IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC90839**
	)	
FARON R. COLLINS,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF DOUGLAS COUNTY, MISSOURI
FORTY-FOURTH JUDICIAL CIRCUIT
THE HONORABLE ROBERT C. CARTER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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TRANSFER QUESTION

The Southern District's newest opinion is still contrary to previous decisions of Missouri appellate courts and presents a question of general interest and importance:[1]

§ 577.023.9, provides that in a court-tried case proof that the defendant is a chronic DWI offender must be done "prior to sentencing." The Southern District found that the state did not prove Appellant to be a chronic DWI offender prior to original sentencing and remanded for re-sentencing. Is the state allowed to adduce additional proof at re-sentencing to prove Appellant is a chronic DWI offender even though it would violate § 577.023.9 since the state has already failed to adduce such proof "*prior to sentencing*"? In other words, is re-sentencing the equivalent of sentencing under § 577.023.9, which would allow the state a second bite of the apple?

By holding that the state can adduce additional proof after sentencing, violating § 577.023.9, the Southern District's opinion is contrary to ***State v. Craig***, 287 S.W.3d 676 (Mo. banc 2009) (remedy for such a violation is to re-sentence a defendant to the facts proven by the State during the original proceedings), and ***State v. Severe***, 307 S.W.3d 640 (Mo. banc 2010) (when dealing with the DWI recidivist statute "there is no opportunity for the state to have a twice-bitten apple).

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[1] On March 2, 2010, this Court granted Appellant's application for transfer and retransferred the case for reconsideration in light of ***State v. Severe***, SC89948.

JURISDICTIONAL STATEMENT

Faron Collins (Appellant), appeals his conviction for driving while intoxicated, § 577.010,[2] following a court-tried case in the Circuit Court of Douglas County, Missouri. On December 2, 2008, the Hon. Robert C. Carter sentenced Appellant as a chronic DWI offender, § 577.023, RSMo (Supp. 2006), to a five-year prison sentence concurrent with another sentence (Tr. 58; LF 67-71).[3] On December 3, 2008, a notice of appeal was timely filed *in forma pauperis* (LF 26-27, 72-73). Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, § 3, Mo. Const.; § 477.060. This Court thereafter granted Appellant's application for transfer, so this Court has jurisdiction. Article V, §§ 3 and 10, Mo. Const. and Rule 83.03.

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[2] All statutory references are to RSMo 2000, unless otherwise indicated. Except that all references to § 577.023 are to RSMo (Supp. 2006). All Rule references are to the Missouri Court Rules 2008.

[3]The Record on Appeal consists of a trial transcript (Tr.), and a legal file (L.F.).

STATEMENT OF FACTS

Appellant was charged by information with driving while intoxicated (DWI), *§ 577.010* (LF 8). He was also charged with driving while suspended, but he pled guilty to that offense, so that count is not involved in this appeal (Tr. 6-7, 45, 47; LF 10, 28). Appellant waived his right to a jury trial on the record (Tr. 2-4; LF 21). At a court-tried case, viewing the evidence in the light most favorable to the State, the following evidence was presented:

On September 3, 2006, Charles Bearden of the Ozark County Sheriff's Department was driving on Highway 181 when he received a dispatch that a small black car with a specific license plate number was traveling on FF Highway and that the driver was extremely intoxicated (Tr. 9, 17). Bearden knew that FF Highway would connect with Highway 181, so he pulled off the road to see if the car would drive his way (Tr. 10, 17).

A short time later, Appellant drove by in the car (Tr. 10, 17). Bearden was familiar with Appellant (Tr. 10, 17-18). Bearden had dispatch run a records check on Appellant's driving status (Tr. 10). The check revealed that Appellant's driving license was suspended or revoked (Tr. 10, 18, 20). Appellant pulled into a driveway (Tr. 11). Appellant had not committed any "moving violations" (Tr. 19). He had not weaved, crossed the center line, or sped (Tr. 20). But because Appellant's license was revoked or suspended, Bearden activated his emergency lights (Tr. 11, 18, 20, 22).

Appellant exited his car and walked toward where Bearden had stopped (Tr. 11). Bearden exited his car and made contact with Appellant (Tr. 11). Appellant's eyes were "glassy" and extremely bloodshot (Tr. 11). Appellant was not staggering, but he was swaying and unsteady on his feet (Tr. 11, 15). He had a strong odor of intoxicants on his breath, his speech was slurred,[4] and it appeared that he might have urinated on himself (Tr. 11, 15).

Bearden asked Appellant if he had been drinking that day (Tr. 12). Appellant said he had two beers (Tr. 12). Bearden asked him to do some field sobriety tests, but Appellant said he could not do them and refused to do so (Tr. 12, 15, 28). Based on Appellant's appearance and demeanor, Bearden believed that Appellant was intoxicated (Tr. 15, 28). Bearden arrested Appellant for driving while suspended or revoked and for "investigation of DWI" and Bearden waited for the Sheriff to arrive (Tr. 13, 21).

Bearden checked to see if the passenger of Appellant's vehicle had a driver's license (Tr. 14). There was some alcohol in Appellant's vehicle; there was a twelve-pack that had numerous cans missing from it (Tr. 14-15, 24). Bearden had not put Appellant in his car because there was a shotgun in it (Tr. 27).

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[4] During argument, defense counsel reminded the judge that when Appellant waived jury on the record his voice was slurred because he is somewhat hard-of-hearing (Tr. 40-41).

Appellant, who was handcuffed in front, walked to his car, had the passenger give him a beer, and quickly took a drink out of it (Tr. 22-23, 27).

Later, Appellant took a breathalyzer test, but the result of that test was not established at trial (Tr. 13).

Appellant was also charged as a chronic DWI offender, § 577.023, RSMo (Supp. 2007) (LF 8-9). It was alleged that he was "convicted" of DWI and "driving with excess blood alcohol content" (BAC) in the municipal courts of Willow Springs (DWI on 12-16-1985) and Thayer (DWI on 2-8-1991, and BAC on 2-13-1998), and that he was also "convicted" in the circuit courts of the counties of Cole (DWI on 5-18-1991) and Howell (BAC on 3-7-1985, and DWI on 5-11-1987, and 9-10-1992) (LF 8).

At the trial, the State introduced into evidence, without objection, State's Exhibit No. 1, which was a copy of Appellant's "driving history" (Tr. 13). That exhibit is a certified copy of Appellant's Missouri Driver Record prepared by the custodian of records of the Missouri Department of Revenue (State's Exhibit No. 1) (see Appendix). Pages 6 through 9 of that exhibit showed the following regarding the offenses alleged in the information: (1) "Excess Blood Alcohol Content", "Convicted on 3-07-1985 in HOWELL CO by CIRCUIT court" (pg. 9); (2) DWI, "Convicted on 12-16-1985 in WILLOW SP by MUNICIPAL court" (pg. 9); (3) DWI, "Convicted on 5-11-1987 in HOWELL CO by CIRCUIT court" (pg. 8); (4) DWI, "Convicted on 2-08-1991 in THAYER by MUNICIPAL court" (pg. 7); (5) DWI, "Convicted on 4-08-1992 in COLE by COLE CO CIR CRT –

JEFERSON CTY" (pg. 7); (6) DWI, "Convicted on 9-10-1992 in HOWELL CO by CIRCUIT court" (pg. 7); and (7) "Excess Blood Alcohol Content", "Convicted on 2-13-1998 in OREGON by CIR CRT – MUN DIV – THAYER" (pg. 6).

After this evidence was adduced at the court-trial, the trial court overruled Appellant's motion for judgment of acquittal at the close of the evidence and found Appellant guilty of DWI, as a "persistent offender" (Tr. 42, 45; LF 56-57). The prosecutor informed the court that Appellant was charged as a chronic offender, so the court changed replied, "It would be chronic" (Tr. 45).

On December 2, 2008, the court sentenced Appellant as a chronic DWI offender to a five-year prison sentence concurrent with a one-year sentence for driving while suspended (Tr. 58; LF 67-71). This appeal follows. Any further facts necessary for the disposition of this appeal will be set out in the argument portion of this brief.

POINT RELIED ON

The trial court erred or plainly erred in overruling Appellant's motion for judgment of acquittal and finding him to be a chronic DWI offender under *§ 577.023*, which resulted in the court enhancing his punishment from a class B misdemeanor to a class B felony, because this violated *§ 577.*023 and Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution in that the State failed to plead and prove "all essential facts" showing that Appellant had pleaded guilty to or had been found guilty of four or more intoxication-related traffic offenses, because the Department of Revenue records contained in State's Exhibit No. 1 – the sole evidence introduced to prove the priors - did not show whether he "pleaded guilty to" or had "been found guilty of" any of the priors or that he was represented by or waived the right to an attorney in writing, as required by *§ 577.023*, and thus Appellant was sentenced in excess of the maximum sentence authorized by law.

State v. Craig, 287 S.W.3d 676 (Mo. banc 2009);

State v. Severe, 307 S.W.3d 640 (Mo. banc 2010);

State v. Coomer, 888 S.W.2d 356 (Mo. App. S.D. 1994);

State v. Turner, 245 S.W.3d 826 (Mo. banc 2008);

U.S. Constitution, Amendment XIV;

Mo. Constitution, Article I, §10;

§§ 302.312, 577.010, 577.023, and 558.021;

Rule 30.20; and

MACH-CR 31.02, and 31.04.

ARGUMENT

The trial court erred or plainly erred in overruling Appellant's motion for judgment of acquittal and finding him to be a chronic DWI offender under *§ 577.023*, which resulted in the court enhancing his punishment from a class B misdemeanor to a class B felony, because this violated *§ 577.*023 and Appellant's right to due process as guaranteed by the 14th Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution in that the State failed to plead and prove "all essential facts" showing that Appellant had pleaded guilty to or had been found guilty of four or more intoxication-related traffic offenses, because the Department of Revenue records contained in State's Exhibit No. 1 – the sole evidence introduced to prove the priors - did not show whether he "pleaded guilty to" or had "been found guilty of" any of the priors or that he was represented by or waived the right to an attorney in writing, as required by *§ 577.023*, and thus Appellant was sentenced in excess of the maximum sentence authorized by law.

Introduction:

The State of Missouri in its brief in the Southern District Court of Appeals has conceded error in this case by admitting: "The trial court erred in finding beyond a reasonable doubt that Appellant was a chronic offender pursuant to

§ 577.023.1(2) because the evidence presented by the State was silent as to whether Appellant had been represented by counsel or had waived his right to counsel in his pervious cases." (Resp. Br. at 10).

Thus, the issue in this case is not whether there was error. It has been conceded that there was error. Rather, the issue in this case is the remedy for such an error. In particular, the issue is: If the State fails to prove the requisite number of prior intoxication-related traffic offenses in order to be eligible for sentencing enhancement under ***§ 577.023***,[5] is the remedy the same in a court-tried case as it is a jury-tried case where the remedy is a remand for resentencing consistent with the number of priors correctly proven in the first instance? E.g., ***State v. Craig***, 287 S.W.3d 676 (Mo. banc 2009) and ***State v. Severe***, 307 S.W.3d 640 (Mo. banc 2010).

Facts:

Appellant was charged as a chronic DWI offender, ***§ 577.023*** (LF 8-9). It was alleged that he was "convicted" of DWI and "driving with excess blood alcohol content" (BAC) in the municipal courts of Willow Springs (DWI on 12-

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[5] All references to ***§ 577.023*** are to RSMo (Supp. 2006). *See* ***State v. Coomer***, 888 S.W.2d 356, 358-60 (Mo. App. S.D. 1994) (Version of persistent offender statute in effect on dates of DWI offense for which defendant was tried was applicable). The section has been amended more than once since the date of the offense, September 3, 2006.

16-1985) and Thayer (DWI on 2-8-1991, and BAC on 2-13-1998), and that he was also "convicted" in the circuit courts of the counties of Cole (DWI on 5-18-1991) and Howell (BAC on 3-7-1985, and DWI on 5-11-1987, and 9-10-1992) (LF 8).

At the trial, the State introduced into evidence, without objection, State's Exhibit No. 1, which was a copy of Appellant's "driving history" (Tr. 13). That exhibit is a certified copy of Appellant's Missouri Driver Record prepared by the custodian of records of the DOR (State's Exhibit No. 1) (see Appendix). Pages 6 through 9 of that exhibit showed the following regarding the offenses alleged in the information: (1) "Excess Blood Alcohol Content", "Convicted on 3-07-1985 in HOWELL CO by CIRCUIT court" (pg. 9); (2) DWI, "Convicted on 12-16-1985 in WILLOW SP by MUNICIPAL court" (pg. 9); (3) DWI, "Convicted on 5-11-1987 in HOWELL CO by CIRCUIT court" (pg. 8); (4) DWI, "Convicted on 2-08-1991 in THAYER by MUNICIPAL court" (pg. 7); (5) DWI, "Convicted on 4-08-1992 in COLE by COLE CO CIR CRT – JEFERSON CTY" (pg. 7); (6) DWI, "Convicted on 9-10-1992 in HOWELL CO by CIRCUIT court" (pg. 7); and (7) "Excess Blood Alcohol Content", "Convicted on 2-13-1998 in OREGON by CIR CRT – MUN DIV – THAYER" (pg. 6).

After this evidence was adduced at trial, the trial court overruled Appellant's motion for judgment of acquittal at the close of the evidence and found Appellant guilty of DWI, as a "persistent offender" (Tr. 42, 45; LF 56-57). The prosecutor informed the court that Appellant was charged as a chronic offender, so the court replied, "It would be chronic" (Tr. 45).

On December 2, 2008, the court sentenced Appellant as a chronic DWI offender to a five-year prison sentence concurrent with a one-year sentence for driving while suspended (Tr. 58; LF 67-71).

Preservation:

Appellant had no objection to the admission of the Department of Revenue (DOR) records contained in State's Exhibit No. 1 (Tr. 13). But Appellant does not contest that certified copies of DOR records are admissible. Such records are admissible as evidence in all court of this state under ***§ 302.312***. ***State v. Miller***, 153 S.W.3d 333 (Mo. App. S.D. 2005). Instead, the question is whether such records in this case established beyond a reasonable doubt that Appellant had four or more intoxication-related traffic offenses," as defined in ***§ 577.023.1(2)(a)***, in order for him to be classified as a chronic DWI offender, ***§ 577.023.5***?

After the evidence was adduced at trial, Appellant moved for judgment of acquittal at the close of the evidence, which was denied by the trial court before finding Appellant guilty of DWI as a chronic offender (Tr. 42, 45; LF 56-57). Because the point on appeal does not concern the admissibility of the DOR records, rather, it is a challenge to the sufficiency of the evidence to support the finding and his sentence as a chronic DWI offender, this issue is properly preserved for review. *See*, ***State v. Craig***, 287 S.W.3d 676, 681 (Mo. banc 2009); ***Miller***, 153 S.W.3d at 336. *Also see*, ***State v. Coomer***, 888 S.W.2d 356, 357-358 (Mo. App. S.D. 1994) (defendant may later challenge sufficiency of evidence to support finding that he is persistent offender without having raised issue by

objection when finding was made and without objecting to exhibit concerning prior conviction).

Standard of Review:

It is the State's burden to prove prior intoxication-related traffic offenses beyond a reasonable doubt. ***Craig***, 287 S.W.3d at 681; ***§ 577.023.7(2)***. In reviewing a challenge to the sufficiency of the evidence to support the alleged priors in a court-tried case, the sufficiency of the evidence is determined by the same standard as in a jury-tried case. ***Miller***, 153 S.W.3d at 336; ***Craig***, 287 S.W.3d at 681. "Statutory interpretation, however, is a question of law which this Court review *de novo*." ***Miller***, 153 S.W.3d at 336. ***Craig***, 287 S.W.3d at 680.

Respondent in its brief in the Southern District asserted that the issue was not properly preserved for appeal because, aside from the challenge to the sufficiency of the evidence, there was no objection to the trial court's finding that Appellant was a chronic offender, not was the issue raised in the motion for new trial (Resp. Br. at 11). It this court agrees, Appellant requests plain error review. ***Rule 30.20***.

Where a defendant's sentence has been improperly enhanced as a result of prior offenses, his right to due process has been violated, and the result is a manifest injustice. ***State v. Dixon***, 24 S.W.3d 247, 250 (Mo. App. E.D. 2000). In ***Severe***, this Court held that "[b]eing sentenced to a punishment greater than the maximum sentence for an offense constitutes plain error resulting in manifest injustice." 307 S.W.3d at 642. Thus, if this Court holds that the issue was not

properly preserved by Appellant motion for judgment of acquittal at the close of the evidence, this Court should do as it did in ***Severe*** and grant plain error review and remand the case for resentencing.

The error:

As noted above, the State of Missouri (Respondent) in the Southern District conceded that there was error in this case – although not on all ground raised in Appellant's argument. Respondent agrees that the record was insufficient to prove that Appellant was represented by counsel or had waived counsel in each of his prior intoxication-related traffic offenses (Resp. Br. at 10-11). Respondent agrees that "[t]he evidence presented by the State was silent as to whether Appellant was represented by counsel or had knowingly waived counsel when he was convicted in each of his eight prior DWI and BAC cases" (Resp. Br. at 11). "[A] prior conviction does not qualify as an 'intoxication-related traffic offense' unless the defendant was represented by or waived the right to counsel. § 577.023.1(3). Because the State's proof was inadequate on this point, a remand for resentencing is appropriate." (Resp. Br. at 11).

The trial court sentenced Appellant as a chronic offender and enhanced his punishment from a class B misdemeanor to a class B felony based solely upon the DOR records. The trial court plainly erred in doing so because the State failed to plead and prove "all essential facts" showing that Appellant had pleaded guilty to or had been found guilty of four or more intoxication-related traffic offenses. The DOR records fail to show whether Appellant "pleaded guilty to" or had "been

found guilty of" any of the priors or that he was represented by or waived the right to an attorney in writing, as required by ***§ 577.023***.

Appellant was charged by information with DWI, ***§ 577.010***. The maximum sentence that he could receive for that offense was six months in jail, ***§ 577.010.2***, unless it is found beyond a reasonable doubt that he has committed additional intoxication-related traffic offenses, ***§ 577.023.5***. For instance, a person who is found guilty of DWI and who is alleged and proved to be a chronic DWI offender is guilty of a class B felony, ***§ 577.023.5***.

A "chronic offender" includes "a person who has pleaded guilty to or has been found guilty of four or more intoxication-related traffic offenses." ***§ 577.023.1(2)(a)***. As relevant here, an "intoxication-related traffic offense is "driving while intoxicated, driving with excessive blood alcohol content … 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." ***§ 577.023.1(3)***.

A chronic offender finding requires the following: (1) the information must plead all essential facts warranting such a finding, ***§ 577.023.7(1)***;[6] (2) evidence

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[6] The statute's terms in this subsection refer only to "prior offender or persistent offender," but the rest of the statute makes it clear that is an inadvertent omission and also applies to aggravated and chronic offenders. E.g., "Evidence is introduced that establishes *sufficient facts pleaded* to warrant a finding beyond a

must establish "sufficient facts pleaded" to warrant such a finding beyond a reasonable doubt, ***§ 577.023.7(2)***; (3) the trial court has to make findings of fact that warrant such a finding beyond a reasonable doubt, ***§ 577.023.7(3)***; and, (4) in a court-trial, although the court can defer the proof and findings of such facts to after the trial, it still must be done prior to sentencing, ***§ 577.023.9***.

These procedures were not followed in this case, and therefore the trial court erroneously entered a judgment and sentence as a chronic offender and sentenced Appellant to a sentence that was more excessive than that allowed by law.

First, the information failed to plead "all essential facts" concerning the alleged priors, ***§ 577.023.7(1)***. In pertinent part, an "intoxication-related traffic offense" is driving while intoxicated, or driving with excessive blood alcohol content, 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." ***§ 577.023.1(3)***. Thus, an "essential fact" was that Appellant was represented by or waived the right to an attorney in writing. Yet, this "essential fact" was not pled in the information as to any of the alleged priors, contrary to ***§ 577.023.7(1)***. *See* ***MACH-CR 31.02*** (DWI) and ***MACH-CR 31.04*** (BAC), where the 2nd paragraph on the approved charges

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reasonable doubt the defendant is a prior offender, persistent offender, *aggravated offender, or chronic offender*…"***§ 577.023.7(2)*** (emphasis added).

provides, "[*Identify the particular court and jurisdiction; and the defendant was represented by an attorney or waived counsel in writing*.]" A*lso see*, ***State v. Girdley***, 957 S.W.2d 520, 524 (Mo. App. S.D. 1997) (State admitted that the record failed to prove that Appellant's two municipal court convictions for DWI were before a judge who was an attorney and that the defendant was represented by an attorney or waived in writing his right to counsel as required under former a former version of ***§ 577.023***). *Cf.* ***State v. Cooper***, 16 S.W.3d 680, 682 (Mo. App. E.D. 2000) (under ***§ 558.021*** the state must prove that the defendant was represented by counsel or waived this right at the prior proceedings).

In ***State v. Miller***, 427 S.W.2d 506 (Mo. 1968), the information was defective because it failed to allege Miller's commitment or its equivalent as required under the Second Offender Act, §556.280, RSMo 1959. The State alleged that on February 27, 1956, Miller had been convicted in the Circuit Court for the County of Genesee, State of Michigan of larceny, and had been duly sentenced to imprisonment in the State Prison of Southern Michigan, at Jackson, Michigan, for a term of two to four years. ***Id***. at 506-507.

This Court held that the information failed to invoke the Second Offender Act because the State failed to plead that Miller had been "subsequently placed on probation, paroled, fined or imprisoned on said sentence." ***Id***. at 507. This Court explained that it had recently held that the Second Offender Act was highly penal and had to be strictly construed. ***Id***. "Both the prior conviction and subsequent probation, parole, fine or imprisonment therefore must be pleaded and proved. ***Id***.

Although the holding in ***Miller*** applies to a former requirement to plead and prove commitment or its equivalent as required under the former Second Offender Act, its reasoning would apply to the requirement that in order to qualify as a intoxication-related traffic offense, it must be pled and proved that during the prior offense "the defendant was represented by or waived the right to an attorney in writing." ***§ 577.023.1(3)***.

Second, the DOR records failed to establish "sufficient facts pleaded to warrant a finding beyond a reasonable doubt" that Appellant was a chronic offender, ***§ 577.023.7(2)***. A "chronic offender" is "a person who has *pleaded guilty to or has been found guilty of* four or more intoxication-related traffic offenses." ***§ 577.023.1(2)(a)***. The records do not reflect either that Appellant "pleaded guilty to" or had "been found guilty of" any of the alleged priors. The DOR records merely alleged that Appellant had been "Convicted on [alleged date] in [alleged jurisdiction] of either "EXCESS BLOOD ALCOHOL CONTENT" or "DRIVING WHILE INTOXICATED." While the jurisdictions and offenses alleged fell within the definition of "intoxication-related traffic offense," ***§ 577.023.1(3)***, none of the priors specified whether there had either been a guilty plea to or finding of guilty of the alleged offenses.

It is unknown as to how DOR determined that the defendant had been "convicted," or just exactly what DOR means by the term "convicted," which is important especially municipal offenses because this Court in ***State v. Turner***, 245

S.W.3d 826, 829 (Mo. banc 2008), held that "prior municipal offenses resulting in an SIS cannot be used to enhance punishment under § 577.023."

Thus, the DOR records failed to establish "sufficient facts pleaded to warrant a finding beyond a reasonable doubt" that Appellant was a chronic offender, ***§ 577.023.7(2)***. For instance, in ***Craig***, *supra*, the State charged that the defendant was an aggravated DWI offender. The State introduced three certified judgments in an attempt to prove that allegation. 287 S.W.3d at 680. Two of the exhibits showed beyond a reasonable doubt that intoxication-related traffic offenses were valid judgments since on their face they contained specific language that the defendant had plead guilty to DWI and BAC. ***Id***. at 682. But this Court held that the third judgment form that purported to show that defendant pled guilty to a prior DWI offense used to enhance punishment was facially deficient, and thus, could not be used to enhance a DWI conviction because the form was blank in the space to mark whether defendant pled guilty or not guilty, and blank in the space to mark whether he was found guilty or not guilty. ***Id***. This was so even though the records showed that the defendant had received a suspended imposition of sentence and had subsequently completed probation. ***Id***. As a result of the failure of the exhibit to indicate a finding of guilty or plea of guilty as required by the plain language of ***§ 577.023***, the defendant's judgment was vacated and the case remanded to sentence the defendant as a persistent DWI offender (which requires only two priors) instead of an aggravated DWI offender. ***Id***.

Third, the records did not establish the "essential facts" that Appellant was "represented by or waived the right to an attorney in writing." ***§ 577.023.1(3)***. As noted above, the State has conceded that the evidence presented by the State was silent as to whether Appellant was represented by counsel or had knowingly waived counsel on his prior offenses, and thus the prior offenses did not qualify as "intoxication-related traffic offenses, entitling Appellant to a remand for resentencing (Resp. Br. at 11).

Thus, the trial court erred in finding Appellant to be a chronic offender under ***§ 577.023*** and in enhancing his punishment from a class A misdemeanor to a class B felony.

The remedy:

On December 22, 2009, the Southern District in this case found, and the state conceded, that it was plain error for the trial court to sentence Appellant as a chronic DWI offender because the state agreed that it had completely failed to prove that Appellant was represented by counsel or waived such representation in writing for each of Appellant's prior convictions used to enhance Appellant's punishment. ***State v. Collins***, No. SD29516 (December 22, 2009).

The only issue remaining was the remedy. The Southern District, rejecting Appellant's argument regarding the remedy, ordered that the case was to be remanded to the trial court "with instructions to allow the State to present evidence or take any other actions related to Defendant's prior intoxication- related traffic offenses under § 577.023, as otherwise allowed or provided by law to be taken

prior to sentencing, and then to resentence Defendant accordingly." ***Id***., slip op. at 8.

In Appellant's first transfer application filed with this Court he argued that the Southern District's opinion was contrary to this Court's opinion in ***Craig***, 287 *supra*, and that the case involved a question of general interest or importance. On March 2, 2010, this Court granted Appellant's application for transfer, and ordered the case retransferred to the Southern District "for reconsideration in light of ***State v. Severe***, SC89948, decided January 12, 2010."

The Southern District's new opinion after remand did not change its prior conclusion even after reconsideration in light of ***Severe***. It again held that the state will be allowed "to present evidence or take any other actions related to Defendant's prior intoxication-related traffic offenses under section 577.023, as otherwise allowed or provided by law to the take prior to sentence, and then to resentence Defendant accordingly." ***State v. Collins***, No. SD29516, slip op. at 8-9 (March 29, 2010).

This remedy is contrary to this Court's opinion in ***Craig***, 287 S.W.3d at 682. The Southern District's opinion acknowledged ***Craig*** but attempted to distinguish it. ***Collins***, slip op. at 7. The Southern District wrote that "the issue of whether the state was allowed to present additional evidence upon remand was not addressed by the Court." ***Id***., citing ***Craig***, 287 S.W.3d at 682. But a close reading of ***Craig*** reveals that such is precluded by this Court's remedy in that case. There, this Court held that the state failed to prove three prior intoxication-related

traffic offenses and only proved two prior intoxication-related traffic offenses beyond any reasonable doubt and thus Craig's sentence was only subject to enhancement as a persistent offender. ***Id***. This Court's remedy for such violation was: "The judgment is vacated, and this case is remanded to resentence Craig as a persistent offender." ***Id***.

This remedy in effect precluded the state from presenting additional evidence to show that Craig had three prior offenses as originally found by the trial court since the remedy required that the trial court resentence Craig as a persistent offender and not an aggravated DWI offender, as had been originally charged and found in that case. Thus, the Southern District's suggested remedy in Appellant's case is contrary to this Court's opinion in ***Craig***.

The Southern District also attempted to distinguish ***Craig*** by noting that the issue in ***Craig*** was properly preserved. ***Collins***, slip op. at 7. But that only affects the standard of review and not the remedy after the appellate court finds a manifest injustice. Once a violation is found, the remedy in both cases once should be the same regardless of what the standard of review was.

While discussing plain error review, the Southern District also argued that the State was denied the opportunity to present any additional evidence to cure such deficiency. But that argument was rejected by this Court in ***Severe***, *supra*.

In ***Severe***, the defendant was convicted after a jury trial of DWI. 307 S.W.3d at 640-641. Before submitting the case to the jury, the trial court found Severe to be a persistent DWI offender; one of the priors was a municipal DWI

guilty plea that resulted in a suspended imposition of sentence. ***Id***. The existing Missouri case law at that time allowed consideration of such a prior. ***Id***. While the case was on appeal, however, this Court in ***Turner***, *supra*, held that prior municipal offenses resulting in an SIS cannot be used to enhance punishment under § 577.023. Thus, one of Severe's alleged and proven prior DWI's could *not* be used to enhance punishment, resulting in plain error. ***Severe***, 307 S.W.3d at 640-641.

The question presented in ***Severe*** was whether, on remand of Severe's conviction to the trial court, the state could offer additional evidence that was not presented before the original trial. ***Id***. at 641. This Court ruled that the state could not offer such additional evidence: "Because of the timing requirement of the statute – which requires the trial court to determine persistent offender status before the case is submitted to the jury- there is no opportunity for the state to have a twice-bitten apple." ***Id***. <u>This Court noted that if the state had additional evidence, then it should have offered it to the trial court before the case was submitted to the jury, as required.</u> ***Id***. at 643. The state asked for an exception to the "rule prohibiting further evidence of prior offenses on remand in cases where the prosecutor presented evidence that was sufficient to prove the prior offenses at the time of trial but that subsequently are declared to be insufficient by a supposedly new interpretation of the law." ***Id***. at 645. This Court rejected the exception finding that such an exception would "give the state 'two bites at the apple' when the statute allows only one bite." ***Id***.

Thus, ***Severe*** makes clear that the state had notice by the statute that it should present everything it had available to prove the prior intoxicated-related offenses and that the failure to do so falls upon the state.

The Southern District opinion is also in error when it holds that ***§577.023.9*** allows the presentation of evidence at re-sentencing. ***Collins***, slip op. at 6, 8. That subsection provides, "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***." ***§ 577.023.9*** (emphasis added). But sentencing is over. A re-sentencing was ordered but it is too late to have such facts be proven "prior to sentencing," which has already occurred.

This Court's opinion in ***Severe*** supports Appellant's position because in essence the Southern District opinion gave the state two bites at the apple even though the state already failed to prove the prior convictions prior to sentencing contrary to ***§ 577.023.9***, which provides that in a court-tried case the state has to prove "prior to sentencing" that Appellant was a chronic DWI offender. That subsection provides, "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***." ***§ 577.023.9*** (emphasis added). But it is too late to have such facts be proven "prior to sentencing," which has already occurred, as required by ***§ 577.023.9***. As this Court held in ***Severe***, "there is no opportunity for the state to have a twice-bitten apple." 307 S.W.3d at 641. The state already took a bite out

of the apple prior to original sentencing, as required by ***§ 577.023.9***; it should not now be allowed a second bite after sentencing has already occurred once.

Contrary to the Southern District's opinion and Respondent's argument about the remedy, the difference between a jury-tried and a court-tried case should not change the remedy once the appellate court has been determined that a manifest injustice has occurred because the state failed in its burden of proving the requisite prior DWI offenses. In a jury trial, the priors have to be proven before the case is submitted to the jury, whereas in a court-tried case the state is given until "prior to sentencing." But neither subsections of the statute allow the state to present additional proof not only *after* sentencing but also after an appeal has been filed and decided against the state.

The Southern District opinion also continued to erroneously cite to ***State v. Cobb***, 875 S.W.2d 533 (Mo. banc 1994. ***Collins***, slip op. at 6. But in ***Severe***, this Court held that "***Cobb*** did not involve the statutory timing issues that are dispositive in this case, and there was no discussion of them in the opinion." ***Severe***, 307 S.W.3d at 644. Thus, the Southern District continued reliance upon ***Cobb*** is misplaced.

Similarly, the Southern District's opinion also erroneously cited to ***Girdley***, *supra*, ***State v. Monroe***, 18 S.W.3d 455, 459 (Mo. App. S.D. 2000), and ***State v. Anders***, 975 S.W.2d 462, 467 (Mo. App. W.D. 1998), to support its suggested remedy. ***Collins***, slip op. at 5-6. But both ***Girdley*** and ***Monroe*** relied upon ***Cobb***, and as noted by this Court in ***Severe*** that reliance was misplaced since "***Cobb*** did

not involve the statutory timing issues that are dispositive in this case, and there was no discussion of them in the opinion." ***Severe***, 307 S.W.3d at 644. And ***Anders*** is inapplicable because in that case the state *did* prove up the prior convictions before sentencing, but the defendant argued that the priors should have been proven up before submission to the court even though the statute specifically allowed the court to do after submission as long as it was done prior to sentencing in a court-tried case.

The remedy is clear by this Court's opinions in ***Craig,*** *supra*, and ***Severe***, *supra*. Without any of the priors being properly pled and found beyond a reasonable doubt, Appellant's judgment must be vacated and the case remanded for the trial court to sentence Appellant for DWI as a class B misdemeanor under ***§ 577.010.2***.

CONCLUSION

For the reasons presented, this Court must vacate Appellant's judgment and remand the case to the trial court to sentence Appellant for DWI as a class B misdemeanor under ***§ 577.010.2***.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Craig A. Johnston, hereby certify to the following. The attached substitute brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, 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 6,532 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using Symantec Endpoint Protection, which was updated on July 13, 2010. 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 substitute brief and a floppy disk containing a copy of this brief were hand-delivered this _____ day of July, 2010, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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