IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	**)**	
	)	
Respondent,	**)**	
	)	
vs.	**)**	**No. SC 87860**
	)	
BRIAN EDWARD NEHER,	**)**	
	)	
Appellant.	**)**	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF BARTON COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT
THE HONORABLE JAMES R. BICKEL, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Brian Neher, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Mr. Neher incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

ARGUMENT

I.

Counsel's statement of a general principle of law—that the court in a bench-tried case may consider lesser included offenses—was not an "affirmative waiver" of the violation of Mr. Neher's double jeopardy rights because that issue was not raised or discussed in the trial court. The mere failure to object does not operate as a waiver where the double jeopardy violation is clear on the face of the record. The State may not go beyond the trial court's words—specifically finding Mr. Neher not guilty on Count II—to impeach its verdict by reference to the subsequent discussion as to intent to deliver. The substance of the ruling was a final acquittal before the lesser offense was even raised by the State.

There is a substantial difference between the principles in the cases cited in the State's argument, and the question presented here. The State claims, first, that Mr. Neher "affirmatively waived" his double jeopardy claim (Resp.Br. 9), by counsel's statement following his acquittal and the prosecutor's subsequent request to consider lesser included offenses:

> [DEFENSE COUNSEL]: Judge, actually it is my understanding that the Court is free to find the defendant guilty at a bench trial of lesser included offenses. So, as long as they are actually lesser included offenses, and obviously simple possession is one.

(Tr. 52).

The State would have this Court rule that Mr. Neher—by his counsel's action—waived his double jeopardy claim without it being stated in open court, and without the question being put to Mr. Neher himself. Thus the State, without discussing the issue, asks this Court to ignore the settled concept that a waiver is an intentional relinquishment of a known right or privilege. ***Johnson v. Zerbst***, 304 U.S. 458, 464 (1938). The State cannot point to anything here other than counsel's comment quoted above—which was a correct statement of the law—that the court can consider lesser included offenses in bench-tried cases. At least, it can consider them if timely requested to do so by the State.

This is not a fair use of the concept of waiver. Certainly, there was no discussion of Mr. Neher's double jeopardy rights or the fact that the court had already acquitted him entirely on Count II before the State asked it to consider the lesser included offense. It stands to reason that such a discussion is necessary before there can be an "affirmative waiver," as opposed to the simple failure to object that the record shows.

There are two conceivable reasons why trial counsel did not object to the court finding Mr. Neher guilty of the lesser offense: either he did not consider the matter, or he decided intentionally to forego such an objection. In neither case did counsel consult Mr. Neher. Thus it can hardly be said that if counsel made an intentional choice it was with Mr. Neher's consent. And if counsel did not consider the import of the court's having already found Mr. Neher not guilty, then counsel was similarly negligent.

The State next argues waiver by operation of law. (Resp.Br. 11). But as mentioned, the cases cited by the State declaring that the failure to raise a constitutional claim at the earliest opportunity operates as a "waiver" do not apply to this situation. First of all, the concept of a failure to object being the equivalent of a waiver was clarified by this Court in ***State v. Wurtzberger***, 40 S.W.3d 893, 897 (Mo. banc 2001). In ***Wurtzberger***, the defendant challenged the verdict directing instruction because it defined "attempt" according to the "common-law attempt" formulation that this Court disapproved in ***State v. Withrow***, 8 S.W.3d 75, 80 (Mo. banc 1999), rather that the "substantial step" language of § 564.011. The State argued in ***Wurtzberger*** that, under Rule 28.03 and ***State v. Martindale***, 945 S.W.2d 669 (Mo.App. E.D. 1997), the defendant waived all appellate review, including plain-error review under Rule 30.20. *Id*. This Court said:

> Although the state is correct that appellant waived appellate review when counsel failed to raise a specific objection to the disputed attempt instruction, it misconstrues the extent of the waiver. Unpreserved claims of plain error may still be reviewed under Rule 30.20 if manifest injustice would otherwise occur. To be sure, there is some confusion regarding the interplay between Rule 30.20 and Rule 28.03. ***State v. Bradshaw***, 26 S.W.3d 461 (Mo.App. 2000), a Western District case, interpreted ***State v. Martindale*** as disallowing all review, including plain-error review, in the absence of a timely objection. But, in fact,

there is no case, not even ***Martindale*** itself, holding that Rule 28.03 trumps Rule 30.20.

Wurtzberger, 40 S.W.3d at 898. The same rule should apply here, especially where Mr. Neher's double jeopardy rights are implicated, and the error is as significant as "the very power of the state to bring the defendant in the court to answer the charge brought against him[.]" ***Hagan v. State***, 836 S.W.2d 459, 461 (Mo. banc 1992).

Indeed, "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." ***Menna v. New York***, 423 U.S. 61, 62 (1975), *citing*, ***Blackledge v. Perry***, 417 U.S. 21, 30 (1974). If even a guilty plea by Mr. Neher would not have been valid, once he had been acquitted, then *a fortiori* counsel's statement that did not mention double jeopardy, the acquittal already entered, or even claim that Mr. Neher was in agreement with counsel's position could not waive this claim.

Beyond its general statement of the law, the State has not cited a single case in which the defendant was acquitted and the State thereafter attempted to retry him for the same offense. Instead, the State cites such examples as ***State v. Mann***, 35 S.W.3d 913, 915 (Mo.App. S.D. 2001) (Resp.Br. 11), in which the defendant objected at trial that the admission of a videotape under § 492.304 violated his right to confrontation. On appeal, he argued that its admission violated his constitutional rights to due process and a fair trial, but he did not object on that basis at trial. *Id.*, at 916. The

Court said, "[c]onstitutional claims are deemed to be waived if not presented to the trial court at the first opportunity." *Id*., *citing*, ***State v. Parker***, 886 S.W.2d 908, 925 (Mo. banc 1994). But ***Parker*** does not actually say that constitutional claims are *waived* in such circumstances; it simply says they are not preserved.[1]

The State also cites ***State v. Martin***, 940 S.W.2d 6, 9-10 (Mo.App. W.D. 1997), in which the defendant claimed that his rights to a jury trial and due process of law were violated because the record did not reflect that he affirmatively waived his right to a jury trial. He raised the issue for the first time on appeal, and the Court simply said, as in ***Parker***, that the alleged error had not been properly preserved for appellate review, citing, ***State v. Nave***, 694 S.W.2d 729, 734 (Mo. banc 1985). There was no mention of a "waiver."

Even the cases cited by the State (Resp.Br. 11), that state that a double jeopardy claim is a personal right, which is waived if not properly raised, do not address the issue raised here. In ***State v. Markham***, 63 S.W.3d 701, 708 (Mo.App. S.D. 2002), the defendant was charged with manufacturing methamphetamine (Count I), possession of methamphetamine (Count II), possession of drug paraphernalia (Count III), and possession of ephedrine with intent to manufacture methamphetamine (Count IV). *Id*., at 703. He attempted to raise a double jeopardy issue as plain error, contending that manufacturing methamphetamine was a continuing course of conduct

[1] The Court reviewed the claim for plain error, finding none. 886 S.W.2d at 925.

that was prosecuted in separate parts in Counts II, III and IV. *See* § 546.041.[2] The Court said, "[I]t is well-settled that double jeopardy is a personal right which, if not properly raised, is waived." *Id*., citing, ***State v. Gaver***, 944 S.W.2d 273, 279 (Mo.App. S.D. 1997); ***State v. Miner***, 748 S.W.2d 692, 693 (Mo.App. E.D. 1988); ***State v. Baker***, 850 S.W.2d 944, 947 (Mo.App. E.D. 1993); ***Rost v. State***, 921 S.W.2d 629, 635-36 (Mo.App. S.D. 1996); and ***Horsey v. State***, 747 S.W.2d 748, 754-56 (Mo.App. S.D. 1988). ***Gaver***, ***Miner***, and ***Baker*** are also cited by the State. (Resp.Br. 11).

Markham is a "statutory" double jeopardy claim, that is very different from the issue raised by Mr. Neher. Again, his claim that he was first acquitted before he was convicted of the lesser included offense, goes to "the very power of the state to bring the defendant in the court to answer the charge brought against him," ***Hagan***, 836 S.W.2d at 461, and it is therefore akin to a jurisdictional defect.

Gaver, involving four counts of endangering the welfare of a child, was also raised as a "continuing course of conduct" issue. 944 S.W.2d at 279. The Court of Appeals relied on ***Baker***, ***Miner***, ***Horsey***, and ***Rost*** to once again find that the claim was "waived." *Id*. ***Baker*** involved the same sort of claim, where the defendant argued

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[2] "When the same conduct of a person may establish the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if . . . (4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

that his possession of four knives within a correctional facility constituted a single offense, not four. 850 S.W.2d at 947. The ***Baker*** Court also relied on ***Miner*** to say that the claim was "waived." *Id*.[3]

Rost did not itself consider the issue of waiver of a double jeopardy violation. In that postconviction case that followed guilty pleas in three related cases, the Court held that the defendant had not actually challenged the only one of his three convictions that even arguably constituted a violation of his double jeopardy rights. 921 S.W.2d at 635. Then, in *dicta*, the Court merely mentioned the holdings of other courts that such a claim is "waived" if not timely raised. *Id*. It did not apply that principle to the facts presented. *Id*.

Horsey, another postconviction case, also did not involve a claim of a conviction following a previous acquittal, but rather an application of the "continuing course of conduct" or "unit of prosecution" rule in a case involving multiple counts of receiving stolen property. 747 S.W.2d at 750-51. The Court first determined that the multiple counts were proper, based on the evidence that the defendant received or retained stolen property at different times. *Id*., at 750-54. Then, in *dicta*, it discussed the waiver concept and noted that the defendant filed a pretrial motion to sever the various counts, alleging that there were no common factual issues among any of the

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[3] In the consolidated appeal of Baker's postconviction action, the Court found that an evidentiary hearing was necessary on the claim that trial counsel was ineffective for failing to raise the double jeopardy issue. 850 S.W.2d at 947-48.

counts. *Id*., at 754. The Court's *dicta* stated that under those circumstances, the defendant could not raise a double jeopardy claim. *Id*.

In ***Miner***, the authority underlying ***Gaver*** and ***Baker***, the Court of Appeals had previously reversed Miner's conviction for error in the admission of evidence, then reversed a second time for admitting evidence that violated the first order of remand. 748 S.W.2d at 693. The defendant did not raise a double jeopardy issue before his second trial or in his second appeal, but before his third trial, he moved to dismiss, arguing that the State's violation of the original remand order constituted prosecutorial misconduct. *Id*. The motion was denied, the defendant was again convicted, and in the third appeal, he raised the double jeopardy issue. The Court held that the claim was waived, as a personal right that was not asserted before the second trial or in the second appeal. *Id*., at 693-94.

The ***Miner*** Court relied on ***State v. Harper***, 353 Mo. 821, 184 S.W.2d 601 (1945) ("the plea of former jeopardy is personal to an accused and may be waived."). But ***Harper's*** underpinnings are no longer valid.

First of all, the claim of double jeopardy was really a non-issue. Harper was tried and convicted, then, during the extended period that he requested to file a motion for new trial, the court on its own motion granted him a new trial, which resulted in a hung jury. *Id*., at 603. Harper filed a "plea of former jeopardy" before his third trial, which was overruled, and he was convicted, resulting in his raising the issue on appeal. *Id*. So Harper was actually convicted at his first trial and was granted the new trial he intended to seek—but the trial court beat him to it. Thus, there was no basis

on which this Court could conclude on appeal that he was prejudiced by the trial court overruling his motion to dismiss.

Further, ***Harper*** was decided in 1945, before the double jeopardy protection of the Fifth Amendment was held to be applicable to the states. See, ***Benton v. Maryland***, 395 U.S. 784, 794 (1969) ("we today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment."). So the line of cases beginning from ***Harper***, and leading from there to ***Miner*** and through ***Miner*** to ***Gaver*** and ***Baker***, was based on different considerations from those involved in Mr. Neher's case.

Mr. Neher must make one final comment on the State's waiver argument. It claims that Mr. Neher "was only tried once before he was convicted on the lesser-included offense." (Resp.Br. 16). But Mr. Neher's trial ended with his acquittal on Count II. (Tr. 51). It was only thereafter, when only the sentence was left to consider,[4] that the State even asked the court to consider the lesser included offense of which Mr. Neher stands convicted. On these facts, he was tried twice.

In sum, the State's "waiver" argument is seriously flawed, in this case where Mr. Neher does not argue multiple punishment for a single act, or a continuing course of conduct, but rather, his position was that he was acquitted by the court's explicit finding. Under these circumstances, while Mr. Neher's argument must be for plain error, this Court should not base its decision on the State's claim of waiver.

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[4] The court did not even need to "accept the verdict," as it would in a jury-tried case.

When it reaches the merits of the issue, the State argues that the trial court "only acquitted [Mr. Neher] of having the intent to deliver," and that it did not plainly err in finding him guilty of simple possession. (Resp.Br. 17). But again, the State relies on facts that arose after Mr. Neher's acquittal. If the court had discharged Mr. Neher on Count II and sent him home, and State had the next day charged Mr. Neher with simple possession, the issue would be the same. Whatever the trial court's "intent" was, and however clearly it expressed that intent after the fact, would not matter. The trial, and the prosecution, was over.

Mr. Neher does not dispute that the trial court expressed that it found only the delivery element lacking (Tr. 52). But that is irrelevant, because that was only raised and determined after its general verdict acquitting Mr. Neher was announced. If that had come up five minutes or a week later in idle conversation between the judge and the prosecutor, it would not change anything. Mr. Neher stood acquitted, just as if a jury had returned a not guilty verdict, and the then State asked to submit a lesser charge. That had to be done before submission, or not at all.

Rule 28.02(b) requires that "[a]t the close of the evidence, or at such earlier time as the court may direct, counsel shall submit to the court instructions and verdict forms that the party requests be given." This Rule does not permit lesser included offense instructions to be submit after the verdict is returned, and by analogy, it does not permit, in a bench-tried case, a finding of guilty of a lesser included offense if that offense is not "submitted" or requested before the court announces its verdict. In

other words, the State is attempting to impeach the trial court's verdict by claiming that it really "meant" to do something other than what it did.

The State cites ***State v. Smith***, 988 S.W.2d 71, 78 (Mo.App. W.D. 1999), for the proposition that, "[i]n our determination of whether the outcome of this appeal might result in double jeopardy, we look at the substance of the trial court's ruling, and not its form." (Resp.Br. 18). The problem is that ***Smith*** was the State's appeal of the trial court's ruling that the State's opening statement was insufficient. *Id*., at 74. After finding that it was sufficient, the Court of Appeals considered the double jeopardy question and distinguished the case from those in which a retrial was barred when the State's *evidence* was deemed insufficient. *Id*., at 78. After reviewing the authorities, the Court ordered a new trial, ruling that the dismissal due to an insufficient opening statement was more like a request by the defendant for a mistrial than a discharge for legally insufficient evidence. *Id*., at 81. Thus ***Smith*** is not like Mr. Neher's case, where the trial court did not either dismiss or declare a mistrial but, as the finder of fact, found him not guilty. The State's theory that Mr. Neher is advocating viewing the form of the finding over its substance fails.

Similarly, in ***State v. Reed***, 770 S.W.2d 517, 520 (Mo.App. E.D. 1989), the trial court granted the defendant's pretrial motion to dismiss the indictment, but only after declaring a mistrial due to a hung jury. The Court of Appeals mentioned the "form vs. substance" issue because it could not "say with assurance what the substance of the trial court's ruling [was]." *Id*. The Court recognized the possibility that the dismissal was actually a post-trial grant of a motion for judgment of acquittal;

it remanded and directed the trial court to clarify the basis of its ruling, because that would determine whether the order was appealable by the State. *Id*., at 520-21. Therefore, ***Reed*** is also inapplicable to Mr. Neher's case, because the ruling was plain and unambiguous: "I will find him not guilty as to Count II." (Tr. 51). This language brooks no form vs. substance argument.

Tibbs v. Florida, 457 U.S. 31 (1982), also does not aid the State. The sole issue in ***Tibbs*** was whether an appellate court ruling that the verdict was against the weight of the evidence, rather than being founded on legally insufficient evidence, barred retrial. *Id*., at 39. The United States Supreme Court held that it did not. *Id*., at 45. It also said, as the State noted in part, that "the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." *Id*., at 41 (footnotes omitted). That was what happened here.

Ashe v. Swenson, 397 U.S. 436 (1970), cited by the State (Resp.Br. 19), actually supports Mr. Neher's position. The Court considered the question of an acquittal in a trial of one of six armed robbery charges that occurred in a single incident. *Id*., at 437-39. In putting the concept of collateral estoppel on a constitutional footing in criminal cases, the Court said:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be

> litigated between the same parties in any future lawsuit. * * * As a rule of federal law, therefore, "(i)t is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain."

Id., at 443, quoting, ***United States v. Kramer***, 289 F.2d 909, 913 (2nd Cir. 1961).

Therefore, the State may not go behind the general verdict of acquittal and argue that it was only one element on which its proof failed, to the exclusion of all other elements. The State was precluded from proceeding further against Mr. Neher once the court announced a general verdict.

Again, the State attempts to read too much into the court's discussion of the element of delivery following Mr. Neher's acquittal. It argues that he was not acquitted of possessing a controlled substance (Resp.Br. 22), and thereby attempts to distinguish this case from ***Barnes v. State***, 9 S.W.3d 646 (Mo.App. E.D. 1999). But in ***Barnes***, the trial court made it clear *before* submitting the case on second degree murder that it found the State's evidence insufficient *only* as to the element of deliberation. *Id*., at 647. Thus, continuing on the lesser included offense was permissible. But had the court acquitted Barnes of the homicide *count*, a different result would obtain, regardless of any subsequent explanation as to *how* the court

arrived at its decision. And if the trial court here had said "as to Count II, I find no evidence of intent to deliver," and then the State asked it to consider the lesser offense, this case would be like ***Barnes*** to the extent that conviction of the lesser included offense was allowable.

The State continues to claim that Mr. Neher's position puts form over substance, and it is the substance that controls. (Resp.Br. 23). Mr. Neher agrees that the substance controls, but the substance was "I will find him not guilty as to Count II." (Tr. 51). The State wishes either that the court had not said what it did, or that it had not waived closing argument (Tr. 51), in which it could have asked the court to consider the lesser offense. But wishing does not make it so, and the State cannot change the substance of the court's general, unlimited, unambiguous acquittal by arguing that it "mere words." (Resp.Br. 23). The words a trial court uses are the only thing from which this Court may judge the effect of its ruling, and the words were "not guilty." Therefore, this Court must reverse Mr. Neher's conviction for possession of a controlled substance and discharge him as to that count.

II.

The State ignores in its "probable cause" argument that the trial court's ruling was that the affidavit did *not* establish probable cause. The bare bones affidavit filed here did not establish the officer's objectively reasonable reliance thereon, and there is a substantial suggestion in the record that the affidavit was false in material respects.

It is interesting that the State argues that the trial court's ruling as to questions of fact is entitled to "great deference" and this Court's review is not *de novo* (Resp.Br. 26-27), because the ruling in this case was that it "was not the case" that the warrant application and supporting affidavits provided probable cause to search (L.F. 20-21; App. A-1 - A-2)). Therefore, the denial of Mr. Neher's motion to suppress may be upheld, if at all, only on the basis, as found by the trial court, that the affiant (Sheriff Griffitt) acted in good faith in believing that the information in his affidavit "came from the confidential informant's personal observation." (L.F. 21).

But the "***Leon***" good faith exception applies where there is *objectively reasonable* reliance on the warrant issued by a magistrate. ***United States v. Leon***, 468 U.S. 897, 922 (1984). The good faith exception does not apply when the warrant is so facially deficient that the officer cannot reasonably presume it to be valid. *Id*., at 923. Further,

> [i]t is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who

> originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.

Id., n.24. The bare bones affidavit here does not satisfy ***Leon***.

The State argues that the sheriff did not misstate or omit material facts from the affidavit. (Resp.Br. 39). But the record suggests otherwise. The combination of the sheriff's affidavit and the hearing testimony strongly suggests that Mr. Neher's father was the confidential informant, because there was no one else mentioned who would have seen the matters the informant claimed to have seen, and because the father testified that he saw "some cans of stuff there on the counter" at Mr. Neher's house, though he could not say what they were (Tr. 8-9). And he testified that he had seen Carl Carter there on some unspecified date (he did not say it was the night before, as stated in the affidavit) (Tr. 22).

If the father was the confidential informant, as the record suggests, but admittedly does not conclusively establish, there is a significant issue of the affidavit containing false statements. Suppression "remains an appropriate remedy if the magistrate or judge in issuing a warrant was misled by information in an affidavit that

the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id*., *citing* ***Franks v. Delaware***, 438 U.S. 154 (1978).

Finally although it relates to the question of probable cause, which the trial court determined adversely to the State's position, Mr. Neher notes that the State argues that the confidential informant's statements to the sheriff were reliable because he admitted his own criminal conduct. (Resp.Br. 34). The State arrives at this conclusion through a misreading of the affidavit. The paragraph at issue reads:

> The confidential informant contacted your affiant, Sheriff William A Griffitt on today's date of 08-30-2004 and stated the Brian Neher was cooking meth late last night (8/29-30/04). The confidential informant also stated that Neher has all the chemicals used in the [sic] manufacturing methamphetamine. *The confidential informant also stated that he also is in possession of paraphernalia for the manufacturing and use of methamphetamine*.

(State's Exhibit 2) (emphasis added). Taken in context, the word "he" in the italicized portion must refer to Mr. Neher, not the informant. This is shown by the fact that the sentence before concerns the necessary chemicals, and the emphasized portion refers to the accompanying paraphernalia. It all referred to Mr. Neher.

For these reasons, as well as those stated in his opening brief, Mr. Neher asks this Court to reverse his convictions and remand for a new trial without the evidence seized from his home.

CONCLUSION

For the reasons set forth in Point I herein and in his opening brief, appellant Brian Neher respectfully requests that this Court reverse his convictions and sentence on Count II, possession of methamphetamine, and discharge him therefrom. For the reasons set forth in Point II herein and in his opening brief, Mr. Neher respectfully requests that this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,107 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan, updated in October, 2006. According to that program, these disks are virus-free.

On the _____ day of October, 2006, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Shaun J Mackelprang, Assistant Attorney General, 221 W. High Street, Jefferson City, MO 65102.

_____
Kent Denzel

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