ All statutory citations are to RSMo 2000 unless otherwise indicated. All Rule references are to Missouri Court Rules (2003), unless otherwise indicated.

STATEMENT OF FACTS

I. Pretrial matters

Appellant was charged by second amended information with four counts of first degree assault (L.F. 18-20).² He was also charged as a prior offender, Section 558.016 (L.F. 19). The prior offense that was alleged was a 1981 general court-martial conviction for “assault with a means likely to produce grievous bodily harm” (L.F. 19; Tr. 3; S.E. No. 1).

Defense counsel objected to the prior conviction contained in State’s Exhibit No. 1, stating, “I cannot provide [the court] with any arguments to back up my objection, but, again, I would oppose this prior offender status” (Tr. 11). The trial court found, beyond a reasonable doubt, that Appellant was a prior offender under Section 558.116 (Tr. 3).

² The Record on Appeal consists of two volumes of transcript (“Tr.”), a legal file (“L.F”), and State’s Exhibits, (“SE No. __”). Ultimately, the prosecution elected to only have two counts submitted to the jury (Tr. 227-28). Appellant was acquitted of both counts of first-degree assault, but was convicted of the lesser included offenses of second degree assault (L.F. 47-48).

*II. The evidence*³

Appellant and Catherine Lehman⁴ were married on June 1st, 1999, after having lived together since 1995 (Tr. 119-121, 165-66, 167). While they were living together, but before they were married, Ms. Lehman had a sexual relationship for about four months with another man, who was a coworker of Appellant and Ms. Lehman (Tr. 166, 167). Before Appellant married Ms. Lehman, he asked her if she had a sexual relationship with this other man, but she denied it (Tr. 166-67). She continued to deny that relationship during the course of her marriage to Appellant (Tr. 168). Shortly before Memorial Day in 2000, however, she finally told Appellant about her prior sexual encounter with that other man (Tr. 168, 184). She

³ Appellant's defense at trial was that he was only guilty of second degree assault (Tr. 70-71, 111-12). On both counts, the jury convicted Appellant of those lesser included offenses (L.F. 47-48). He was found to have knowingly caused physical injury to Ms. Lehman on June 6th (Count I) and to have recklessly caused serious physical injury to her on or about June 17th (Count II) (L.F. 34, 39, 47-48). Because Appellant's stated defense was that he was only guilty of second degree assault, which is what he was ultimately convicted of, Appellant will only give a brief recitation of the facts supporting the two convictions.

⁴ At the time of the offenses, she was Catherine Grubb; at the time of trial, she had divorced Appellant and was Catherine Lehman (Tr. 122). They separated on July 20th, 2000, after the charged offenses (Tr. 143, 149).

told it to him while they were at work together, partly because she was mad at him because he had worn cologne to work that day (Tr. 168-69).

On June 6, 2000, Appellant hit Ms. Lehman with two toilet plunger sticks and a broom handle while they were arguing about Ms. Lehman's prior sexual encounter with the other man (Tr. 122, 124, 127-30, 174, 186).⁵ He struck her several times below the waist (Tr. 127-30, 174). As a result, she received some injuries (Tr. 131). Her right foot was swollen (Tr. 132). When she went to the emergency room, they put a "jell splint" on it (Tr. 134, 176). She had a "non-displaced incomplete fracture of the distal fibula" of her right ankle (Tr. 135, 136, 140, 182). Eventually, the splint was replaced by a "short-leg walking case" (Tr. 140-41). Initially, she lied to others as to how she received the injury (Tr. 137, 175-76).

On July 18th, while arguing about the same matter, Appellant struck Ms. Lehman with his fist (Tr. 143, 147). He knocked her down (Tr. 147). At first, she could not see or stand up; her vision was blurred (Tr. 147). She had a fracture of her orbital bone and fractures to her nose (Tr. 153-54, 155, 182). She had numbness and tingling to her face, which was still present somewhat at the time of trial (Tr. 155-56, 189-90).

She also suffered other injuries from acts of physical abuse between June 6th and July 18th, including a "non-displaced fracture" of her right middle finger, a fracture of her left little finger, and a fracture of one of her ribs (Tr. 140, 151, 163-64).

⁵ Both of the charged offenses occurred in Carroll County (Tr. 119, 144).

III. Post-trial matters

On November 5-6, 2001, a jury trial was held before the Hon. Werner A. Moentmann in the Circuit Court of Carroll County (L.F. 2-3). After the foregoing evidence was presented, the jury found Appellant guilty of two counts of the lesser included offense of second-degree assault (Tr. 254; L.F. 47-48).⁶ The trial court gave Appellant twenty-five days to file his motion for new trial, which was filed on November 30, 2001 (Tr. 256; L.F. 49-51).

On January 15, 2001, Judge Moentmann overruled Appellant's motion for new trial (Tr. 262) and sentenced him as a prior offender to seven years imprisonment on each count, consecutive to each other (Tr. 269; L.F. 52-53).

On January 24, 2002, Appellant timely filed a notice of appeal, in *forma pauperis* (L.F. 54-56). On February 18, 2003, the Western District affirmed Appellant's conviction. *State v. Grubb*, slip op., No. 60983 (Mo.App. W.D., 2003). However, on April 22, 2003, this Court granted the Appellant's application for transfer this case. This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

⁶Because appellant was found to be a prior offender (Tr. 1-3), the jury did not recommend punishment (L.F. 47-48).

POINT RELIED ON

The trial court plainly erred in finding Appellant to be a prior offender, thereby removing sentencing from the jury, because the State did not prove that the alleged prior conviction qualified under Section 558.016, violating Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, and to his statutory right to jury sentencing under Sections 557.036 and 558.016, resulting in a manifest injustice, in that the only prior conviction relied upon by the state was a court-martial conviction, which Missouri case law and statutes clearly prohibit from using under its recidivist statutes.

State v. Mitchell, 659 S.W.2d 4 (Mo.App. E.D., 1983);

State v. Golatt, 81 S.W.3d 640 (Mo.App. W.D., 2002);

State v. McMillin, 783 S.W.2d 82 (Mo.banc 1990);

State v. Wimberly, 787 P.2d 729 (Kan. 1990);

United States Constitution, Amdt. XIV;

Mo. Const., Art. I, Secs. 10 and 22(a);

Sections 556.016, 557.036, and 558.016, RSMo 2000;

Missouri Supreme Court Rule 30.20;

10 U.S.C. Sections 815-21, 816(1), 818, 852, and 856;

Manual for Courts-Martial (2002 Edition), Rules 501 and 921; and

Uniform Code of Military Justice (UCMJ), Arts. 16(1), 18, 52(a), 85, 86,

87, 88, 89, 90, 91, 92, 98, 113, 115, and 133.

ARGUMENT

The trial court plainly erred in finding Appellant to be a prior offender, thereby removing sentencing from the jury, because the State did not prove that the alleged prior conviction qualified under Section 558.016, violating Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution and Art. I, Section 10 of the Missouri Constitution, and to his statutory right to jury sentencing under Sections 557.036 and 558.016, resulting in a manifest injustice, in that the only prior conviction relied upon by the state was a court-martial conviction, which Missouri case law and statutes clearly prohibit from using under its recidivist statutes.

QUESTION PRESENTED

- Q.** Can a court-martial conviction be used in Missouri under its recidivism statutes to remove a defendant's right to jury sentencing?
- A.** No. A court-martial conviction cannot be used to establish a prior felony conviction under Missouri recidivism statutes. *State v. Mitchell*, 659 S.W.2d 4 (Mo.App. E.D., 1983).

Facts

Appellant was charged by second amended information with four counts of first degree assault (L.F. 18-20). He was also charged as a prior offender, Section 558.016 (L.F. 19). The prior offense that was alleged was a 1981 general court-martial conviction for “assault with a means likely to produce grievous bodily harm” (L.F. 19; Tr. 3; S.E. No. 1).

Defense counsel objected to the prior conviction contained in State’s Exhibit No. 1, stating, “I cannot provide [the court] with any arguments to back up my objection, but, again, I would oppose this prior offender status” (Tr. 11).

The trial court found, beyond a reasonable doubt, that Appellant was a prior offender under Section 558.116, in that he had been convicted on June 11, 1981, of “the felony of assault with the means likely to produce grievous bodily harm in the United States Army Judiciary at Fort Eustis, Virginia” (Tr. 3).

There was no claim regarding the prior offender finding raised in Appellant’s motion for new trial (L.F. 49-51).

Relevant Missouri statutes

Section 557.036 provides in pertinent part:

2. The court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless:

(1) The defendant requests in writing, prior to voir dire, that the court assess the punishment in case of a finding of guilt; or

(2) The State pleads and proves the defendant is a prior offender

Section 558.016 provides, in pertinent part:

1. The court may sentence a person who has pleaded guilty to or has been found guilty of an offense to a term of imprisonment . . . if it finds the defendant is a prior offender . . .

2. A “prior offender” is one who has pleaded guilty to or has been found guilty of one felony.

Standard of Review

Although Appellant objected to the trial court finding him to be a prior offender (Tr. 2), since the issue was not included in his motion for new trial, the issue was not preserved for appellate review and thus Appellant must request that this Court grant plain error review. **Rule 30.20.**

Rule 30.20 authorizes this Court to consider errors which are “plain” if they affect substantial rights. *State v. Vaught*, 34 S.W.3d 293, 295 (Mo.App. W.D., 2000) (circuit court’s use of two offenses that occurred after date of charged offenses to determine defendant’s persistent offender status amounted to plain error). An error is plain if, on its face, this Court discerns substantial grounds for believing that the error caused manifest injustice or a miscarriage of justice. *Id.*

Since the trial court considered a non-qualifying conviction in removing sentencing from the jury, Appellant has facially established a substantial ground for believing that he suffered a manifest injustice. Hence, this Court should review the

plain error to determine whether it, in fact, resulted in manifest injustice or a miscarriage of justice. A trial court commits plain error if it sentences a defendant as a prior offender and the record does not demonstrate that the conviction qualifies under **Section 558.016**. *State v. Golatt*, 81 S.W.3d 640 (Mo.App. W.D., 2002).

Appellant was not a prior offender

As noted above, the only prior offense alleged and pled by the State in this case was a court martial conviction. If a court martial conviction is not a “felony” under the Missouri recidivist statutes, then Appellant was deprived of his statutory right to jury sentencing. **Sections 557.036** and **558.016**. And, although the claim was not presented in Appellant’s motion for new trial, plain error review is appropriate where a defendant has been deprived of his right to jury sentencing. E.g., *Vaught*, 34 S.W.3d at 295; *State v. Merrill*, 990 S.W.2d 166, 172 (Mo.App. W.D., 1999).

Section 557.036 provides in pertinent part that the trial court shall instruct the jury as to the range of punishment authorized by statute and upon a finding of guilt to assess and declare the punishment as a part of their verdict, unless the State pleads and proves the defendant is a prior offender. In a related statute, **Section 558.016.1** provides, in pertinent part, that the court may sentence a person who has pleaded guilty to or has been found guilty of an offense to a term of imprisonment if it finds the defendant is a prior offender.

A “prior offender” is one who has pleaded guilty to or has been found guilty of one felony. **Section 558.016.2**. The State has the burden of proving beyond a reasonable doubt that a defendant has the requisite qualifying prior conviction. *Golatt, supra*. The failure to do so can result in a deprivation of the defendant’s right to due process.⁷ *Scharnhorst v. State*, 775 S.W.2d 241, 246, n 4, (Mo.App. W.D., 1989).

Here, Appellant’s alleged conviction was a general court-martial conviction. But prior to the Western District’s opinion in this case Missouri case law was clear - a court-martial conviction could not be used as a qualifying conviction under Missouri recidivism statutes. *Mitchell, supra*. Although a court-martial conviction could be used for the purpose of impeaching a witnesses’ credibility, it could not be used to establish a prior felony conviction under Missouri recidivism statutes. *Mitchell*, 659 S.W.2d at 5

In *Mitchell*, the defendant was given an enhanced sentence after the trial court found him to be a persistent offender. *Id*. On appeal he contended that the trial court should not have considered his court-martial conviction as one of the two felony convictions necessary to sentence him as a persistent offender. *Id*. The court of appeals agreed. The *Mitchell* court found that the military system of

⁷The 14th Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution.

discipline “sufficiently foreign from our own system of criminal justice and from that of our sister states and federal government so as to prohibit its use as a threshold predicate of enhanced punishment under § 558.016.” *Id.* at 6.

Mitchell was cited with approval by this Court in *State v. McMillin*, 783 S.W.2d 82, 95 (Mo.banc 1990). This Court in *McMillin* noted that *Mitchell* held that court-martial convictions should not be used to enhance punishment, and stated that, “No comparable restriction on the admission of evidence in the punishment phase of a capital trial exists.” *Id.* at 95.

Contrary to *Mitchell*, the Western District in this case held that it did not discern plain error in the use of a court-martial conviction because such a conviction constituted a felony, as defined in **Section 556.016** (slip op. at 2-3). In reaching its conclusion, the Western District noted that Appellant relied upon *Mitchell*. The Western District’s opinion in this case, however, held that, “The *Mitchell* court erred.” (slip op. at 3).

But not only did the Western District fail to follow *Mitchell*, the Western District’s opinion also ignored that *after Mitchell* was decided, the Missouri legislature amended **Section 558.016** in 1990 but it did not amend that statute to include court-martial convictions. The legislature is presumed to have acted with full awareness and complete knowledge of the present state of the law, including judicial precedent. *State v. Rumble*, 680 S.W.2d 939 (Mo.banc 1984). If the legislature had wanted to extend the recidivism statute beyond the interpretation of

the *Mitchell* court, then it could have by merely including “general court-martial convictions” within its coverage. It is the duty of the legislature to amend statutes, it is not the court’s duty to re-write statutes. *Jepson v. Stubbs*, 555 S.W.2d 307, 313 (Mo.banc 1997). The legislature’s failure to do so is telling. *See, State v. Wimberly*, 787 P.2d 729, 737-38 (Kan. 1990) (noting that the Kansas Habitual Criminal Act had been amended several time since the date that a prior Kansas Supreme Court case had held that court-martial convictions could not be used to enhance a defendant’s sentence, and thus the Kansas Supreme Court would presume that the legislature acted with full knowledge of that case in effecting the later amendments).

If the Western District’s opinion in this case is adopted, then an individual could be found to be a prior offender if he had a prior conviction by general court-martial by a five-member panel,⁸ which would be unconstitutional if applied to the United States, *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978) and is unconstitutional under the Missouri Constitution. **Article I, Section 22(a) of the Missouri Constitution.** Further, this finding of guilt could be non-unanimous, requiring only two-thirds vote,⁹ which again would be unconstitutional if

⁸ **Uniform Code of Military Justice (UCMJ), Art. 16(1); 10 U.S.C. Section 816(1); Manual for Courts-Martial (MCM) (2002 Edition), Rule 501.**

⁹ **UCMJ, Art. 52(a); 10 U.S.C. Section 852(a); MCM, Rule 921.**

applied to the United States if the jury was six members or less, *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979), and is unconstitutional under the Missouri Constitution. **Article I, Section 22(a) of the Missouri Constitution.** It is probably for these reasons that the only previous Missouri appellate decision to address this issue held that a court-martial conviction cannot be used to establish a prior felony conviction under the Missouri recidivism statute. *Mitchell, supra*.

Finally, the Western District’s opinion equates a court-marital conviction with a felony, yet in fact military offenses are not classified as felonies or misdemeanors, but instead by reference to the type of court-martial: “general,” “special,” and “summary.” **See 10 U.S.C. Sections 815-21.** The **Uniform Code of Military Justice** (UCMJ) does not set maximum penalties, but provides instead for maximums set by Presidential regulation, **10 U.S.C. Section 856.** A conviction of these non-criminal offenses can result in any lawful sentence other than death. **UCMJ, Art. 18; 10 U.S.C. Section 818.** Thus, an individual could be court-martialed for imprisonment for a year or more for non-criminal conduct, in the civilian sense of the word, such as conduct unbecoming an officer and a gentleman, **UCMJ, Art. 133**, absence without leave, **UCMJ, Art. 86**, desertion, **UCMJ, Art. 85**, missing movement, **UCMJ, Art. 87**, contempt toward officials, **UCMJ, Art. 88**, disrespect toward a superior commissioned officer, **UCMJ, Art. 89**, willfully disobeying superior commissioned officer, **UCMJ, Art. 90**, insubordinate conduct toward warrant officer, **UCMJ, Art. 91**, failure to obey order or regulation, **UCMJ,**

Art. 92, noncompliance with procedural rules, **UCMJ, Art. 98**, misbehavior of sentinel or lookout, **UCMJ, Art. 113**, and malingering, **UCMJ, Art. 115**.

This is why the Kansas Supreme Court has reasoned that because their statute applies when there are former “felony convictions” in and out of that state, but courts-martial convictions frequently relate to offenses of a strictly military character which have no counterpart in the civil law, the legislature could not have contemplated that Kansas’ enhancement statute was to be applied to a person previously convicted of an offense peculiar only to the military establishment. *State v. Paxton*, 440 P.2d 650, 659-60 (Kan. 1968). That reasoning is sound and is consistent with the prior Missouri case addressing this issue, *Mitchell*, *supra*.

Because the state did not prove beyond a reasonable doubt that Appellant was a prior offender, this Court should vacate Appellant’s convictions and sentences and remand for a new trial. Although the remedy in *Mitchell* was a remand for resentencing because Mitchell had another prior conviction, here Appellant did not have another prior conviction and therefore he is entitled to a new trial on all issues. *State v. McFall*, 866 S.W.2d 915, 919 (Mo.App. S.D., 1993); *Merrill*, 990 S.W.2d at 172.

CONCLUSION

For the reasons presented above, Appellant requests that this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Craig Johnston, MOBar #32191
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3722
Telephone: (573) 882-9855
FAX: (573) 875-2594
E-mail: cjohnsto@mspd.state.mo.us

CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13-point font. I hereby certify that this brief includes the information required by Rule 55.03. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 3,811 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated on May 2, 2003. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this ____ day of May, 2003, to Nicole E. Gorovsky, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Craig A. Johnston