

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2, 3

JURISDICTIONAL STATEMENT.....4

STATEMENT OF FACTS.....5

POINTS RELIED ON.....8

ARGUMENT.....9

CONCLUSION.....21

CERTIFICATE OF COMPLIANCE.....22

CERTIFICATE OF SERVICE.....23

TABLE OF AUTHORITIES

33 MISSOURI PRACTICE “Courtroom Handbook On Missouri Evidence”
 §201.3(c) (West 2003).....19

33 MISSOURI PRACTICE “Courtroom Handbook On Missouri Evidence”
 §201.3(e) (West 2003).....20

Boone County Court v. State of Missouri, 321, 324 (Mo. en banc 1982).....12

Boone County Court v. State of Missouri, 631 S.W. 2d 321, 324 (Mo. en banc 1982)....10

Chandler v. Hemeyer, 49 S.W. 3d 786, 792 (Mo. App. 2001).....20

Hardin v. Hardin, 512 S.W. 2d 851, 854 (Mo. App. 1974).....20

Kleeman v. Kingsley, 88 S.W. 3d 521, 523 (Mo. App. S.D. 2002).....15

McCoy v. Rawlings, 849 S.W. 2d 719 (Mo. App. 1993).....20

MO. ANN. STAT. §304.050(4) (West Supp. 2004).....5, 7-11, 14, 16

Mo. Bar CLE Sources of Proof, 7.12 (2d ed. 1977).....19

NEW WEBSTER’S DICTIONARY AND THESAURUS 457 (1992).....10, 11, 14

Morrison v. Thomas, 481 S.W. 2d 605, 607 (Mo. App. 1972).....19, 20

Pogue v. Smallen, 285 S.W. 2d 915, 917 (Mo. 1956).....20

Rice v. James, 844 S.W. 2d 64, 68 (Mo. App. 1992).....20

Scheuller v. Continental Life Ins., 169 S.W. 2d 359, 365 (Mo. 1943).....20

Schrimpf v. Director of Revenue, State of Missouri,
 889 S.W. 2d 171 (Mo. App. 1994).....16, 17

State ex. rel. Wabash RY. Co. v. Public Service Commission of Missouri,
 100 S.W. 2d 522, 525-526 (Mo. 1936).....11, 16

<u>State v. Buckley</u> , 298 S.W. 777 (Mo. 1927).....	18
<u>State v. Condict</u> , 65 S.W. 3d 6 at 9, 10 (Mo. App. 2001).....	9
<u>State v. Crews</u> , 968 S.W. 2d 763, 765 (Mo. App. 1998).....	14
<u>State v. Duggar</u> , 806 S.W. 2d 407, 408 (Mo. Banc 1991).....	10, 12
<u>State v. Hammons</u> , 964 S.W. 2d 509, 511-512 (Mo. App. 1998).....	14, 17
<u>State v. Hammons</u> , 964 S.W. 2d 509, 514 (Mo. App. 1998).....	11, 15-17
<u>State v. Hanson</u> , 493 S.W. 2d 8 (Mo. App. 1973).....	16, 17
<u>State v. Harris</u> , 913 S.W. 2d 348, 349 (Mo. App. E.D. 1995).....	14, 17
<u>State v. Lanier</u> , 985 S.W. 2d 377, 379 (Mo. App. 1999).....	14
<u>State v. Reed</u> , 553 S.W. 2d 946 (Mo. 1970).....	14, 17
<u>State v. Silvey</u> , 980 S.W. 2d 103, 108 (Mo. App. 1998).....	14
<u>State v. Stone</u> , 926 S.W. 2d 895, 899 (Mo. App. 1996).....	9
<u>State v. Thenhaus</u> , 117 S.W. 3d 702 (Mo. App. E.D. 2003).....	15
<u>State v. Weber</u> , 814 S.W. 2d 298, 303 (Mo. App. 1991).....	20
<u>State v. Wiles</u> , 26 S.W. 3d 436, 442 (Mo. App. 2000).....	9
<u>State v. Williams</u> , 24 S.W. 3d 101, 110 (Mo. App. 2000).....	9, 13
<u>State v. Williams</u> , 24 S.W. 3d 101, 115 (Mo. App. 2000).....	14
THE WORLD BOOK DICTIONARY, Volume II, 1477 (1972 ed.).....	13

JURISDICTIONAL STATEMENT

This is an appeal from the trial court's bench trial verdict on a misdemeanor criminal case, as well as its rulings on the Appellant's/Defendant's, motions for judgment of acquittal and for judgment of acquittal notwithstanding the verdict.

This criminal case does involve, in one of three points relied on, the validity of a statute of this state. The jurisdiction of this appeal, therefore, is vested in the Missouri Supreme Court, pursuant to Article V, §3 of the Constitution of the State of Missouri, as the judgment appealed from involves the validity of a state statute.

STATEMENT OF FACTS

This case arises out of a misdemeanor information filed by the State of Missouri charging Appellant/Defendant William Dunn with a violation MO. ANN. STAT. §304.050(4) (West Supp. 2004) (LF 1, 5-6, TR 11).

On the afternoon of November 8, 2002, Sarah Rost, a student, was riding a school bus home from school (Savannah High School) (TR 54, 55) and was discharged from the school bus at a point South of her bus stop by Appellant/Defendant William Dunn, a school bus driver in the employ of Laidlaw Transit who had missed Ms. Rost's bus stop, on State Route D in Andrew County, Missouri (TR 25-26, 55-56, 73-75). State Route D is a two lane Missouri blacktop highway, running in a North/South direction in Andrew County, Missouri with a maximum speed limit of 55 miles per hour (TR 19, 75, 91-92).

Sarah Rost, the student who was discharged from the bus South of her bus stop by the driver who had missed the bus stop (TR 25-26, 55-56, 73-75) testified at trial that the Appellant/Defendant did not move the school bus after discharging her from the school bus (TR 58) and that the driver did not move the school bus as a southbound Jeep avoided striking the bus and that the bus driver did not move the school bus prior to a second truck colliding with the school bus (TR 59).

Greg Rost, the father of Sarah Rost, testified that he measured the distance from where his daughter advised him she was discharged from the school bus to the crest of a hill on State Route D North of the point where she was discharged at approximately 250 feet. He further testified there is no visibility on Route D from the North side of the crest of that hill looking South (TR 37, 45, 46-52).

Trooper Andrew Tourney of the Missouri State Highway Patrol testified that he measured the distance from the rear of the bus as he found it on November 8, 2002 to a point on Route D which was the crest of a hill North of the school bus to where “one could reasonably see” South at 216 feet and that standing on the North side of the crest there was no visibility South along State Route D (TR 22-24, 27-29, 31-32).

Appellant/Defendant admitted on cross examination that he stopped on the South side of a steep hill on State Route D to discharge the student Sarah Rost (TR 91), although Appellant/Defendant also testified he proceeded South after discharging Sarah Rost, coming to a stop prior to being struck by and oncoming vehicle, after another vehicle (a Jeep) driven by Bastian T. Rosmollen narrowly avoided striking Sarah Rost before swerving to avoid the school bus and rolling over at a location opposite the school bus (TR 58, 73-82). Appellant/Defendant also testified that the night before the trial he and a co-worker, Candace Frakes of Laidlaw Transit conducted their own measurements at a point where he claimed he discharged Sarah Rost from the school bus (TR 84-85). Candace Frakes, a Laidlaw Transit employee, took pictures allegedly showing the bus was visible 300 feet and even 500 feet North of the point where Appellant/Defendant said he discharged the student Sarah Rost (TR 102, 112-114). The Appellant’s/Defendant’s co-employee Ms. Frakes further testified that she could see her personal vehicle parked 163 feet North of the center of the crest of the hill North of where Appellant/Defendant testified he discharged Sarah Rost (TR 114-116). This same witness, however, later testified on cross examination that the Appellant/Defendant “absolutely” did the right thing by leaving the bus parked where it was full of children on a school bus after one

vehicle rolled over to avoid a collision with the school bus where Appellant/Defendant has parked it, another vehicle had swerved to avoid the parked bus and another vehicle had driven into the rear of the parked bus (TR 119-120).

The trial judge took judicial notice (Appellant's brief 40) Sua Sponte that until you reach the crest of the hill North of the area where Sarah Rost testified she was discharged from the school bus and Trooper Tourney testified he conducted his measurements, (TR 22-24, 27-29, 31-32, 37, 45, 46-52) there was no visibility South of the crest of the hill (TR 124-125).

The Court found the Appellant/Defendant guilty of violation of MO. ANN. STATE §304.050(4) and imposed a fine of \$250 (TR 125-126, LF 30 – 31, Second TR 11).

POINTS RELIED ON

- I. The trial court committed no error in finding Defendant guilty as the statute under which Defendant was convicted, MO. ANN. STAT. §304.050(4) (West Supp. 2004) did not violate the due process rights of the Defendant under either the United States Constitution or the Missouri Constitution, in that the portion of the statute complained of by Defendant provided fair notice to the Defendant when measured by common understanding, that his conduct in stopping a school bus full of children on State Route D in Andrew County, Missouri without at least 300 feet of unimpeded visibility to traffic approaching the bus from the North (or rear) was plainly prohibited under the State.**
- II. The trial court did not err in finding Defendant guilty as the statute in question applies to highways as regards the violation committed by Defendant; further, the State proved Route D in Andrew County, Missouri is in fact a highway.**
- III. The trial court did not err in finding the Appellant/Defendant guilty beyond a reasonable doubt, as there was sufficient evidence adduced to enable a reasonable juror to have found the Appellant/Defendant guilty beyond a reasonable doubt of each of the elements constituting the offense charged.**

Argument

- I. **The trial court committed no error in finding Defendant guilty as the statute under which Defendant was convicted, MO. ANN. STAT. §304.050(4) (West Supp. 2004) did not violate the due process rights of the Defendant under either the United States Constitution or the Missouri Constitution, in that the portion of the statute complained of by Defendant provided fair notice to the Defendant when measured by common understanding, that his conduct in stopping a school bus full of children on State Route D in Andrew County, Missouri without at least 300 feet of unimpeded visibility to traffic approaching the bus from the North (or rear) was plainly prohibited under the State.**

Standard of Review

Courts presume statutes are constitutional and will so apply them unless the statute plainly contravenes some constitutional provision. Any doubt should be decided in favor of the statute's validity. State v. Conduct, 65 S.W. 3d 6 at 9, 10 (Mo. App. 2001); State v. Stone, 926 S.W. 2d 895, 899 (Mo. App. 1996); State v. Wiles, 26 S.W. 3d 436, 442 (Mo. App. 2000). Relative to the point of statutory construction of the term "highway" in regards to the violation committed by Defendant, a question of law is reviewed independently of the trial court's determination. State v. Williams, 24 S.W. 3d 101, 110 (Mo. App. 2000).

The portion of the statute in question is clear and definite as to the conduct prohibited. Appellant/Defendant filed a Motion or argued a Motion to Dismiss the misdemeanor charge against him on the grounds of constitutional vagueness on at least two occasions during the pendency of this case. The first was a formal Motion to Dismiss, filed on April 22, 2003 and argued May 13, 2003, which was denied by the trial court on May 15, 2003 (LF 8, 15 and 19). The second was a motion for a judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial filed on September 15, 2003, responded to by the State on September 15, 2003 and denied by the trial court after argument on September 30, 2003 (LF 8, 23-25 and 26). The actions of the trial court were well taken.

Appellant/Defendant first complains that the statute lacks clarity as to whether the statute in question applies only to highways with four lanes of traffic while Route D is only a two lane highway (TR 19). When MO. ANN. STAT. §304.050(4) (West Supp. 2004) applies to four lane highways, it clearly does so; otherwise the reference to highways or roads must be understood, giving these terms their plain and ordinary meaning. The test becomes “ ‘Whether the language of the statute conveys a sufficiently definite warning as to the prescribed conduct when measured by common understanding and practices.’ ” State v. Duggar, 806 S.W. 2d 407, 408 (Mo. Banc 1991) (citation omitted). In other words, the constitutional construction of a word for plainness is arrived at by giving that word its “[O]rdinary, usual and commonly understood meaning...” which is derived from the dictionary. Boone County Court v. State of Missouri, 631 S.W. 2d 321, 324 (Mo. en banc 1982). **NEW WEBSTER’S**

DICTIONARY AND THESAURUS 457 (1992) defines “highway” as “[A] public road, especially one that is wide, well paved and direct.” The Appellant/Defendant was not confused on this score, as during the trial he admitted Route D was a highway (TR 75, 91). Further, courts may take judicial notice of official state highway maps, State v. Hammons, 964 S.W. 2d 509, 514 (Mo. App. 1998) and the official highway map of the State of Missouri designates Highway D in Andrew County, Missouri as a secondary state highway.

“A road or a highway is nothing more than a strip of ground set aside, improved and dedicated to the public for use as a passageway.” State ex. rel. Wabash RY. Co. v. Public Service Commission of Missouri, 100 S.W. 2d 522, 525-526 (Mo. 1936).

Finally, the very actions of Appellant/Defendant belie his protestations that he was unclear whether the term “highway” as used in MO. ANN. STAT. §304.050(4) (West Supp. 2004) and regarding stopping distances and visibility included Route D. The Appellant/Defendant himself, as well as his co-worker Candace Frakes, drove to the location in question the night before the trial to measure the distance between the school bus where he allegedly stopped it and the alleged point of closest visibility from a vehicle approaching the school bus from the rear (TR 84, 85, 102-118); further, on cross examination of the Defendant he testified that he knew he could stop the bus on Route D to discharge a child “if you’re visible from the rear end” (TR 92) although he was personally ignorant of the statutorily mandated stopping distance (TR 92).

Appellant/Defendant next complains that the term “plainly visible” is so vague that it did not provide fair notice as to what was expected of him. Initially, it is urged by the State there is no question but that the mandated stopping distance was 300 feet of plain visibility, given the testimony of Trooper Andrew Tourney of the Missouri State Highway Patrol that the speed limit on Route D was 55 miles per hour (TR 19), so there can be no justifiable confusion in that regard. In addition, the language “plainly visible” provides a sufficiently specific constitutional prohibition based on the same rules elucidated in State v. Duggar, 806 S.W. 2d 407, 408 (Mo. Banc 1991) and Boone County Court v. State of Missouri, 321, 324 (Mo. en banc 1982). It was obvious during the trial of this case, (TR 31-32, 42, 70-72) (Second TR of 9/30/03 5) that Appellant/Defendant was asserting a definition of “plainly visible” which would allow a school bus driver to stop a bus filled with children with intervening obstacles between the school bus and an approaching motor vehicle so long as an approaching motorist could catch a glimpse of a school bus from the top of a hill from a theoretically infinite distance that was at least 300 feet from the stopped bus. Not only is this position at odds with Appellant/Defendant’s own admission that the statute was designed to protect children getting on and off school buses, (Appellant Brief 21) it is at odds with the law as stated in State v. Duggar, 806 S.W. 2d 407, 408 (Mo. banc 1991) and Boone County Court v. State of Missouri, 321, 324 (Mo. en banc 1982). Those cases stand for the proposition that the constitutionally plain and common understanding of a word or term gives sufficient notice to a Defendant of prohibited conduct and that such plain and common meanings are to be found in the dictionary:

“[P]lain...12. flat; level; smooth: plain ground. The crooked shall be made straight, and the rough places plain (Isaiah 40:4). 13. without obstructions; open; clear: in plain sight or view.” THE WORLD BOOK DICTIONARY, Volume II, 1477 (1972 ed.).

To the extent not otherwise herein addressed, the “bullet points” of Point I of Appellant/Defendant’s brief are not issues relative to ambiguity or specificity, but are simply the attempts of a guilty Defendant to cloud the areas of relevant inquiry, i.e., the fact that the conduct prescribed by the statute requires care on the part of the Defendant/Appellant to insure compliance with its provisions has nothing to do with the fact that it is constitutional and unambiguous.

II. The trial court did not err in finding Defendant guilty as the statute in question applies to highways as regards the violation committed by Defendant; further, the State proved Route D in Andrew County, Missouri is in fact a highway.

Standards of Review

Relative to the point of statutory construction of the term “highway” in regards to the violation committed by Defendant, a question of law is reviewed independently of the trial court’s determination. State v. Williams, 24 S.W. 3d 101, 110 (Mo. App. 2000).

Relative to the Appellant’s/Defendant’s claim that the State of Missouri did not demonstrate Route D in Andrew County, Missouri to be a highway for purposes of a

school bus discharging children with 300 feet of plain visibility in either direction under MO. ANN. STAT. §304.050(4) (West Supp. 2004), “The standard of review for a court tried criminal case is the same as for a jury tried criminal case. State v. Harris, 913 S.W. 2d 348, 349 (Mo. App. E.D. 1995). We review the record to see whether sufficient evidence exists from which the trial court could have returned a guilty verdict. Id. In reviewing the record we accept all evidence and inferences favorable to the guilty verdict and ignore all contrary evidence and inferences. Id.” State v. Hammons, 964 S.W. 2d 509, 511-512 (Mo. App. 1998). See also State v. Reed, 553 S.W. 2d 946 (Mo. 1970).

Appellant/Defendant first complains that the statute is inapplicable because only highways with four lanes of traffic constitute a “highway” under the statute. The State contends that when MO. ANN. STAT. §304.050(4) (West Supp. 2004) applies to four lane highways, it clearly does so; otherwise the reference to highways or roads must be understood, giving these terms their plain and ordinary meaning, State v. Lanier, 985 S.W. 2d 377, 379 (Mo. App. 1999); State v. Williams, 24 S.W. 3d 101, 115 (Mo. App. 2000). That case, along with State v. Silvey, 980 S.W. 2d 103, 108 (Mo. App. 1998) and State v. Crews, 968 S.W. 2d 763, 765 (Mo. App. 1998) provide that when a word used in a statute is not defined therein it is appropriate to derive its plain and ordinary meaning from a dictionary. **NEW WEBSTER’S DICTIONARY AND THESAURUS 457 (1992)** defines “highway” as “[A] public road, especially one that is wide, well paved and direct.”

In a Point contained within a Point, Appellant/Defendant contends the State did not prove Route D was a highway. During the trial of the case Trooper Andrew Tourney

of the Missouri State Highway Patrol testified that he was familiar with Route D in Andrew County, Missouri, that it is a two lane state lettered blacktop road, running in a North/South direction. Further, when asked if State Route D was a “blacktop highway” Trooper Tourney responded in the affirmative. (TR page 19).

Further, it is well established that a trial court, as well as an appellate court, may take judicial notice of official state highway maps. State v. Hammons, 964 S.W. 2d 509, 514 (Mo. App. 1998) and the official highway map of the State of Missouri shows that Highway D in Andrew County, Missouri is a secondary state highway. Under Point II of Appellant’s/Defendant’s brief Appellant/Defendant suggests that he has an “analogous” case to the present case, i.e., State v. Thenhaus, 117 S.W. 3d 702 (Mo. App. E.D. 2003) which he cites for the proposition that the court cannot take such judicial notice, but a close investigation of that case demonstrates that 1) the thoroughfare there in question was known as “Bowen Cemetery Road” thus giving no indication as to whether it was a “highway” as that term is commonly and plainly understood and 2) the case relies upon a case known as Kleeman v. Kingsley, 88 S.W. 3d 521, 523 (Mo. App. S.D. 2002) in which the question of whether or not a road is a state road is not addressed. As herein demonstrated, and as was demonstrated at trial, there is no question but that Route D is a state road. Hence, the case relied upon by Appellant/Defendant is not applicable to the case at bar, particularly in light of the well established line of cases which stand for the proposition that a trial court, as well as an appellate court can take judicial notice of whether or not Route D is a “highway”. State v. Hammons, 964 S.W. 2d 509, 514 (Mo.

App. 1998); State v. Hanson, 493 S.W. 2d 8 (Mo. App. 1973); Schrimpf v. Director of Revenue, State of Missouri, 889 S.W. 2d 171 (Mo. App. 1994).

“A road or a highway is nothing more than a strip of ground set aside, improved and dedicated to the public for use as a passageway.” State ex. rel. Wabash RY. Co. v. Public Service Commission of Missouri, 100 S.W. 2d 522, 525-526 (Mo. 1936).

Finally, the very actions of Appellant/Defendant belie his protestations that he was unclear whether the term “highway” as used in MO. ANN. STAT. §304.050(4) (West Supp. 2004) and regarding stopping distances and visibility included Route D. The Appellant/Defendant himself, as well as his co-worker Candace Frakes, drove to the location in question the night before the trial to measure the distance between the school bus where he stopped it and its alleged point of nearest visibility from a vehicle approaching the school bus from the rear (TR 84, 85, 102-118); on cross examination of the Defendant he testified that he knew he could stop the bus on Route D to discharge a child “if you’re visible from the rear end” (TR 92) although he was personally ignorant of the statutorily mandated stopping distance (TR 92).

III. The trial court did not err in finding the Appellant/Defendant guilty beyond a reasonable doubt, as there was sufficient evidence adduced to enable a reasonable juror to have found the Appellant/Defendant guilty beyond a reasonable doubt of each of the elements constituting the offense charged.

Standard of Review

The standard of review for a court tried criminal case is the same as for a jury tried criminal case. The appellate court examines the record to see whether sufficient evidence exists from which the trial court could have returned a guilty verdict. In reviewing the record, the appellate court accepts all evidence and inferences favorable to the guilty verdict and ignores all contrary evidence and inferences. State v. Harris, 913 S.W. 2d 348, 349 (Mo. App. 1995); State v. Hammons, 964 S.W. 2d 509, 511-512 (Mo. App. 1998); State v. Reed, 553 S.W. 2d 946 (Mo. 1970).

The prescribed conduct was the act of Appellant/Defendant on November 8, 2002, in stopping a school bus on Route D, a secondary two lane state blacktop highway (TR 19). (falling within the definition of a highway on the official Missouri Highway Map as to which the trial and appellate court can take judicial notice, State v. Hammons, 964 S.W. 2d 509, 514 (Mo. App. 1998), State v. Hanson, 493 S.W. 2d 8 (Mo. App. 1973), Schrimpf v. Director of Revenue, State of Missouri, 889 S.W. 2d 171 (Mo. App. 1994)) to unload a child, one Sarah Marie Rost, when the school bus was not plainly visible by providing unimpeded visibility at the stopping place to approaching motorists for at least 300 feet from the school bus stopping point.

Sarah Rost, a student, testified that the defendant did not move the school bus after discharging her from the school bus (TR 58), and that he did not move the bus as a southbound Jeep avoided striking the bus, rolling over in the process, and that the bus was not moved prior to a second truck colliding with the school bus (TR 59).

Greg Rost, the father of Sarah Rost, testified that he measured the distance from where his daughter advised him she was discharged from the bus to the crest of the hill on Route D North of the point where she was discharged at approximately 250 feet. He further testified there is no visibility on Route D from the North side of the crest of that hill looking South (TR 37, 45, 46-52).

Trooper Andrew Tourney of the Missouri State Highway Patrol testified that he measured the distance from the rear of the school bus as he found it to a point on Route D North of the school bus to where “one could reasonably see” South at 216 feet and that standing on the North side of the crest of Route D North of where Sarah Rost advised she was discharged there was no visibility South along Route D (TR 22-24, 27-29, 31-32).

Appellant/Defendant admitted on cross examination during the trial of the cause that he stopped on Route D, which he admitted was a highway, on the South side of a steep hill (TR 91) to discharge Sarah Rost.

The trial judge took judicial notice (Appellant’s/Defendant’s brief 40) Sua Sponte that until you reach the crest of the hill North of the area where Sarah Rost testified she was discharged from the school bus and Trooper Tourney testified he conducted his measurements (TR 22-24, 27-29, 31-32, 37, 45, 46-52) there was no visibility South of the crest of the hill (TR 124-125). It is clearly established under Missouri law that a trial court is able to take judicial notice of facts commonly known within the jurisdiction of the trial court, even though the facts are not universally known. State v. Buckley, 298 S.W. 777 (Mo. 1927).

“Courts **take notice** of whatever is or ought to be generally **known** within the limits of their jurisdiction, and that they ought not to assume ignorance of, or exclude from their knowledge, matters which are **known** to all persons of intelligence. * * * What may be a proper subject of **judicial notice** at one time or place may not be at another. * * * yalthough a **fact** must be pretty well **known** and pretty obvious besides before it can be **taken judicial notice** of, it is not necessary for courts to wait, before **taking judicial notice** of a thing, until everybody **knows** and understand it. * * * The test has been said to be: (1) Is the **fact** one of common every day knowledge in the jurisdiction which every one of average intelligence and knowledge of things about him can be presumed to **know**? and (2) Is it certain and indisputable? 23 C.J. 59, 61.” State v. Buckley, 298 S.W. 777, 781 (Mo. 1927).

“There is no rule of law that guarantees that a party opposing judicial notice will have notice or a reasonable opportunity to present information relevant to the propriety of [the court’s] taking judicial notice of the matter in question. Mo. Bar CLE Sources of Proof, 7.12 (2d ed. 1977). On appeal, there is even less likelihood that a party opposing notice will have any advance notice or opportunity to contest the propriety of the court’s taking judicial notice. *See, e.g., Morrison v. Thomas*, 481 S.W. 2d 605, 607 (Mo.

App. 1972).” 33 MISSOURI PRACTICE “Courtroom Handbook
On Missouri Evidence” §201.3(c) (West 2003).

Failure to object to the court taking judicial notice constitutes a waiver. Chandler v. Hemeyer, 49 S.W. 3d 786, 792 (Mo. App. 2001); Rice v. James, 844 S.W. 2d 64, 68 (Mo. App. 1992) and the record reflects no such objection. Further, Missouri courts can take judicial notice at any stage of the proceedings. Hardin v. Hardin, 512 S.W. 2d 851, 854 (Mo. App. 1974).

Defendant cites the court to McCoy v. Rawlings, 849 S.W. 2d 719 (Mo. App. 1993) for the proposition that the facts judicially noticed may not be considered because they were not in evidence, but a review of the case demonstrates that this case stands for no such rule of law. McCoy v. Rawlings has nothing to do with judicial notice and simply stands for the proposition that unless a doctrine like judicial notice comes into play, the trial court must base its decision on the evidence presented at trial. The doctrine of judicial notice, however, eliminates the necessity of establishing a judicially noticed fact by evidence. Scheuller v. Continental Life Ins., 169 S.W. 2d 359, 365 (Mo. 1943), “Thus, a fact judicially noticed may be found to have been established, even though no other proof of it is offered. See Pogue v. Smallen, 285 S.W. 2d 915, 917 (Mo. 1956); State v. Weber, 814 S.W. 2d 298, 303 (Mo. App. 1991).” 33 MISSOURI PRACTICE “Courtroom Handbook On Missouri Evidence” §201.3(e) (West 2003).

CONCLUSION

For all the reasons outlined above, Respondent/State of Missouri prays this Court affirm the conviction of Appellant/Defendant.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Supreme Court Rules 55.03 and 84.06(b) is proportionately spaced, using Times New Roman, 13 point type, and contains 4,999 words, excluding the cover.

I also certify that the computer diskettes that I am providing have been scanned for viruses and have been found to be virus-free.

STATE OF MISSOURI

BY: _____

Steven L. Stevenson

Prosecuting Attorney in and for
Andrew County, Missouri

Missouri Bar #28604

P.O. Box 377

Savannah, Missouri 64485

Telephone: (816) 324-3535

Facsimile: (816) 324-6015

**ATTORNEY FOR THE RESPONDENT
STATE OF MISSOURI**

STATE OF MISSOURI

BY: _____

Steven L. Stevenson
Prosecuting Attorney in and for
Andrew County, Missouri
Missouri Bar #28604
P.O. Box 377
Savannah, Missouri 64485
Telephone: (816) 324-3535
Facsimile: (816) 324-6015
ATTORNEY FOR THE RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF SERVICE

I hereby certify that two true and correct
copies of the above and foregoing
Respondent's Brief was mailed this
_____ day of April, 2004, to:

Kevin Weakley
James L. (Jay) MowBray
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282-2290
ATTORNEY FOR APPELLANT/DEFENDANT
WILLIAM DUNN

Steven L. Stevenson
Attorney for Respondent/Plaintiff
State of Missouri