

**IN THE  
MISSOURI SUPREME COURT**

---

<b>STATE OF MISSOURI,</b>	)	
	)	
	<b>Respondent,</b>	)
	)	
<b>vs.</b>	)	<b>No. SC88986</b>
	)	
<b>EDWIN MINNER,</b>	)	
	)	
	<b>Appellant.</b>	)

---

**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF NEW MADRID COUNTY, MISSOURI  
THIRTY-FOURTH JUDICIAL CIRCUIT  
THE HONORABLE FRED W. COPELAND, JUDGE**

---

**APPELLANT’S SUBSTITUTE REPLY BRIEF**

---

**Craig A. Johnston, MOBar #32191  
Attorney for Appellant  
Woodrail Centre  
1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Phone: (573) 882-9855  
Fax: (573) 884-4793  
Email: [Craig.Johnston@mspd.mo.gov](mailto:Craig.Johnston@mspd.mo.gov)**

**INDEX**

	<u>Page</u>
TABLE OF AUTHORITIES.....	2
JURISDICTIONAL STATEMENT.....	4
STATEMENT OF FACTS.....	4
POINTS RELIED ON .....	5
ARGUMENTS .....	
I. State did not prove that Mr. Minner knew he delivered cocaine within 1000 feet of public housing or other governmental assisted housing .....	7
CONCLUSION .....	17
CERTIFICATE OF COMPLIANCE AND SERVICE.....	18
APPENDIX .....	

**TABLE OF AUTHORITIES**

**Cases:**

*Com. v. Alvarez*, 596 N.E.2d 325 (Mass. 199200)..... 8, 14

*Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc., v. Nixon*, 185 S.W.3d 685 (Mo. banc 2006)..... 5, 7

*State v. Belton*, 153 S.W.3d 307 (Mo. banc 2005)..... 6, 13

*State v. Briscoe*, 847 S.W.2d 792 (Mo. banc 1993) ..... 13

*State v. Brown*, 648 So.2d 872 (La. 1995) ..... 8, 14

*State v. Crooks*, 64 S.W.3d 887 (Mo. App. S.D. 2002) ..... 15

*State v. Derenzy*, WL 1566662 (Mo. App. W.D. 2001)..... 16

*State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996) ..... 6, 12, 13

*State v. McQuary*, 173 S.W.3d 663 (Mo. App. W.D. 2005)..... 16

*State v. Moore*, 782 P.2d 497 (Utah,1989)..... 9, 14

*State v. Morales*, 539 A.2d 769, 775 (N.J.Super.L.,1987) ..... 8, 14

*State v. Salazar*, 236 S.W.3d 644 (Mo. banc 2007) ..... 12

*State v. Self*, 155 S.W.3d 756 (Mo. banc 2005) ..... 5, 11, 12, 13

*State v. Silva-Baltazar*, 886 P.2d 138 (Wash. 1994)..... 8, 14

*State v. Williams*, 126 S.W.3d 377 (Mo. banc 2004) ..... 13

**STATUTES:**

§ 195.211, RSMo Cum.Supp. 2003..... 6, 10, 11, 12, 13, 14

§ 195.212, RSMo 2000..... 6, 14, 15

§ 195.214, RSMo Cum.Supp. 2003..... 6, 10, 14, 15

§ 195.218, RSMo Cum.Supp. 2003.....	5, 6, 7, 8, 11, 12, 13, 14, 15
§ 562.016, RSMo 2000.....	5, 6, 7, 9
§ 562.021, RSMo 2000.....	5, 6, 7, 10, 11, 12, 13
§ 562.026, RSMo 2000.....	6, 10, 11
§ 570.033, RSMo 2000.....	6, 13
§ 570.040, RSMo 2000.....	6, 13
§ 571.015, RSMo 2000.....	6, 13
§ 577.023, RSMo 2000.....	6, 13

## **JURISDICTIONAL STATEMENT**

Mr. Minner incorporates by reference the jurisdictional statement from his opening brief.

## **STATEMENT OF FACTS**

Mr. Minner incorporates by reference the Statement of Facts from his opening brief.

## POINTS RELIED ON

### I.

The trial court erred in overruling Minner's motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove that Minner knew that he was delivering cocaine within 1000 feet of such housing, as required under §195.218, RSMo Cum.Supp. 2003, and §§ 562.016 and 562.021, violating Minner's right to due process of law as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence presented that Minner knew that there was public or governmental assisted housing nearby or that the housing was visibly marked as such, the only reason that the officer who witnessed the delivery knew about the nearby public housing apartment was because he had a record of all the residences in that county that were public or governmental assisted housing, and there was no evidence that such a record was available to Minner or that he had knowledge of such a record.

*State v. Self*, 155 S.W.3d 756, 762 (Mo. banc 2005);

*Reproductive Health Services of Planned Parenthood of St. Louis Region,*

*Inc., v. Nixon*, 185 S.W.3d 685, 690 (Mo. banc 2006);

*State v. Belton*, 153 S.W.3d 307 (Mo. banc 2005);

*State v. Hatton*, 918 S.W.2d 790 (Mo. banc 1996);

§§ 195.211, 195.212, 195.214 and 195.218, RSMo Cum.Supp. 2003;

§§ 195.212, 562.016, 562.021, 562.026, 570.033, 570.040, 571.015,  
577.023, RSMo 2000.

.

## ARGUMENT

### I.

The trial court erred in overruling Minner’s motion for judgment of acquittal at the close of all the evidence and in sentencing him upon his conviction for delivery of a controlled substance near public or other governmental assisted housing, §195.218, RSMo Cum.Supp. 2003, because the State did not prove that Minner knew that he was delivering cocaine within 1000 feet of such housing, as required under §195.218, RSMo Cum.Supp. 2003, and §§ 562.016 and 562.021, violating Minner’s right to due process of law as guaranteed by the 14<sup>th</sup> Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was no evidence presented that Minner knew that there was public or governmental assisted housing nearby or that the housing was visibly marked as such, the only reason that the officer who witnessed the delivery knew about the nearby public housing apartment was because he had a record of all the residences in that county that were public or governmental assisted housing, and there was no evidence that such a record was available to Minner or that he had knowledge of such a record.

“Missouri law generally requires a mental state as an element to any crime.” *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 690 (Mo. banc 2006). Respondent

concedes that there is a *mens rea* requirement to support a conviction under *section 195.218* (Resp. Br. at 19). But Respondent disputes that the State was required to prove a *mens rea* regarding Appellant's proximity to governmental assisted housing at the time of the alleged drug sale (Resp. Br. at 17-32). So the issue facing this Court is the scope, not the existence of scienter.

Respondent cites a number of jurisdictions where statutes have not required the government to prove that defendants had the specific knowledge of the proximity of a school or public housing (Resp. Br. at 23-25). Unlike the Missouri statutes in question in this case, however, some of those jurisdictions have *explicitly* stated in their statutes that the government does *not* have to prove this specific knowledge. E.g. *State v. Brown*, 648 So.2d 872, 876 (La. 1995) (statute provided that “[l]ack of knowledge that the prohibited act occurred on or within one thousand feet of school property shall not be a defense.”); *State v. Silva-Baltazar*, 125 Wash.2d 472, 482, 886 P.2d 138, 144 (Wash. 1994) (statute provided, “[i]t is not a defense to a prosecution for a violation of this section that the person was unaware that the prohibited conduct took place while in a school or school bus or within one thousand feet of the school or school bus route stop, in a public park, on a public transit vehicle, or in a public transit stop shelter.”); *Com. v. Alvarez*, 596 N.E.2d 325, 327 (Mass. 1992) (statute provided “[l]ack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.”); *State v. Morales*, 224 N.J.Super. 72, 83, 539 A.2d 769, 775 (N.J.Super.L.,1987) (statute provided “it shall be no defense to a

prosecution for a violation of this section that the actor was unaware that the prohibited conduct took place while on or within 1,000 feet of any school property.”); *State v. Moore*, 782 P.2d 497, 504 (Utah,1989) (statute provided “[i]t is not a defense to a prosecution under this subsection that the actor mistakenly believed ... that the location where the act occurred was not as described in subsection (5)(a) or was unaware that the location where the act occurred was as described in subsection (5)(a).”).

Appellant concedes that the weight of case law in other jurisdictions holds that the Missouri Legislature could, under the proper circumstances, remove the component of intent regarding an element without violating Appellant’s due process rights if it is necessary to achieve a proper legislative objective. But the question is not whether the Missouri legislature *could* write statutes making it crimes to deal drugs within specified distances of specified locations whether or not the dealer knew he or she was within those specified distances of those specified locations; instead, the question is whether it *has* written the statutes in such a way.

“[A] person is not guilty of an offense unless he acts with a culpable mental state ..., as the statute defining the offense may require with respect to the conduct, the result thereof or the attendant circumstances which constitute the material elements of the crime.” § 562.016.1. If the definition of any offense prescribes a culpable mental state but does not specify the conduct, attendant circumstances or result to which it applies, the prescribed culpable mental state

applies to each such material element. § 562.021.1. But “if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly ....” § 562.021.3. An exception to this last provision is that “[i]f the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the offense. § 562.021.2. And, regarding felonies, there is an exception to the rule requiring an imputation of a culpable mental state when it is not expressly prescribed: If .... no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result” then a culpable mental state is not required. § 562.026(2).

§ 195.214.1 provides that “[a] person commits *the offense of distribution of a controlled substance near schools* if such person violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within two thousand feet of, the real property comprising a public or private elementary or secondary school, public vocational school, or a public or private junior college, college or university or on any school bus.” (Emphasis added). There is no culpable mental state explicitly set forth in this statute.

Similarly, § **195.218.1** provides that “[a] person commits *the offense of distribution of a controlled substance near public housing or other governmental assisted housing* if he violates section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within one thousand feet of the real property comprising public housing or other governmental assisted housing.” (Emphasis added). There is no culpable mental state explicitly set forth in this statute.

Both of these sections incorporate by reference § **195.211.1**, which provides in pertinent part, “except as authorized by sections 195.005 to 195.425 and except as provided in section 195.222, it is unlawful for any person to distribute, deliver, manufacture, produce or attempt to distribute, deliver, manufacture or produce a controlled substance or to possess with intent to distribute, deliver, manufacture, or produce a controlled substance.” § **195.211.1**. There is no culpable mental state explicitly set forth in this statute.

As this Court has noted, it is well-settled that where a specific mental state is not prescribed in a statute, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly. *State v. Self*, 155 S.W.3d 756, 761-62 (Mo. banc 2005), citing § **562.021.3**. This Court has further held that a culpable mental state will be imputed to *each statutory element*, unless its imputation would be inconsistent with the purpose of the statute or lead to “an absurd or unjust result.” *Self*, 155 S.W.3d at 762, quoting § **562.026.2**. “Legislative intent not to require a culpable mental state *for each element* of the

crime must be clearly apparent before a particular statute will be construed not to require proof of such culpability.” *Self*, 155 S.W.3d at 762 (emphasis added). Further, when interpreting a criminal statute, the rule of lenity requires the statute is to be strictly construed against the state. *State v. Salazar*, 236 S.W.3d 644, 646 (Mo. banc 2007). When a defendant’s liberty is at stake, criminal statutes may not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within their terms. *Id.*

Here, § 195.218.1 does not explicitly prescribe a specific mental state, so a culpable mental state is nonetheless required and is established if Appellant acted purposely or knowingly as to each statutory element, including the distance element. *Self*, 155 S.W.3d 756, 761-62 (Mo. banc 2005), citing § 562.021.3.

Relying upon this Court’s opinion in *State v. Hatton*, 918 S.W.2d 790, 794 (Mo. banc 1996), respondent argues that because § 195.211 contains a *mens rea* requirement of knowingly or purposely and because § 195.218 is not “a separate crime” but is only a “punishment-enhancement provision” that Appellant’s reliance upon § 562.021.3 is misplaced (Resp. Br. at 19-21).

Although not controlling on the ultimate decision in this case, this Court’s assertion in *Hatton* that § 195.218 does not create “a separate crime” but is only a “punishment-enhancement provision” is incorrect. By its own explicit terms § 195.218.1 creates “the offense of distribution of a controlled substance near public housing or other governmental assisted housing.” Thus, it is not merely a punishment-enhancement provision, such as exists for other offenses, e.g.,

stealing, §§ **570.033** and **570.040**, and driving while intoxicated, § **577.023**. The mere fact that § **195.218** incorporates by reference § **195.211** does not make it a punishment provision only. Cf., § **571.015**, armed criminal action, which incorporates by reference other felony offenses, yet § **571.015** still has the mental state of knowingly or purposely regarding the use of a weapon imputed to it by § **562.021.3**, because no mental state is specified under § **571.015**, regardless of the fact that there might be a different mental state for the underlying felony. *State v. Williams*, 126 S.W.3d 377, 382 (Mo. banc 2004); *State v. Belton*, 153 S.W.3d 307, 310 (Mo. banc 2005).

Respondent also argues that Appellant cannot rely upon § **562.021.3** because § **195.211** already provides a culpable mental state, which is referenced by § **195.218** (Resp. Br. at 20). But § **195.211** does not expressly contain a mental state; it has only been found to require a scienter element because of the statutes contained in Chapter 562. *Hatton*, 918 S.W.3d at 794; *State v. Briscoe*, 847 S.W.2d 792, 794 (Mo. banc 1993). Thus, because neither § **195.211** nor § **195.218** contain culpable mental states, a culpable mental state of purposely or knowingly is to be imputed to *each statutory element*. *Self*, 155 S.W.3d at 762; § **562.021.3**.

Further, it is not “clearly apparent” that there was a legislative intent not to require a culpable mental state for each element of the offense of distribution of a controlled substance near public housing or other governmental assisted housing, § **195.218.1**. *Self*, 155 S.W.3d at 762. In fact, there is evidence of a legislative intent to require a culpable mental state regarding the proximity requirement.

As noted above, some state legislatures have expressly stated in their statutes that the government does not have to prove this specific knowledge regarding proximity. E.g. *Brown, supra*; *Silva-Baltazar, supra*; *Alvarez, supra*; *Morales, supra*; *Moore, supra*. §§ *195.214* and *195.218*, however, do not expressly provide that the State does not have to prove knowledge about the defendant's proximity to the prescribed premises.

In stark contrast to §§ *195.214* and *195.218*, § *195.212*, concerning unlawful distribution to a minor, has an express provision concerning defendant's knowledge of the minor's age. Similar to §§ *195.214* and *195.218*, that statute provides that a person "commits the offense of unlawful distribution of a controlled substance to a minor if he violates § *195.211* by distributing or delivering any controlled substance to a person under seventeen years of age who is at least two years that person's junior." § *195.212.1*. But subsection 3 of that statute also states, "It is not a defense to a violation of this section that the defendant did not know the age of the person to whom he was distributing or delivering." § *195.212.3*.

If respondent's construction of § *195.214* and § *195.218* were to be applied to § *195.212*, then there would have been no need for the legislature to explicitly state that the defendant's lack of knowledge concerning age was not a defense. This shows that the Missouri legislature knew how to provide that lack of knowledge as to certain matters is not a defense, yet it did not include similar provisions in §§ *195.214* and *195.218*, even though § *195.214* was in the same

senate bill as § **195.212** (L 1989 S.B. 215 & 58), and § **195.218** was enacted after § **195.212**. The failure of the legislature to include express provisions that a defendant's knowledge of his proximity to the prescribed premises in §§ **195.214** and **195.218** is not a defense when it included an express provision in § **195.212** that it was not a defense that the defendant did not know the age of the minor whom he delivered or distributed the drugs to shows a legislative intent to not impose strict liability insofar as the proximity requirement is concerned.

Respondent also argues that a knowledge requirement concerning the proximity element could lead to absurd or unjust results (Resp. Br. at 28). In doing so respondent argues that it would be impossible for the state to prove that a defendant subjectively knew that he was committing the crime within the prescribed distance of the prohibited area (Resp. Br. at 28). Appellant is not arguing that the State had to prove that Appellant was "good at judging distances" as suggested by respondent (Resp. Br. 28). Appellant submits that the State only has to prove, directly or circumstantially and through permissible inferences, the defendant's knowledge of the prescribed premises. It's no different than any other knowledge requirement that the State has to prove. Indeed, Missouri cases that have required the State to prove that a defendant knew about the proximity of the prescribed premises or location have found that the State satisfied their burden of proof; thus, a knowledge requirement concerning the proximity element would not lead to absurd or unjust results. *See, State v. Crooks*, 64 S.W.3d 887 (Mo. App. S.D. 2002) (evidence that the defendant knew the

school might be no more than five or six block from his house and children could be seen walking by defendant's house from school during lunch time); *State v. McQuary*, 173 S.W.3d 663 (Mo. App. W.D. 2005) (from the evidence presented, including photographs taken from just outside defendant's residence that showed a building with "Junior College" on it, a jury could concluded that defendant had requisite knowledge that community college was less than 2,000 feet from his residence); *State v. Derenzy*, WL 1566662, \*2-3 (Mo. App. W.D. 2001) (defendant played football for college where the alleged drug sale took place, and his residence was less than 2,000 feet from where he played football for that college). These cases show that a knowledge requirement concerning the proximity element would not lead to absurd or unjust results.

## CONCLUSION

For the reasons presented in Points I, this Court should remand for an entry of conviction for the class B felony of delivery of a controlled substance under § 195.211. For the reasons presented in Point II, this Court should reverse Mr. Minner's conviction and sentence and order him discharged. For the reasons presented in Points III, IV, and V, this Court should reverse Mr. Minner's conviction and remand for a new trial.

Respectfully submitted,

---

Craig A. Johnston, MOBar #32191  
Assistant State Public Defender  
Woodrail Centre  
1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Phone: (573) 882-9855  
Fax: (573) 875-2594  
Email: Craig.Johnston@mspd.mo.gov

## 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 2002, 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 3,245 words, which does not exceed the 3,875 words allowed for an a reply 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 April 15, 2008. 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 April, 2008, to Joshua N. Corman, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

---

Craig A. Johnston, MOBar #32191  
Assistant State Public Defender  
Woodrail Centre  
1000 West Nifong  
Building 7, Suite 100  
Columbia, Missouri 65203  
Phone: (573) 882-9855  
Fax: (573) 875-2594  
Email: Craig.Johnston@mspd.mo.gov