

IN THE  
MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

**FILED**  
DEC 16 2009

**LAURA ROY**  
CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

DAMON FELDHAUS, )  
)  
Appellant, )  
)  
v. )  
)  
STATE OF MISSOURI, )  
)  
Respondent. )

No. ED93024

**FILED**

**90585**

DEC 30 2009

Thomas F. Simon  
CLERK, SUPREME COURT

APPEAL TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT  
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY  
STATE OF MISSOURI  
ELEVENTH JUDICIAL CIRCUIT, DIVISION 7  
THE HONORABLE DANIEL PELIKAN, JUDGE

---

APPELLANT'S STATEMENT, BRIEF, AND ARGUMENT

---

Gwenda Renee' Robinson  
Missouri Bar No. 43213  
District Defender, Office B/Area 68  
415 S. 18th Street, Suite 300  
St. Louis, Missouri 63103-2237  
314.340.7662 (telephone)  
314.340.7685 (facsimile)  
Gwenda.Robinson@mspd.mo.gov

ATTORNEY FOR APPELLANT

SCANNED

INDEX

TABLE OF AUTHORITIES.....2-5

JURISDICTIONAL STATEMENT .....6-7

STATEMENT OF FACTS.....8-13

POINT..... 14

ARGUMENT.....15-38

CONCLUSION..... 39

CERTIFICATE OF SERVICE AND COMPLIANCE..... 40

APPENDIX.....A1-6

**TABLE OF AUTHORITIES**

<b><u>Authority</u></b>	<b><u>Page</u></b>
<b><u>Cases</u></b>	
<i>Bd. of Educ. of St. Louis v. State</i> , 47 S.W.3d 366 (Mo. banc 2001).....	33
<i>Brown v. State</i> , 452 S.W.2d 176 (Mo. 1970) .....	30
<i>Cocktail Fortune, Inc. v. Supervisor of Liquor Control</i> , 994 S.W.2d 955 (Mo. banc 1999) .....	34
<i>Comstock v. State</i> , 68 S.W.3d 561 (Mo. App. W.D. 2001) .....	28-29
<i>Dorsey v. State</i> , 115 S.W.3d 842 (Mo. banc 2003) .....	27-29
<i>Ex Parte Smith</i> , 36 S.W. 628 (Mo. 1896).....	29
<i>Dudley v. State</i> , 903 S.W.2d 263 (Mo. App. E.D. 1995) .....	32
<i>Gooden v. State</i> , 846 S.W.2d 214 (Mo. App. S.D. 1993).....	29
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) .....	34
<i>Hagan v. State</i> , 836 S.W.2d 459 (Mo. banc 1992).....	28
<i>Higgins v. Treasurer of State of Missouri</i> , 140 S.W.3d 94 (Mo. App. W.D. 2004)	31
<i>Kolender v. Lawson</i> , 461 U.S. 352 (1983).....	34
<i>Moore v. State</i> , 288 S.W.3d 810 (Mo. App. S.D. 2009) .....	26, 31
<i>Rizzo v. State</i> , 189 S.W.3d 576 (Mo. banc 2006) .....	32

<i>Russell v. State</i> , 3 S.W.3d 380 (Mo. App. E.D. 1999).....	32
<i>Searcy v. State</i> , 981 S.W.2d 597 (Mo. App. W.D. 1998).....	29
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974).....	34
<i>State ex rel. Nixon v. Peterson</i> , 253 S.W.3d 77 (Mo. banc 2008).....	34
<i>State ex rel. Zobel v. Burrell</i> , 167 S.W.3d 688 (Mo. banc 2005).....	35
<i>State v. Bohlen</i> , 284 S.W.3d 714 (Mo. App. E.D. 2009).....	28
<i>State v. Bratina</i> , 73 S.W.3d 625 (Mo. banc 2002).....	35
<i>State v. Brown</i> , 660 S.W.2d 694 (Mo. banc 1983).....	34
<i>State v. Brown</i> , 140 S.W.3d 51 (Mo. banc 2004).....	34
<i>State v. Burgin</i> , 203 S.W.3d 713 (Mo. App. E.D. 2006).....	29
<i>State v. Burns</i> , 978 S.W.2d 759 (Mo. banc 1998).....	33
<i>State v. Conduct</i> , 65 S.W.3d 6 (Mo. App. S.D. 2001).....	35
<i>State v. Crawford</i> , 478 S.W.2d 314 (Mo. 1972).....	32
<i>State v. Dillard</i> , 158 S.W.3d 291 (Mo. App. S.D. 2005).....	30
<i>State v. Duggar</i> , 806 S.W.2d 407 (Mo. banc 1991).....	35
<i>State v. Ellis</i> , 853 S.W.2d 440 (Mo. App. E.D. 1993).....	26
<i>State v. Fields</i> , 186 S.W.3d 501 (Mo. App. S.D. 2006).....	31
<i>State v. Graham</i> , 204 S.W.3d 655 (Mo. banc 2006).....	33

*State v. Hicks*, 221 S.W.3d 497 (Mo. App. W.D. 2007)..... 29

*State v. Kinder*, 89 S.W.3d 454 (Mo. banc 2002) ..... 33

*State v. Kinder*, 122 S.W.3d 624 (Mo. App. E.D. 2003) ..... 32

*State v. Mitchell*, 563 S.W.2d 18 (Mo. banc 1978)..... 27

*State v. Parkhurst*, 845 S.W.2d 31 (Mo. banc 1992) ..... 30

*State v. Peeples*, 288 S.W.3d 767 (Mo. App. E.D. 2009)..... 31

*State v. Pizzella*, 723 S.W.2d 384 (Mo. banc 1987)..... 25-26

*State v. Stokely*, 842 S.W.2d 77 (Mo. banc 1992)..... 35

*State v. Stottlemire*, 35 S.W.3d 854 (Mo. App. W.D. 2001) ..... 26

*State v. Young*, 695 S.W.2d 882 (Mo. banc 1985)..... 34

*Stidham v. State*, 963 S.W.2d 351 (Mo. App. W.D. 1998) ..... 29-30

*United States v. Raines*, 362 U.S. 17 (1960) ..... 26

*Woods v. State*, 176 S.W.3d 711 (Mo. banc 2005)..... 33

Statutes

§ 477.050..... 7

§ 558.011..... 37

§ 577.010..... 6

§ 577.023..... 6, 15-27, 30-31, 36-37

Rules

Rule 24.035 ..... 12, 32

Constitutional Provisions

Mo. Const., Art. I, § 10 ..... 34, 37

Mo. Const., Art. V, § 3 ..... 7, 30

U.S. Const., Amend. V ..... 34, 37

U.S. Const., Amend. XIV ..... 34, 37

## JURISDICTIONAL STATEMENT

In St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01123-01, the State charged Appellant Damon Feldhaus with one count each of the class B felony of driving while intoxicated (DWI) in violation of §§ 577.010 and 577.023.<sup>1</sup> On May 7, 2008, Mr. Feldhaus pleaded guilty to the counts.

On May 7, 2008, the Honorable Daniel G. Pelikan of Division 7 of the St. Charles County Circuit sentenced Mr. Feldhaus to eight years as a chronic DWI offender in St. Charles County Cause Number 0711-CR07466-01, and to a concurrent eight years in St. Charles County Cause Number 0811-CR01123-01. Authorities delivered Mr. Feldhaus to the Missouri Department of Corrections to begin serving his sentence on May 23, 2008.

On October 31, 2008, Mr. Feldhaus timely filed his *pro se* Rule 24.035 motion. On November 14, 2008, the motion court appointed counsel to represent

---

<sup>1</sup> All statutory references are to RSMo 2000 unless otherwise indicated. All references to section 577.023 are to RSMo Supp. 2005, effective September 15, 2005. Appellant Mr. Feldhaus will cite to the record on appeal as follows: Legal File, "(L.F)"; and, Guilty Plea and Sentencing Transcript, "(Tr.)."

Mr. Feldhaus, and on February 9, 2009, undersigned counsel timely filed an amended motion after receipt of the guilty plea and sentencing transcript.

On April 10, 2009, the motion court entered its findings of fact and conclusions of law, denying Mr. Feldhaus' Rule 24.035 motion without an evidentiary hearing. On May 14, 2009, Mr. Feldhaus timely filed his notice of appeal.

This Court should transfer Mr. Feldhaus' appeal to the Missouri Supreme Court because Mr. Feldhaus has made a real and substantial challenge to the constitutional validity of section 577.023, and the Missouri Supreme Court has exclusive jurisdiction over appeals involving the constitutional validity of a state statute. Mo. Const., Art. V, § 3.

## STATEMENT OF FACTS

Appellant Damon Feldhaus is single, has a teenaged son, and has worked as a union construction worker (Tr. 3, 23). Mr. Feldhaus has received treatment for depression (Tr. 20), and suffers from the disease of alcoholism (Tr. 23).

On June 10, 2007, Mr. Feldhaus ate some barbeque, drank a few beers, and watched a little television with his friend and his friend's wife at their home (Tr. 13). He fell asleep and after awakening a few hours later, decided to leave (Tr. 14). He was driving home when police stopped him at Omar Court near Jungermann Road in St. Charles County, and charged him with driving while intoxicated (Tr. 14-15; L.F. 1, 5).

Months later, on the afternoon of November 27, 2007, Mr. Feldhaus was driving in St. Charles County near Birdie Hills and Eagle Ridge when police stopped him again (Tr. 16-17). Mr. Feldhaus was driving under the influence of marijuana (Tr. 16-17).

The State charged Mr. Feldhaus in St. Charles County Cause Number 0711-CR07466-01 with one count of the class B felony of driving while intoxicated for the event on June 10, 2007 (L.F. 5). The State charged Mr. Feldhaus in St. Charles County Cause Number 0811-CR01223-01 with one count of the class B

felony of driving while intoxicated for driving while drugged on November 27, 2007 (L.F. 23). In each case, the State charged Mr. Feldhaus as a chronic DWI offender because he had previously pleaded guilty in circuit court to four DWI charges for events occurring on May 15, 1996 and July 16, 1999 in St. Louis County, and on November 8, 1996 and October 20, 1999 in St. Charles County (L.F. 5-6, 23-24). For his plea of guilty to charges in St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01123-01, the State agreed to recommend two concurrent terms of eight years of imprisonment in the Missouri Department of Corrections (Tr. 5, 11).

On May 7, 2008, Mr. Feldhaus appeared in person and with counsel to plead guilty to the charges (Tr. 2). The plea court admitted certified copies of Mr. Feldhaus' four prior DWI convictions (Tr. 10), and Mr. Feldhaus admitted his prior convictions, as well as guilt of the pending St. Charles County charges (Tr. 13-19). The plea court found Mr. Feldhaus to be a chronic DWI offender, and accepted Mr. Feldhaus' plea (Tr. 20-22).

Before sentencing Mr. Feldhaus that same day, the plea court permitted Mr. Feldhaus to speak (Tr. 23). Mr. Feldhaus informed the plea court how he'd suffered with alcoholism since his early teens, but had never resorted to criminal

activity and had managed to maintain stable employment with only an occasional mishap (Tr. 23). He also told the plea court how alcoholism had deteriorated his relationship with his son's mother, and had contributed to the loss of his home (Tr. 23).

Mr. Feldhaus asked for help and noted alternatives to his imprisonment (Tr. 23). Mr. Feldhaus advised the plea court as follows:

In an article in the St. Louis Post-Dispatch written by Missouri Supreme Court Judge Michael Wolff, Judge Wolff talks about alternative sentencing methods for repeat, nonviolent offenders in an attempt to reduce recidivism and cut the Department of Correction's [sic] costs. He states that although there must be punishment for those crimes, there are ways to do more with less using alternative sentencing methods.

Judge Wolff specifically mentions electronic and GPS monitoring systems, alcohol detection devices, day report centers, drug courts, substance

abuse programs, and other services that help  
addicted offenders get their lives back together.

(Tr. 23-24).

Then, Mr. Feldhaus pleaded with the plea court for help stating, "I'm just basically asking you, sir, to – I need help. That's all I'm saying" (Tr. 24).

The plea court responded:

I agree with Judge Wolff, Mr. Feldhaus. And  
I'm sure that many attempts have been tried with you  
given the number of cases you've pled guilty to here,  
the number of DWIs you've got. I'm sure many  
attempts have been tried with you, but at some  
point – and Judge Wolff would agree with me. At  
some point it's got to stop.

At some point some people just aren't  
fixable . . . Where's it going to stop?

(Tr. 24-25).

The plea court sentenced Mr. Feldhaus to two concurrent terms of eight  
years of imprisonment in the Missouri Department of Corrections (Tr. 26-27; L.F.

19-20, 37-38). Authorities delivered Mr. Feldhaus to the Missouri Department of Corrections to begin serving his sentence on May 23, 2008 (L.F. 41, 51).

On October 31, 2008, Mr. Feldhaus timely filed his *pro se* Rule 24.035 motion (L.F. 41-48). On November 14, 2008, the motion court appointed counsel to represent Mr. Feldhaus (L.F. 49), and on February 9, 2009, undersigned counsel timely filed an amended motion after receipt of the guilty plea and sentencing transcript (L.F. 50-59; A1-3).<sup>2</sup> In his amended motion, Mr. Feldhaus claimed the plea court denied his constitutional rights by convicting him of the class B felony of driving while intoxicated as a chronic DWI offender under section 577.023 because section 577.023 violates the void-for-vagueness doctrine (L.F. 52-55).

On April 10, 2009, the motion court entered its findings of fact and conclusions of law, denying Mr. Feldhaus' Rule 24.035 motion without an evidentiary hearing (L.F. 62). The plea court concluded that section 577.023 does not leave a person of ordinary intelligence to guess as to its meaning, and that "a

---

<sup>2</sup> Undersigned counsel tenders her file copy of the order granting an extension of time under Rule 24.035(g) to file the amended motion and will attempt to obtain a certified copy of the same order with which to supplement the record.

person of ordinary intelligence is given a sufficient notice of the prohibited conduct as well as the enhanced penalty” (L.F. 62). The plea court found no ambiguity in the plain language of the statute and no conflict as to the definition of each class of offender proscribed in section 577.023 (L.F. 61). The plea court concluded that section 577.023 is not void for vagueness (L.F. 62).

On May 14, 2009, Mr. Feldhaus timely filed his notice of appeal (L.F. 63-66). This appeal follows (L.F. 63-66).

POINT

The motion court clearly erred in denying Mr. Feldhaus' Rule 24.035 motion because the plea court denied Mr. Feldhaus' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution in convicting Mr. Feldhaus of the class B felony of driving while intoxicated as a chronic DWI offender under section 577.023 in St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01223-01, in that section 577.023 violates the void-for-vagueness doctrine. Section 577.023's language provides insufficient guidance and standards, and permits arbitrary and discriminatory application. The Court must vacate Mr. Feldhaus' convictions and sentences.

*Kolender v. Lawson*, 461 U.S. 352 (1983);

*Dorsey v. State*, 115 S.W.3d 842 (Mo. banc 2003);

*State v. Mitchell*, 563 S.W.2d 18 (Mo. banc 1978);

U.S. Const., Amends V and XIV;

Mo. Const., Art. I, § 10;

§ 577.023; &

Rule 24.035.

## ARGUMENT

The motion court clearly erred in denying Mr. Feldhaus' Rule 24.035 motion because the plea court denied Mr. Feldhaus' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution in convicting Mr. Feldhaus of the class B felony of driving while intoxicated as a chronic DWI offender under section 577.023 in St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01223-01, in that section 577.023 violates the void-for-vagueness doctrine. Section 577.023's language provides insufficient guidance and standards, and permits arbitrary and discriminatory application. The Court must vacate Mr. Feldhaus' convictions and sentences.

### *Facts*

Section 577.023 provides:

1. For purposes of this section, unless the context clearly indicates otherwise:
  - (1) An **"aggravated offender"** is a person who:
    - (a) Has pleaded guilty to or has been found guilty of three or more intoxication-related traffic offenses; or

(b) Has pleaded guilty to or has been found guilty of one or more intoxication-related traffic offense and, in addition, any of the following: involuntary manslaughter under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; or assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of subsection 1 of section 565.082, RSMo;

(2) A **“chronic offender”** is:

(a) A person who has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses; or

(b) A person who has pleaded guilty to or has been found guilty of, on two or more separate occasions, any combination of the following: involuntary manslaughter

under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of subsection 1 of section 565.082, RSMo; or

(c) A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses and, in addition, any of the following: involuntary manslaughter under subdivision (2) or (3) of subsection 1 of section 565.024, RSMo; murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense; assault in the second degree under subdivision (4) of subsection 1 of section 565.060, RSMo; or assault of a law enforcement officer in the second degree under subdivision (4) of

subsection 1 of section 565.082, RSMo;

(3) An “**intoxication-related traffic offense**” is driving while intoxicated, driving with excessive blood alcohol content, involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo, murder in the second degree under section 565.021, RSMo, where the underlying felony is an intoxication-related traffic offense, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo, or driving under the influence of alcohol or drugs in violation of state law or a county or municipal ordinance, where the defendant was represented by or waived the right to an attorney in writing;

(4) A “**persistent offender**” is one of the following:

(a) A person who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic

offenses;

(b) A person who has pleaded guilty to or has been found guilty of involuntary manslaughter pursuant to subdivision (2) or (3) of subsection 1 of section 565.024, RSMo, assault in the second degree pursuant to subdivision (4) of subsection 1 of section 565.060, RSMo, assault of a law enforcement officer in the second degree pursuant to subdivision (4) of subsection 1 of section 565.082, RSMo; and

(5) A “**prior offender**” is a person who has pleaded guilty to or has been found guilty of one intoxication-related traffic offense, where such prior offense occurred within five years of the occurrence of the intoxication-related traffic offense for which the person is charged.

2. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a prior offender shall be guilty of a class A misdemeanor.

3. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or 577.012 who is alleged and proved to be a persistent offender shall be guilty of a class D felony.

4. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or section 577.012 who is alleged and proved to be an aggravated offender shall be guilty of a class C felony.

5. Any person who pleads guilty to or is found guilty of a violation of section 577.010 or section 577.012 who is alleged and proved to be a chronic offender shall be guilty of a class B felony.

6. No state, county, or municipal court shall suspend the imposition of sentence as to a prior offender, persistent offender, aggravated offender, or chronic offender under this section nor sentence such person to pay a fine in lieu of a term of imprisonment, section 557.011, RSMo, to the contrary notwithstanding. No

prior offender shall be eligible for parole or probation until he or she has served a minimum of five days imprisonment, unless as a condition of such parole or probation such person performs at least thirty days of community service under the supervision of the court in those jurisdictions which have a recognized program for community service. No persistent offender shall be eligible for parole or probation until he or she has served a minimum of ten days imprisonment, unless as a condition of such parole or probation such person performs at least sixty days of community service under the supervision of the court. No aggravated offender shall be eligible for parole or probation until he or she has served a minimum of sixty days imprisonment. No chronic offender shall be eligible for parole or probation until he or she has served a minimum of two years imprisonment.

7. The state, county, or municipal court shall find the defendant to be a prior offender, persistent offender,

aggravated offender, or chronic offender if:

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender or persistent offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, aggravated offender, or chronic offender.

8. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of its hearing.

9. In a trial without a jury or upon a plea of guilty, the court may defer the proof in findings of such facts to a

later time, but prior to sentencing.

10. The defendant shall be accorded full rights of confrontation and cross-examination, with the opportunity to present evidence, at such hearings.

11. The defendant may waive proof of the facts alleged.

12. Nothing in this section shall prevent the use of presentence investigations or commitments.

13. At the sentencing hearing both the state, county, or municipality and the defendant shall be permitted to present additional information bearing on the issue of sentence.

14. The pleas or findings of guilty shall be prior to the date of commission of the present offense.

15. The court shall not instruct the jury as to the range of punishment or allow the jury, upon a finding of guilty, to assess and declare the punishment as part of its verdict in cases of prior offenders, persistent offenders, aggravated offenders, or chronic offenders.

16. Evidence of prior convictions shall be heard and determined by the trial court out of the hearing of the jury prior to the submission of the case to the jury, and shall include but not be limited to evidence of convictions received by a search of the records of the Missouri uniform law enforcement system maintained by the Missouri state highway patrol. After hearing the evidence, the court shall enter its findings thereon. A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in a state court shall be treated as a prior conviction.

In his Rule 24.035 post-conviction motion, Mr. Feldhaus claimed that the trial court denied his constitutional rights by convicting him of the class B felony of driving while intoxicated as a chronic DWI offender under section 577.023, because section 577.023 violates the void-for-vagueness doctrine (L.F. 42-43). In

his timely filed amended motion, Mr. Feldhaus made the same claim (L.F. 52-55; A1-3). Specifically, he claimed that the “or more” language in subsections (1)(a), (2)(a), and (4)(a) of section 577.023 could be arbitrarily applied and that as a result, section 577.023 is void for vagueness (L.F. 53-55).

On April 10, 2009, the motion court entered its findings of fact and conclusions of law, denying Mr. Feldhaus’ Rule 24.035 motion without an evidentiary hearing (L.F. 62). The plea court concluded that section 577.023 does not leave a person of ordinary intelligence to guess as to its meaning, and that “a person of ordinary intelligence is given a sufficient notice of the prohibited conduct as well as the enhanced penalty” (L.F. 62). The plea court found no ambiguity in the plain language of the statute and no conflict as to the definition of each class of offender proscribed in section 577.023 (L.F. 61). The plea court concluded that section 577.023 is not void for vagueness (L.F. 62). Mr. Feldhaus is appealing the motion court’s findings and conclusions to this Court (L.F. 63-66).

### *Standing*

Mr. Feldhaus has standing to make this constitutional challenge on appeal. Standing is a prerequisite to making a constitutional challenge to a statute. *State*

*v. Pizzella*, 723 S.W.2d 384, 386 (Mo. banc 1987). “[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.” *State v. Ellis*, 853 S.W.2d 440, 446 (Mo. App. E.D. 1993) (citing *United States v. Raines*, 362 U.S. 17 (1960)). A litigant must be adversely affected by the statute he challenges. *State v. Stottlemire*, 35 S.W.3d 854, 861 (Mo. App. W.D. 2001).

Mr. Feldhaus has standing to challenge the constitutionality of section 577.023 because he is adversely affected by section 577.023. In charging Mr. Feldhaus with the class B felony of driving while intoxicated in St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01123-01, the prosecution considered the “or more” language in subsections (1)(a), (2)(a), and (4)(a) of section 577.023, and chose the harshest alternative in charging Mr. Feldhaus as a chronic DWI offender under subsection (4)(a) (L.F. 5-6, 23-24). *Cf. Moore v. State*, 288 S.W.3d 810 (Mo. App. S.D. 2009) (finding defendant had no standing to raise claim that section 577.023 is void for vagueness). The trial court then applied subsection (4)(a) in finding Mr. Feldhaus to be a chronic DWI offender under section 577.023, and in enhancing his punishment (Tr. 10, 20-22). As a

consequence of the application of the challenged subsections of section 577.023, Mr. Feldhaus is serving two concurrent eight-year terms of imprisonment, of which he must serve at least two years (Tr. 26-27; L.F. 19-20, 37-38). § 577.023.6.

#### *Appealability and Reviewability*

Moreover, Mr. Feldhaus' constitutional challenge to section 577.023 is cognizable under Rule 24.035 and on appeal, and Mr. Feldhaus did not waive his constitutional challenge through the entry of his guilty plea. In *State v. Mitchell*, 563 S.W.2d 18, 22-23 (Mo. banc 1978), the Missouri Supreme Court held that an attack on the constitutionality of the statute under which the defendant was convicted cannot be waived. There, the court noted the constitutionality of a statute is a jurisdictional issue, and the defendant can raise his constitutional challenge at any stage of the proceedings, including after conviction in a timely filed Rule 24.035 motion. *Id.*

For example, in *Dorsey v. State*, 115 S.W.3d 842, 844 (Mo. banc 2003), the defendant filed his Rule 24.035 motion challenging the constitutionality of section 302.321 on grounds that the statute was void for vagueness, did not provide sufficient guidance on when the enhancement provision should apply, and allowed for arbitrary application. Though the State argued that the

defendant had waived his void-for-vagueness challenge by entering his plea of guilty, the Missouri Supreme Court disagreed. *Id.* at 844 n. 2. The Missouri Supreme Court cited *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992), in stating that “a guilty plea does not waive a subsequent claim that the sentencing court had no jurisdiction to enter the conviction or impose the sentence.” *Id.*

Because the defendant’s void-for-vagueness claim was, in fact, a claim based on a “non-factual, non-procedural, jurisdictional defect,” the Missouri Supreme Court held the defendant had not waived his constitutional challenge through entry of his guilty plea and reviewed his constitutional challenge on appeal. *Id.* at 844.

Similarly, on post-conviction, Mr. Feldhaus claimed a non-factual, non-procedural, jurisdictional defect voided his conviction, and this Court should address his claim that section 577.023 is void for vagueness.

#### *Preservation*

In general, a defendant must raise a constitutional challenge at the earliest opportunity or nothing is preserved for appellate review. *State v. Bohlen*, 284 S.W.3d 714, 717 (Mo. App. E.D. 2009). This assignment of error is preserved for appellate review because Mr. Feldhaus included it in his Rule 24.035 *pro se* and amended motions (L.F. 42-43, 51-55). *See, e.g., Comstock v. State*, 68 S.W.3d 561,

565 (Mo. App. W.D. 2001) (holding Rule 24.035 post-conviction claim was unpreserved for appellate review because it was not included in *pro se* and amended motions); *see also Gooden v. State*, 846 S.W.2d 214, 217 (Mo. App. S.D. 1993) (same).

Mr. Feldhaus' claim is also preserved for appellate review because, regardless of whether he raised it at his plea or in his *pro se* and amended post-conviction motions, Mr. Feldhaus' claim is a jurisdictional claim that he may raise for the first time on appeal. *See, e.g., Dorsey*, 115 S.W.3d at 844 n. 2; *State v. Hicks*, 221 S.W.3d 497, 501 (Mo. App. W.D. 2007). "Jurisdiction," as applied to criminal courts, "refers to the power of a court to hear and resolve the case of a criminal offense, to render a valid judgment, and to declare punishment." *Searcy v. State*, 981 S.W.2d 597, 598-599 (Mo. App. W.D. 1998). A court transcends its jurisdiction when it enters judgment and sentence against a criminal defendant on the basis of an unconstitutional law because the court's jurisdiction extends only to such matters that the law declares to be criminal. *State v. Burgin*, 203 S.W.3d 713, 716 (Mo. App. E.D. 2006) (citing *Ex Parte Smith*, 36 S.W. 628, 630 (Mo. 1896)). The aggrieved criminal defendant may challenge the trial court's jurisdiction at any point, including on appeal. *Stidham v. State*, 963 S.W.2d 351,

353 (Mo. App. W.D. 1998); *Brown v. State*, 452 S.W.2d 176, 179 (Mo. 1970); *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992).

Here, Mr. Feldhaus challenged the constitutional validity of the statute under which the trial court convicted and sentenced him, section 577.023 (L.F. 42-43, 51-55). Nonetheless, the motion court found that “it did have jurisdiction to render the judgment, the sentences imposed were not illegal and there was no denial or infringement of the rights of the Movant under the Missouri and United States Constitutions” (L.F. 62).

#### *Jurisdiction*

This Court should transfer Mr. Feldhaus’ appeal to the Missouri Supreme Court because Mr. Feldhaus made a real and substantial challenge to the constitutional validity of section 577.023. The Missouri Supreme Court has exclusive jurisdiction over appeals involving the constitutional validity of a state statute, and this Court is divested of jurisdiction if it determines that Mr. Feldhaus’ constitutional challenge is real and substantial, and not merely colorable. *State v. Dillard*, 158 S.W.3d 291, 302 (Mo. App. S.D. 2005); Mo. Const., Art. V, § 3. Jurisdiction over real and substantial constitutional challenges rests with the Missouri Supreme Court, even if the Court will likely reject the

challenge on the merits by unanimous decision. *State v. Fields*, 186 S.W.3d 501, 504 (Mo. App. S.D. 2006).

In determining whether a constitutional claim is real and substantial, this Court must inquire whether it presents a contested matter of right that involves fair doubt and reasonable room for disagreement. *Higgins v. Treasurer of State of Missouri*, 140 S.W.3d 94, 98 (Mo. App. W.D. 2004). Or stated another way, a claim is real and substantial if it presents an issue of first impression. *State v. Peoples*, 288 S.W.3d 767, 774 (Mo. App. E.D. 2009).

The constitutionality of section 577.023, RSMo Supp. 2005, effective September 15, 2005, is an issue of first impression that the Missouri Supreme Court has not yet addressed, and which no court has addressed on the merits. Though the Rule 24.035 movant in *Moore* made the same challenge to the constitutionality of section 577.023, RSMo Supp. 2005, the Missouri Court of Appeals, Southern District never reached the merits of movant's constitutional claim because the movant lacked standing to assert it. *Moore*, 288 S.W.3d at 812.

As previously stated, Mr. Feldhaus has standing to assert his constitutional claim, preserved his claim for appellate review, and raised a claim that is both

appealable and reviewable. Consequently, this Court should transfer Mr. Feldhaus' case to the Missouri Supreme Court.

### *Standards of Review*

Should this Court determine it has jurisdiction to hear Mr. Feldhaus' appeal, appellate review of the motion court's action on a motion filed under Rule 24.035 is limited to a determination of whether the findings, conclusion, and judgment of the motion court are clearly erroneous. *Russell v. State*, 3 S.W.3d 380, 382 (Mo. App. E.D. 1999); Rule 24.035(k). The motion court's findings, conclusion, and judgment are clearly erroneous if a review of the entire record leaves this Court with the firm and definite impression that a mistake has been made. *Dudley v. State*, 903 S.W.2d 263, 265 (Mo. App. E.D. 1995).

Further, challenges to the constitutionality of a statute and statutory interpretation are legal issues that are reviewed *de novo*. *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006); *State v. Kinder*, 122 S.W.3d 624, 629 (Mo. App. E.D. 2003). The burden of establishing a statute's unconstitutionality rests upon the party challenging it. *State v. Crawford*, 478 S.W.2d 314, 316 (Mo. 1972).

In determining the constitutionality of a statute, this Court is bound to adopt any reasonable reading of the statute that will allow its validity and

resolve any doubts in favor of constitutionality. *State v. Burns*, 978 S.W.2d 759, 760 (Mo. banc 1998). “A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.” *Bd. of Educ. of St. Louis v. State*, 47 S.W.3d 366, 368-369 (Mo. banc 2001). But if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid. *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002).

Additionally, the rule of lenity requires that the Court construe any ambiguity in a criminal statute against the government and in favor of the defendant. *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). Under the rule of lenity, the defendant gets the benefit of the lesser penalty where there is an ambiguity in the statute allowing for more than one interpretation. *Woods v. State*, 176 S.W.3d 711, 712 (Mo. banc 2005).

#### *Argument*

Section 577.023 is unconstitutional and violates the void-for-vagueness doctrine because it provides insufficient guidance and standards, and consequently, permits arbitrary and discriminatory application (*see* L.F. 54-55). A statute that is unconstitutionally vague violates the due process clause of the

Fifth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Missouri Constitution. See *State v. Young*, 695 S.W.2d 882, 886 (Mo. banc 1985). “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *State v. Brown*, 140 S.W.3d 51, 54 (Mo. banc 2004).

The void-for-vagueness doctrine requires that “a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); see also *State ex rel. Nixon v. Peterson*, 253 S.W.3d 77, 81 (Mo. banc 2008) (citing *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999)). Laws must “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.” *State v. Brown*, 660 S.W.2d 694, 697 (Mo. banc 1983) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Laws must also provide guidelines to govern law enforcement, so that policemen, prosecutors, and juries are not permitted to pursue their personal predilections. *Kolender v. Lawson*, 461 U.S. at 358 (citing *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)). If a law fails to do one, the other, or both, then the law’s

vagueness may render it unconstitutional. *State v. Stokely*, 842 S.W.2d 77, 80 (Mo. banc 1992).

A constitutional challenge to a statute's vagueness may raise the issue of whether the language of the statute, and the terms used within, provide adequate notice of prohibited conduct. *State v. Condict*, 65 S.W.3d 6, 17 (Mo. App. S.D. 2001). A constitutional challenge may also raise the issue of whether the statute provides sufficient, explicit guidance and standards so as to avoid arbitrary and discriminatory application. *See, e.g., State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 692-693 (Mo. banc 2005). Mr. Feldhaus' challenge is of the latter variety.

The standard for determining whether a statute is unconstitutional, or void for vagueness, is whether the terms or words used in the statute are of common usage and are understandable by persons of ordinary intelligence. *State v. Bratina*, 73 S.W.3d 625, 628 (Mo. banc 2002). In determining whether terms are impermissibly vague, "neither absolute certainty nor impossible standards of specificity are required." *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

In applying these standards, the motion court concluded that section 577.023 is not void for vagueness or unconstitutional (L.F. 62). The motion court

clearly erred. Section 577.023 is unconstitutional and violates the void-for-vagueness doctrine because it provides insufficient guidance and standards, and consequently, permits arbitrary and discriminatory application (*see* L.F. 54-55).

The inclusion of the “or more” language in subsections (1)(a), (2)(a), and (4)(a) of section 577.023 encourages discriminatory or selective enforcement on the basis of unjustifiable bases such as race, sex, wealth or other arbitrary classifications. Under the plain language of the statute, a person, such as Mr. Feldhaus, who has pleaded guilty to, or has been found guilty of, four intoxication-related offenses may be found to be an aggravated offender, a chronic offender, or a persistent offender. A person, who has pleaded guilty to or has been found guilty of four intoxication-related offenses, necessarily has “two *or more* intoxication-related traffic offenses” for purposes of classification as a “persistent offender,” “three *or more* intoxication-related traffic offenses” for purposes of classification as an “aggravated offender,” and “four *or more* intoxication-related traffic offenses” for purposes of classification as a “chronic offender.”

Yet, whether a jury or a judge ultimately convicts the person with four intoxication-related offenses as an aggravated offender, chronic offender, or

persistent offender will be arbitrarily determined by which classification the prosecution chooses to charge. The prosecution's unfettered exercise of its discretion may result in the person with four prior intoxication-related offenses receiving a maximum sentence of fifteen years as a chronic offender, rather than the maximum four years he would have received as a persistent offender. §§ 558.011.1(2) & (4), 577.023.3, & 577.023.5. The prosecution's arbitrary exercise of its discretion in determining which classification to charge may also result in some persons with four prior intoxication-related offenses serving longer sentences and a larger percentage of their sentences than others who have DWI convictions and the same number of prior intoxication-related offenses. Because section 577.023's inclusion of "or more" language in subsections (1)(a), (2)(a), and (4)(a) implicates such concerns about equal justice, as well as due process and equal protection interests, the Court should find it void for vagueness.

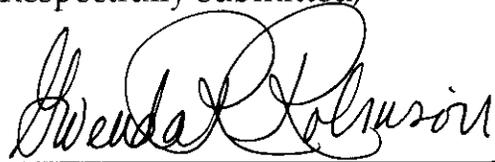
The motion court clearly erred in denying Mr. Feldhaus' Rule 24.035 motion because the plea court denied Mr. Feldhaus' right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, § 10 of the Missouri Constitution in convicting Mr. Feldhaus of the class B felony of driving while intoxicated as a chronic DWI

offender under section 577.023 in St. Charles County Cause Numbers 0711-CR07466-01 and 0811-CR01223-01, in that section 577.023 violates the void-for-vagueness doctrine. The Court must vacate Mr. Feldhaus' convictions and sentences.

CONCLUSION

WHEREFORE, based on his arguments in his brief, Appellant Damon Feldhaus respectfully requests the Court to reverse the motion court's judgment, and vacate his convictions and sentences.

Respectfully submitted,



---

GWENDA R. ROBINSON #43213  
District Defender, Office B/Area 68  
Missouri State Public Defender  
Eastern Appellate/Post-conviction  
415 S. 18th Street, Suite 300  
St. Louis, Missouri 63103-2237  
314.340.7662 (telephone)  
314.340.7685 (facsimile)  
[Gwenda.Robinson@mspd.mo.gov](mailto:Gwenda.Robinson@mspd.mo.gov)

ATTORNEY FOR APPELLANT

**CERTIFICATE OF SERVICE AND COMPLIANCE**

Pursuant to Missouri Supreme Court Rule 84.06(g) and Special Rule 361, I hereby certify that on Wednesday, December 16, 2009, a true and correct copy of the foregoing brief and a floppy disk containing the foregoing brief were mailed postage prepaid to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Palatino Linotype 13 point font, and contains 5,724 words, excluding the cover page, signature block, and certificates of service and of compliance. Finally, I hereby certify that the enclosed diskette has been scanned for viruses with McAfee VirusScan Enterprise 7.1.0 software and found virus-free.



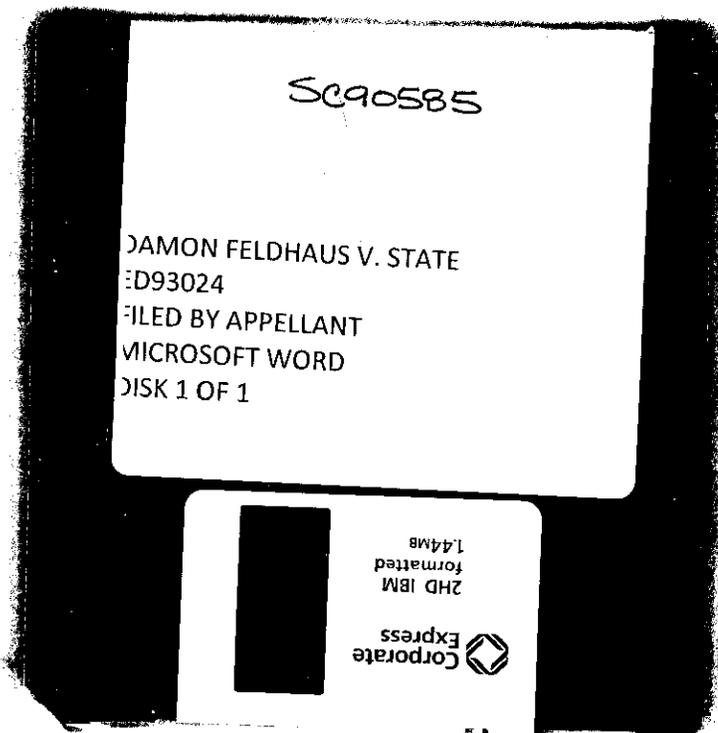
GWENDA R. ROBINSON #43213  
District Defender, Office B/Area 68  
Missouri State Public Defender  
Eastern Appellate/Post-conviction  
415 S. 18th Street, Suite 300  
St. Louis, Missouri 63103-2237  
314.340.7662 (telephone)  
314.340.7685 (facsimile)  
Gwenda.Robinson@mspd.mo.gov

APPENDIX

INDEX

Entry of Appearance and Request for Additional Time (file-copy)..... A1-3

Findings of Fact and Conclusions of Law ..... A4-6



IN THE  
CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI

DAMON M. FELDHAUS,

Movant,

v.

STATE OF MISSOURI,

Respondent.

)  
)  
)  
)  
)  
)  
)  
)  
)  
)

Cause No. 0811-CV10279  
Honorable Daniel Pelikan  
Div No 7

FILED

DEC 01 2008

Judy Zerr  
Circuit Clerk  
St. Charles County

**ENTRY OF APPEARANCE**  
**AND REQUEST FOR ADDITIONAL TIME**  
**IN WHICH TO FILE AN AMENDED MOTION**

Comes now Gwenda R. Robinson and enters her appearance in the above-styled cause.

Counsel moves this Court to grant additional time in which to file amendments to the pro se motion previously filed herein by movant. In support of this motion, counsel for movant states the following:

1. The Office of Appellate Defender, Eastern District, was appointed to represent Movant on November 14, 2008 and has not had a sufficient opportunity to consult with Movant or to review the record and file in Movant's underlying criminal case.

2. Additional time will be required in order to review the transcript(s) and case file(s), to consult with movant, to investigate possible grounds for relief, and to allege any

additional grounds which may have been omitted by Movant in the pro se motion.

3. Postconviction rules require that counsel "ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence." Rule 24.305(e). For counsel to comply with the meaning, spirit and letter of this Rule, additional time will be required in which to file the amended motion.

WHEREFORE, the Office of Appellate Defender, Eastern District, requests the court grant Movant an additional thirty (30) days pursuant to Rule 24.035(g) in which to file an amended motion.

SO ORDERED:



Judge

12-3-08

Date

Respectfully submitted,



Gwenda R. Robinson, Mo Bar No. 43213

Attorney for Movant

1000 St. Louis Union Station

Suite 300

St. Louis, MO 63103

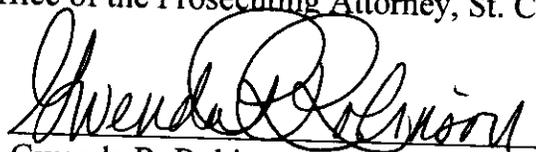
Phone 314-340-7662

Fax 314-340-7685

E-Mail Gwenda.Robinson@mspd.mo.gov

certify that on this 20th day of November, 2008, that a true copy of the above and foregoing was mailed/delivered to the Office of the Prosecuting Attorney, St. Charles County, Missouri.

**Certificate of Service**



Gwenda R. Robinson

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI  
11<sup>TH</sup> JUDICIAL CIRCUIT  
CIRCUIT JUDGE DIVISION 7

DAMON FELDHAUS,

Movant

vs.

STATE OF MISSOURI,

Respondent.

PCR No. 0811-CV10279

FILED

APR 08 2009

Judy Zerr  
Circuit Clerk  
St. Charles County

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

On various dates there came on regularly to be heard, the Amended Motion to Correct Judgment and Sentence and Request for Evidentiary Hearing ("Movant's Motion), and after argument of counsel for Movant and counsel for the State of Missouri ("Respondent"), an evidentiary hearing is denied.

Now, after having considered Movant's motion and having examined the files and the records herein, the Court makes the following findings of fact and conclusions of law and enters its Judgment as hereinafter set forth.

**Factual Background:**

1. Movant was charged in cause number 0711-CR07466-01 with the class B felony of driving while intoxicated and movant was plead and found to be a chronic offender. Movant was charged in cause number 0811-CR01223-01 with the class B felony of driving while intoxicated and movant was plead and found by the Court to be a chronic offender. Movant was found to have pleaded guilty to four intoxicated related traffic offenses as defined in Section 577.023.1(2) RSMo. Movant entered a plea of guilty to each charge on May 7, 2008. Movant was sentenced as a chronic DWI offender to concurrent terms of imprisonment of eight years in each case.

2. Movant filed his motion for post-conviction relief pursuant to Missouri Supreme Court Rule 23.045 on October 31, 2008. Movant's Amended Motion was filed February 9, 2009.

**Findings of Fact and Conclusions of Law:**

Movant's only point of allegation is that he was denied due process of law as Section 577.023 RSMo. is void for vagueness. Movant was found to be a chronic offender as defined by Section 577.023.1(2) in both causes. The facts are not in dispute and the issue presented is solely a matter of law.

A4

The primary rule of statutory construction is to ascertain the intent of the lawmakers from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. State v. Knapp, 843 S.W.2d 345, 347 (Mo banc 1992) *citing* State v. Kraus, 530 S.W.2d 684, 685 (Mo banc 1975); State v. Yount, 813 S.W.2d 85 (Mo App 1991). In interpreting legislation the court should look to the provisions of the whole law, and its object and policy. *Id.* at 615 *citing* Richards v. United States, 369 U.S. 1, 11 (1962). The General Assembly is presumed to have intended what the statute says; consequently, when the legislative intent is apparent from the words used and no ambiguity exists, there is no room for construction. *Id.* *citing* State v. Evers, 777 S.W.2d 344 (Mo App. 1989). All statutes, including penal statutes dealing with punishment enhancement, are to be given that interpretation which corresponds with the legislative objective and, where necessary, the strict letter of the statute must yield to the manifest intent of the legislature. State v. Haskins, 950 S.W.2d 613, 616 (Mo App. 1997) *citing* State v. Williams 693 S.W.2d 125, 127 (Mo App. 1985). Section 577.023 is clearly a legislative effort to address a matter of serious public concern, the repeat DWI offender. *Id.*, *citing* State v. Zoellner, 920 S.W.2d. 132, 135 (Mo App, 1996).

The test for vagueness is whether the language conveys to a person of ordinary intelligence a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Vagueness, as a due process violation, takes two forms. A criminal statute is vague that fails to give notice to potential offenders of the prohibited conduct; that notice is inadequate when the terms of the statute are so unclear that people of common intelligence must guess at their meaning. State v. Knapp 843 S.W.2d 345, 349 (Mo banc 1992) *citing* State v. Young, 695 S.W.2d 882, 884 (Mo banc 1985). Additionally, a statute is vague if it lacks explicit standards necessary to avoid arbitrary and discriminatory application by the state. *Id.* Neither absolute certainty nor impossible standards of specificity are required in determining whether terms are impermissibly vague. State v. Brown, 14 S.W.3d 51, 54 (Mo banc 2004) *citing* Cocktail Fortune, Inc. v. Supervisor of Liquor Control, 994 S.W.2d at 955, 957 (Mo banc 1999). Instead the test is "whether the language conveys a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." State v. Crawford, 478 S.W.2d 314, 317 (Mo.1972) (quoting State v. Smith, 431 S.W.2d 74, 78 (Mo.1968)). Though statutes "should be so worded that one may know whether he is violating the law, ... if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and ... the courts must endeavor, by every rule of construction, to give it effect." City of St. Louis v. Brune, 520 S.W.2d 12, 16-17 (Mo.1975).

There is no ambiguity in the plain language of the statute. There is no conflict as to the definition of each class of offender proscribed in Section 577.023. The statute clearly defines a chronic offender and sets forth explicit standards necessary for the application of statutory requirements for enhanced penalties of offenders who repeatedly commit the crime of driving while intoxicated. Movant's claim and interpretation is not supported by the language of the statute. Movant was given ample notice by the clear language of the statute that having four or more intoxication-related traffic offenses was proscribed conduct subjecting him to an enhanced penalty of up to that of a Class B felony. Movant could have avoided the disadvantage arising from the statutory amendment by acting in conformity with the law. Furthermore, there is no

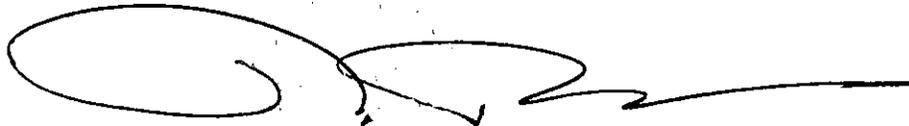
conflict in the 577.023 definition of each class of offender. Section 577.023 explicitly states the standards upon which an offender may be subject to the enhanced penalties and is therefore avoids arbitrary and discriminatory application by the State. The rule of lenity is a default rule and should only be used in the event other canons are inapplicable. Turner v. State 245 S.W.3d. 826, 828 (Mo banc, 2008) *citing* United States v. Wells, 519 US 482, 499 (1997). Movant's claim is properly disposed of by the application of the test for vagueness and therefore the rule of lenity does not apply.

Section 577.023 RSMo. is not void for vagueness. A person of ordinary intelligence is given a sufficient notice of the prohibited conduct as well as the enhanced penalty. Section 577.023 does not leave a person of ordinary intelligence to guess as to the meaning. A person who is found to be a chronic offender is subject to the punishment of a class B felony. There is a sufficiently definite warning in the plain language of Section 577.023. The Court finds from the evidence that Movant failed to sustain his burden of proof as to the allegation. This Court finds Movant's allegation was conclusory and unsupported by law. He has not pleaded facts that would entitle him to relief. Movant's claim is hereby denied.

The Court also finds it did have jurisdiction to render the judgment, the sentences imposed were not illegal and there was no denial or infringement of the rights of the Movant under the Missouri or United States Constitutions. The Court further finds Movant received effective assistance of counsel and Movant was not prejudiced and his plea of guilty was made knowingly and voluntarily.

IT IS, THEREFORE, ORDERED, ADJUDGED & DECREED by this Court that Movant's Motion be, and the same hereby is, denied.

SO ORDERED this 10 day of APRIL, 2009.



The Honorable Daniel Pelikan 34284  
St. Charles County Circuit Court, Division 7

Alc