

**IN THE
SUPREME COURT OF MISSOURI**

No. SC83880

STATE OF MISSOURI,

Respondent,

v.

JOHN ROWE,

Appellant.

**APPEAL FROM THE CIRCUIT COURT OF CLARK COUNTY, MISSOURI, FIRST
JUDICIAL CIRCUIT
THE HONORABLE GARY DIAL, JUDGE**

RESPONDENT'S SUBSTITUTE BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661**

**Post Office Box 899
Jefferson City, Missouri 65102-0899
(573) 751-3321**

**ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... 3
JURISDICTIONAL STATEMENT 6
STATEMENT OF FACTS 7
POINT RELIED ON..... 10
ARGUMENT..... 11
 Standard of Review 12
 Statutes Relating To Appellant’s Conviction And To Nonresident Motorists 12
 Statutes Must Be Construed To Achieve Legislative Intent 14
 Appellant’s Missouri Driving Privilege Was Revoked Under The Laws of This State 15
 Appellant’s Construction Effectively Limits Prosecutions To Missouri Residents..... 17
 Statutory History And Case Law Supports Appellant’s Conviction Under § 302.321 19
 The Record Supports Appellant’s Conviction For Driving While Revoked.... 22
CONCLUSION..... 24
CERTIFICATE OF SERVICE AND COMPLIANCE..... 25

APPENDIX

Appellant's Redacted Iowa Driving Record (State's Exhibit 3).....A1

TABLE OF AUTHORITIES

Cases

Error! No table of authorities entries found.

Constitutions, Statutes, and Rules

Error! No table of authorities entries found.

JURISDICTIONAL STATEMENT

This appeal is from Appellant's conviction of the Class D felony of driving while revoked in violation of § 302.321, RSMo 2000. Appellant was convicted in the Circuit Court of Clark County and sentenced to three years in prison and a \$1000 fine. Following an opinion of the Missouri Court of Appeals, Eastern District, affirming Appellant's conviction, this Court ordered this appeal transferred to it. Therefore, jurisdiction lies in this Court. MO. CONST. art. V, § 10; Rule 83.04.

STATEMENT OF FACTS

This appeal involves Appellant's felony conviction for driving while revoked in violation of § 302.321, RSMo 2000. The issue here is whether Appellant, an Iowa resident who did not hold a valid driver's license from Missouri or any other state, was properly convicted on evidence that he drove in Missouri knowing that his Iowa license had been suspended or revoked.

On October 18, 1999, the State filed an information in Clark County Circuit Court charging Appellant with one count of the Class D felony of driving while revoked in violation of § 302.321, RSMo 2000 (L.F. 1, 6-7). Although driving while revoked is normally a misdemeanor charge, Appellant was charged with a felony because he had already been convicted in Iowa twice for driving with a suspended license and once for DWI (L.F. 27-28). Appellant was tried before a jury, with the Honorable Gary Dial presiding, convicted, and sentenced to three years imprisonment and a \$1000 fine (L.F. 3-4; Tr. 167; Sentencing Tr. 8-9). Appellant challenges the sufficiency of the evidence to support the conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed the following:

On October 2, 1999, several law enforcement officers were operating a checkpoint in Clark County at the intersection of Highways 61 and 136, approximately one mile south of Wayland Missouri (Tr. 106-07, 125, 131). Clark County Deputy Sheriff Rick Davis saw Appellant pull his vehicle off the road and onto the shoulder near the checkpoint (Tr. 110). Appellant then exited the vehicle from the driver's door and walked around the car and re-

entered the car through the passenger's side door (Tr. 110-12, 114). Appellant's wife was also in the car (Tr. 127). Deputy Davis then radioed to the other officers that he had spotted a vehicle stopped on the shoulder that was switching drivers (Tr. 111, 128, 132-33). The other officers, Deputy Brian Lewis and Officer Gary Grubb, then pulled in behind Appellant's vehicle and approached it (Tr. 111-12, 126, 133-34).

As Deputy Lewis and Officer Grubb approached the vehicle they could see Appellant sitting in the passenger seat and his wife was sitting in the driver's seat (Tr. 126-27, 134). Deputy Lewis asked Appellant for his driver's license or identification, but Appellant told him that he did not have any (Tr. 135-35). Deputy Lewis then asked Appellant why he had switched positions in the car and Appellant responded that he had switched places because he did not have a driver's license (Tr. 135-36).

During trial, the state offered into evidence State's Exhibit 3, which showed that Appellant was barred from having an Iowa's driver's license as an habitual offender, that his Iowa license had been indefinitely suspended for nonpayment of fines, and that his Iowa license had been revoked for driving with a suspended, denied, canceled, or revoked license (Tr. 17-20, 82-84; Exhibit 3). The certified copy of Appellant's Iowa driving record had earlier been marked at trial as State's Exhibit 4, but was remarked as State's Exhibit 3 when the prosecutor re-offered the exhibit after redacting entries on the driving record relating to Appellant's prior convictions (Tr. 20, 82-84). A copy of Appellant's Iowa Driving Record is contained in the Appendix. The prosecutor also offered into evidence certified copies of Appellant's Iowa convictions for driving (operating) while intoxicated and for driving while

suspended or revoked (Tr. 16, 20). Appellant presented no evidence at trial (Tr. 146-47).

The jury found Appellant guilty of driving while revoked and recommended a sentence of three years in prison and a fine to be determined by the court (Tr. 167). The trial court later sentenced Appellant to three years in prison and imposed a \$1000 fine (Sentencing Tr. 8-9). The trial court overruled Appellant's motions for judgment of acquittal and for a new trial (L.F. 52-58; Sentencing Tr. 4-5). Appellant appealed his conviction to the Missouri Court of Appeals, Eastern District, which issued an opinion affirming Appellant's conviction. Appellant then filed a motion to transfer this case to this Court, which was sustained.

POINT RELIED ON

The trial court properly overruled Appellant’s motion for judgment of acquittal because reasonable jurors could infer from the evidence that Appellant committed the crime of driving while revoked in violation of § 302.321, RSMo 2000, and, specifically, that his Missouri driving privilege had been canceled or revoked “under the laws of this state” in that: (1) Appellant, an Iowa resident, operated a vehicle on a Missouri highway knowing that his Iowa driver’s license had been canceled or revoked, and; (2) that Appellant’s privilege to drive in Missouri, statutorily granted to him by virtue of his having had a valid Iowa driver’s license, was automatically canceled or revoked by operation of Missouri law after Iowa canceled or revoked Appellant’s Iowa driver’s license.

State v. Bray, 774 S.W.2d 555 (Mo. App. W.D. 1989);

Robinson v. Director of Revenue, 32 S.W.3d 148 (Mo. App. S.D. 2000);

State v. Knapp, 843 S.W.2d 345 (Mo. banc 1992);

State v. Kozlowski, 692 P.2d 316 (Ariz. Ct. App. 1984);

Section 302.321, RSMo 2000;

Section 302.080(2), RSMo 2000;

Section 302.600, RSMo 2000.

ARGUMENT

The trial court properly overruled Appellant’s motion for judgment of acquittal because reasonable jurors could infer from the evidence that Appellant committed the crime of driving while revoked in violation of § 302.321, RSMo 2000, and, specifically, that his Missouri driving privilege had been canceled or revoked “under the laws of this state” in that: (1) Appellant, an Iowa resident, operated a vehicle on a Missouri highway knowing that his Iowa driver’s license had been canceled or revoked, and; (2) that Appellant’s privilege to drive in Missouri, statutorily granted to him by virtue of his having had a valid Iowa driver’s license, was automatically canceled or revoked by operation of Missouri law after Iowa canceled or revoked Appellant’s Iowa driver’s license.

Although Appellant contends that the issue in this case is whether the State presented sufficient evidence to support his conviction, the real issue involves the construction of § 302.321. More precisely, the issue is whether Appellant’s privilege to drive in Missouri had been canceled, suspended, or revoked “under the laws of this state” when Iowa, Appellant’s state of residence, had canceled, suspended, or revoked his Iowa license. Because Appellant’s privilege to drive in Missouri was automatically canceled, suspended, or revoked under Missouri law as a result of the action Iowa took against his Iowa driver’s license, Appellant was properly convicted of driving while revoked.

Standard of Review

In reviewing claims challenging the sufficiency of the evidence, this Court accepts as true all evidence favorable to the state, including all favorable inferences drawn from that evidence and disregards all evidence and inferences to the contrary. *State v. Clay*, 975 S.W.2d 121, 139 (Mo. banc 1998), *cert. denied* 525 U.S. 1085 (1999). Appellate review is limited to determining whether the record contains sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *Id.*

Statutes Relating To Appellant's Conviction And To Nonresident Motorists

Appellant was convicted of driving while revoked in violation of § 302.321, which provides:

A person commits the crime of driving while revoked if he operates a motor vehicle on a highway when his license or driving privilege has been canceled, suspended or revoked under the laws of this state and acts with criminal negligence with respect to the fact that his driving privilege has been canceled, suspended or revoked.

Section 302.321.1. A 1999 amendment to this section, applicable to Appellant's case, made driving while revoked a Class D felony upon a third or subsequent conviction for that offense if the defendant had a "prior alcohol-related enforcement contact." 1999 Mo. Laws 929.

A "license" under Chapter 302 is defined as a "license issued by a state to a person which authorizes a person to operate a motor vehicle." Section 302.010(8), RSMo 2000. Thus, the license referred to in § 302.321 need not be a Missouri license. Finally, any

“nonresident who is at least sixteen years of age and who has in his immediate possession a valid license issued to him in his home state or country” is exempt from obtaining a Missouri driver’s license. Section 302.080(2), RSMo 2000. Consequently, any nonresident with a valid driver’s license issued by that person’s home state or country automatically has a privilege to drive in Missouri.

Moreover, Missouri participates in the “Driver’s License Compact,” which it has entered into with the other states, including Iowa, Appellant’s home state. Section 302.600, RSMo 2000; Iowa Code § 321C.1(2001). The compact expressly provides for the reciprocal recognition of driving privileges among the residents of the participating states:

It is the policy of the each of the party states to:

(2) Make the reciprocal recognition of licenses to drive and eligibility therefor more just and equitable by considering the overall compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance or issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party states.

Section 302.600, art. I(b)(2), RSMo 2000. Under Article III, the compact requires the states to report convictions related to the operation of motor vehicles to the licensing authority of the convicted licensee’s home state. Section 302.600, art. III.

The interrelationship between the states involving license actions is also seen under Article IV. This article requires the licensee’s home state to give the same effect to a conviction occurring in another state as it would if the conviction had occurred in the

licensee's home state. Section 302.600, art. IV.

Finally, the compact's Article V reveals the reciprocal nature among the states of the privilege to drive and of actions to suspend or revoke driver's licenses. Under this article, each state's licensing authority must determine if a license applicant has ever held, or is the holder of, a license in any other state. Section 302.600, art. V. An applicant may not be issued a license if that person has a license issued by another state that is currently suspended or revoked. Section 302.600, art. V(1) and (2). In addition, no state may issue a driver's license until the applicant surrenders any license that he or she may hold from another state. Section 302.600, art. V(3).

Statutes Must Be Construed To Achieve Legislative Intent

The resolution of this case turns on the construction of § 302.321, specifically the phrase "under the laws of this state." 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); *State v. Kraus*, 530 S.W.2d 684, 685 (Mo. banc 1975). In determining legislative intent, courts should give consideration to statutes involving similar or related subjects when those statutes shed light on the meaning of the statute being construed. *State v. Knapp*, 843 S.W.2d at 347; *State v. White*, 622 S.W.2d 939, 944 (Mo. banc 1981), *cert. denied* 456 U.S. 963 (1981). Although ambiguities in criminal statutes must be construed against the State, this rule of strict construction does not require that the court ignore either common sense or evident

statutory purpose. *State v. Knapp*, 843 S.W.2d at 347; *State v. Hobokin*, 768 S.W.2d 76, 77 (Mo. banc 1989). Courts look beyond the plain and ordinary meaning of the statute when its meaning is ambiguous or will lead to an illogical result which defeats the intent of the legislature. *State v. Goddard*, 34 S.W.3d 436, 438 (Mo. App. W.D. 2000).

Appellant gratuitously concedes that he did not have a valid license when he was stopped in Missouri and, therefore, he violated § 302.020, RSMo 2000, which makes it a misdemeanor to operate a vehicle without a license (Appellant's Brief, p. 10). But Appellant was also guilty of a felony violation of § 302.321, because he operated a vehicle in Missouri knowing that his Iowa license had been canceled or revoked and because he had previous Iowa convictions for DWI and for driving with a suspended or revoked license.

Appellant's Missouri Driving Privilege Was Revoked Under The Laws of This State

Appellant's sole argument on appeal is that he was improperly convicted of violating § 302.321 because his driving privilege was not "canceled, suspended or revoked under the laws of this state." Implicit in Appellant's argument is that the Director of Revenue must take some type of affirmative action to cancel, suspend, or revoke a nonresident's driving privilege before that person can be prosecuted under § 302.321. Otherwise, Appellant argues, the State cannot prove that the nonresident's driving privilege was canceled, suspended, or revoked "under the laws of this state."

But Appellant ignores the fact that his privilege to drive in Missouri was automatically canceled, suspended, or revoked by operation of law when Iowa took its action to cancel or revoke his Iowa driver's license. Before Iowa took its action, Appellant

had a valid Iowa license which exempted him from obtaining a Missouri license and gave him a privilege to drive in this state under both § 302.080(2) and the Driver's License Compact. Appellant did not have to apply to the Director of Revenue for the privilege to drive in Missouri and the Director was not required to take any affirmative action to permit Appellant to drive in this state. Appellant's privilege to drive in Missouri was automatic and provided for by operation of Missouri law.

But after Iowa canceled, suspended, or revoked Appellant's Iowa driver's license, his privilege to drive in Missouri, granted under the nonresident exemption, was automatically, and by operation of law, suspended, revoked, or canceled. Consequently, Appellant's Missouri driving privilege was canceled, suspended, or revoked "under the laws of this state." Just as the State, through the Director of Revenue, was not required to take any affirmative action to permit Appellant to drive in this state when he held a valid Iowa license, neither was the Director required to take any affirmative action to cancel, suspend, or revoke Appellant's Missouri driving privilege after Iowa canceled or revoked his Iowa driver's license.

Appellant argues that his license was canceled or revoked only under the laws of Iowa. This is true to the extent that Iowa canceled or revoked Appellant's Iowa driver's license. But Iowa has no authority to cancel or revoke Appellant's Missouri driving privilege. Appellant's privilege to drive in Missouri was canceled or revoked by operation of Missouri law, or, in other words, "under the laws of this state," when Iowa took its action against Appellant's Iowa driver's license.

Appellant's Construction Effectively Limits Prosecutions To Missouri Residents

By its plain language, § 302.321 applies to any person, resident or nonresident, who has knowledge that his or her driver's license is canceled, suspended, or revoked in the their home state and who then operates a motor vehicle in Missouri. Appellant's construction of § 302.321 would limit prosecutions under that section to only those persons with a privilege to drive in Missouri, or to those actually holding a Missouri driver's license, whose license or privilege had been canceled, suspended, or revoked by direct action of the Director or Revenue. In other words, Appellant's construction of the law would prevent prosecutions against any nonresident whose driver's license had been canceled, suspended, or revoked in their home state, but whose Missouri driving privilege had not been affirmatively or directly canceled, suspended, or revoked by the Director of Revenue.

Again, under Missouri law, nonresidents holding valid driver's licenses issued by their home state automatically have a privilege to drive in Missouri. Under Appellant's construction of the law, the Director would have to take action against the potential Missouri driving privilege of every person in the world, even those who never intended to drive in Missouri, whose driver's license had been canceled, suspended, or revoked by their home state or country before that person could be prosecuted for driving while revoked in Missouri.

The practical effect of Appellant's construction of the law would be to limit prosecutions under § 302.321 to only Missouri residents. Missouri would be a safe haven for nonresidents with previous convictions for DWI or for driving with a suspended or

revoked license, whose driver's license in their home state had been canceled, suspended, or revoked. At worst, they would be subject to a misdemeanor prosecution for driving without a license, while Missouri residents committing the same violation would be subject to felony prosecution for driving while revoked. Nothing in § 302.321 suggests that the General Assembly intended such disparate treatment for Missouri residents.

The obvious purpose behind the felony provisions of § 302.321 is to punish drunk drivers and others who repeatedly drive when their licenses or driving privileges have been canceled, suspended, or revoked. Appellant's construction of the law gives nonresident violators an advantage over Missouri residents, since the only action nonresidents would face would be a misdemeanor prosecution for driving without a license. This construction of the law thwarts the General Assembly's purpose and intent in passing this law, especially when one considers the 1999 amendment making certain violations of the law a Class D felony. Appellant's proposed interpretation is contrary to Missouri policy and to the harmonious construction of the statutes relating to nonresident motorists.

Appellant is simply incorrect when he asserts that he had no privilege to drive in Missouri that could be canceled, suspended, or revoked. Even though the compact prevented Missouri from issuing a driver's license to Appellant if he had applied for one, it certainly did not prevent Missouri from canceling, suspending, or revoking Appellant's privilege to drive in this state. See § 302.150, RSMo 2000; *Robinson v. Director of Revenue*, 32 S.W.3d 148, 150 (Mo. App. S.D. 2000) (holding that "Missouri driving privileges afforded nonresidents are subject to suspension on the same basis as those of

Missouri residents.”); *compare Lackey v. Lohman*, 914 S.W.2d 51, 52 (Mo. App. W.D. 1996) (holding that the Driver’s License Compact prevented the Director from issuing a Missouri driver’s license to any person whose out-of-state license was still under active suspension by the issuing state). Here, Appellant’s Missouri driving privilege was canceled, suspended, or revoked by operation of law, rather than affirmative action by the Director of Revenue.

Appellant’s argument that § 302.150 provides a mechanism to suspend or revoke the driving privileges for nonresidents is also misplaced. That section simply provides that the Director of Revenue may take action against a nonresident’s driving privilege in the same manner and for the same causes as she may take against a Missouri resident’s driver’s license or driving privilege. But § 302.321 is a criminal statute; it does not authorize the Director of Revenue to take any action whatsoever. Section 302.150 simply allows the Director of Revenue to suspend or revoke the Missouri driving privilege of any nonresident who, for example, drives with an excessive alcohol concentration, refuses a breath test, or accumulates a sufficient number of points.

Statutory History And Case Law Supports Appellant’s Conviction Under § 302.321

The intent of the legislature to prosecute residents and nonresidents alike under § 302.321 can be discerned from the statute’s history. Before the 1995 amendment giving us the current version § 302.321, under which Appellant was prosecuted, the statute read quite differently and provided, in pertinent part:

A person whose license and driving privilege as a resident or nonresident has been

canceled, suspended, or revoked under the provisions of sections 302.010 to 302.340, sections 302.500 to 302.540, section 544.046, RSMo, or under the provisions of Chapter 577, RSMo, and who drives any motor vehicle upon the highways of this state while such license and privilege is canceled, suspended or revoked and before an official reinstatement notice or termination notice is issued by the director is guilty of a Class A misdemeanor.

1989 Laws of Missouri 1187.

Under this previous version of the statute, the Director of Revenue was arguably required to directly cancel, suspend, or revoke the Missouri driving privilege or license before an individual could be prosecuted for driving while revoked. The language regarding the Director's issuance of reinstatement or termination notices is proof of that. The amended version of the law does not include any of this language. It simply prohibits driving in Missouri when a person knows that his or her license or driving privilege "has been canceled, suspended or revoked under the laws of this state." Appellant's privilege to drive in Missouri was canceled, suspended, or revoked under Missouri law when Iowa canceled or revoked Appellant's Iowa driver's license.

The State's construction of the law has support in Missouri case law. In *State v. Bray*, 774 S.W.2d 555 (Mo. App. W.D. 1989), the defendant's driving privilege had been revoked by the Director of Revenue and he was later convicted of driving while revoked in violation of § 302.321. *Id.* at 555-56 The defendant in *Bray* argued that he could not be prosecuted for driving while revoked in Missouri because he held a current Kansas driver's

license. *Id.* at 556. The court rejected this argument and held that the revocation of his Missouri driving privilege operated to revoke his Kansas driver's license to the extent that it conferred upon him an exemption under § 302.080 that he have a Missouri driver's license to drive in Missouri. *Id.*

This case represents the converse of the situation in *Bray*. Under the current version of § 302.321, a nonresident driver, whose license has been canceled, suspended, or revoked in that driver's home state, cannot avoid prosecution under § 302.321 by claiming that Missouri has taken no action against his Missouri driving privilege. When a nonresident's home state has canceled, suspended, or revoked his or her driver's license that action operates as a cancellation, suspension, or revocation of that driver's privilege to drive in Missouri granted under the exemption contained in § 302.080(2). In other words, that nonresident's driving privilege has, in effect, been "canceled, suspended or revoked under the laws of this state." This interpretation is consistent not only with the plain language of the statute, but also with the intent and purpose behind Missouri's participation in the Driver's License Compact.

Other states have allowed prosecutions for violations of statutes similar to § 302.321 when nonresident drivers have driven in those states after their home states had suspended or revoked their licenses. Although the statutes construed in those cases did not contain the phrase "under the laws of this state," the courts upheld the proposition that a nonresident driver may be prosecuted for driving while revoked or suspended based only on the fact that the driver's home state had suspended or revoked the nonresident's driver's

license.

State v. Kozlowski, 692 P.2d 316 (Ariz. Ct. App. 1984), involved an Arizona prosecution against a nonresident driver for driving while intoxicated when his driver's license was revoked. The state sought to prove that the defendant's driver's license was revoked by presenting evidence that the defendant's home state (Michigan) had revoked his license. The Arizona appellate court held that the trial court had improperly suppressed this evidence because the statutory definition of the word "license" included licenses issued by Arizona or any other state. *Id.* at 317. Missouri's definition of the word "license," under § 302.010(8), is equally as expansive. The court concluded that the statute prohibiting driving while intoxicated with a revoked license "applied to persons whose out-of-state licenses have been suspended, cancelled or revoke by the issuing state" *Id.* at 318. *See also State v. Marshall*, 845 P.2d 659 (Kan. 1993) (holding that the prosecution need not prove notice of mailing in a Kansas prosecution for driving while suspended against a nonresident motorist driving in Kansas while his Louisiana driver's license was under suspension.).

The Record Supports Appellant's Conviction For Driving While Revoked

Appellant does not dispute that the evidence before the jury showed that he drove in Missouri when his Iowa driving privilege was canceled or revoked. The certified copy of Appellant's Iowa Driving Record (State's Exhibit 3–Appendix, A1), which has an October 13, 1999, "run date," shows that Appellant was an Iowa resident. The jury could fairly infer from that driving record that Appellant's Iowa driver's license was indefinitely suspended

effective April 18, 1996, and again on May 7 1996, for nonpayment of Iowa fines.

Moreover, the driving record shows that Appellant was barred from having an Iowa driver's license from May 20, 1996, to May 20, 2002, because he was an habitual offender. In the words of § 302.321, this "bar" on receiving an Iowa driver's license is equivalent to the cancellation or revocation of that license.

The trial court properly overruled Appellant's motion for judgment of acquittal or for a new trial. Nonresident drivers who drive on Missouri roads with the knowledge that their driver's license or driving privilege issued by their home state has been canceled, suspended, or revoked may be prosecuted for driving while revoked under § 302.321.

CONCLUSION

The trial court did not commit reversible error in this case. Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief complies with the limitations contained in Rule 84.06 in that it contains 4578 words, excluding the cover, this certification and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

(3) That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, on November 5, 2001, to:

Emmett D. Queener
3402 Buttonwood
Columbia MO 65201-3742

EVAN J. BUCHHEIM
Assistant Attorney General
Missouri Bar No. 35661

Broadway State Office Building
Post Office Box 899
Jefferson City, Missouri 65102
(573) 751-3321

ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI