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## **Jurisdictional Statement**

Respondent hereby adopts the Jurisdictional Statement previously submitted by the Appellant.

## **Statement of Facts**

At approximately 9:55 p.m. on October 25, 2002, Officer William Crossen of the Versailles Police Department observed a blue Chevrolet pickup truck leaving a bowling alley in Versailles, Missouri (LF 20). As the truck exited the parking lot, Officer Crossen observed the truck accelerate so that the truck's rear tires lost traction and spun on the pavement (LF 20). As the truck approached the stop sign near the bowling alley, Officer Crossen again observed the truck accelerate so that the truck's rear tires lost traction and spun on the pavement (LF 20).

Officer Crossen returned to his patrol car to attempt to stop the truck, but lost sight of the truck (LF 20). As Officer Crossen approached Oak Street, he heard a vehicle accelerating from the north (LF 20). As Officer Crossen turned north, he observed the truck turn on its headlights and accelerate traveling south (LF 20). Officer Crossen turned his patrol car around and again attempted to stop the truck (LF 20). Officer Crossen observed the truck back out of and then pull back into the parking lot of the bowling alley (LF 20). At this time, Officer Crossen was finally able to

make contact with the driver. The narrative is silent as to whether or not the officer ever activated his emergency equipment or had to activate his emergency equipment when he finally made contact with the Respondent.

As Officer Crossen approached the truck, he observed the driver, Marcel Guhr, exit the truck and place two brown-colored objects in the bed of the truck (LF 20). Guhr began to walk away from the truck, at which point Officer Crossen instructed Guhr to return to the truck (LF 20). Guhr refused (LF 20). Officer Crossen again instructed Guhr to return to the truck, and again, Guhr refused (LF 20). Officer Crossen advised Guhr that he was under arrest, and instructed Guhr to return to the truck (LF 20). Guhr still refused (LF 20). Officer Crossen took Guhr's arm, walked Guhr back to the truck, and placed him in handcuffs (LF 16, 20).

After coming into contact with Guhr, Officer Crossen smelled an odor of alcohol coming from Guhr (LF 20). Officer Crossen asked Guhr how much alcohol Guhr drank that night, and Guhr replied he consumed two drinks (LF 20). After placing Guhr in the patrol car and calling Officer Yeager for assistance, Officer Crossen returned to the truck driven by Guhr and retrieved the two brown-colored items Guhr placed in the bed of the truck (LF 20). The two brown-colored items were two bottles of tequila

(LF 20). Officer Crossen then advised Guhr that he also was under arrest for driving while intoxicated (LF 20).

After transporting Guhr to the Morgan County Jail, Officer Crossen asked Guhr to perform sobriety tests, with which he complied (LF 21).

Officer Crossen then read Guhr the Implied Consent warnings from the Alcohol Influence Report form (LF 18, 21) and requested Guhr submit to a breath test. Guhr refused (LF 18, 21).

After Guhr's refusal, the arresting officer, on behalf of the Director of Revenue ("Director") gave notice to Guhr that his driving privilege would be revoked 15 days from October 25, 2002 pursuant to Section 577.041, RSMo (LF 15). This notice further informed Guhr that if he wished to contest the revocation of his driving privileges, Guhr had to petition for a hearing before the Circuit Court in the county where the arrest occurred within 30 days from October 25, 2002 (LF 15).

The Respondent adopts the Procedural History contained in the Appellant's Statement of Facts.

### **Point Relied On**

**The trial court did not err in finding that the arresting officer lacked probable cause to arrest Mr. Guhr for driving while intoxicated because the Director failed to present sufficient evidence of intoxication that would justify an arrest for driving while intoxicated.**

### **Standard of Review**

An appellate court must affirm the trial court's judgment unless there is no substantial evidence to support it, unless the decision is contrary to the weight of the evidence, or unless the trial court erroneously declares the law. Hinnah v. DOR, 77 SW3d 616 (Mo.banc 2002). The appellate court should view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the trial court's judgment, disregarding all evidence and inferences to the contrary. Wright v. Fish, 89 SW3d 548 (Mo.App. 2002). Even though a case is submitted solely on the Director's records, an appellate court must give deference to the trial court's resolution of conflicting facts contained therein. Jarrell v. DOR, 41 SW3d 42 (Mo.App.2001).

## Argument

While the trial court failed to make a finding concerning the requirements of arrest and refusal and the Appellant addressed these issues in their brief, the Respondent affirmatively states to the Court that the Respondent was arrested on the date in question and did, in fact, refuse to submit to a chemical test. The only question to be addressed by this Court is the issue of sufficient probable cause to arrest.

The trial court found that the arresting officer lacked probable cause to arrest Mr. Guhr for driving while intoxicated (LF 22). Appellant is correct when they argue that the court should review the probable cause determination at the point the suspect is actually arrested for driving while intoxicated. However, they are asking this appellate court to make leaps of logic that the trial court refused to make. The appellant argues that the initial arrest of Mr. Guhr was for traffic violations. However, there is nothing in the record to support that position. While the alcohol influence report and narrative do list a traffic violation as the reason for the initial contact, (LF 16, 20) it is never listed as a cause for arrest. Further, there is no evidence that Mr. Guhr was charged with any crime other than driving while intoxicated. This is in contrast to Dixon v. DOR, 118 SW3d 302, the case which the appellant cites as support for their position. “Based on the

aforementioned events, Dixon was ultimately charged with driving while intoxicated, resisting arrest, failure to drive on the right half of the roadway, careless and imprudent driving, failing to yield to an emergency vehicle and failing to wear a seat belt.” Further, the officer’s narrative does not list any specific offense for which Mr. Guhr was arrested at this point. The appellate court should not make an assumption that is unsupported by the record.

Even if the appellate court does choose to accept the Director’s position that probable cause should be evaluated at the point Mr. Guhr was advised that he was under arrest for driving while intoxicated, the trial court’s judgment should still be affirmed. Again, the appellant asks the appellate court to make assumptions and inferences that the trial court refused to make. The appellant lists among the probable cause factors such things as ‘glassy eyes’ ‘swaying balance’ ‘swaying walking’ and an ‘inability to follow instructions’. While those factors are indicated in the alcohol influence report, (LF 16) there is no indication as to whether or not they were observed pre- or post-arrest. In the narrative, the arresting officer does note brief opportunities to observe the walking and balance of Mr. Pugh prior to placing him under arrest (LF 20). He does not document any references to swaying or any other difficulty. He does note difficulties with balance and walking when conducting field sobriety tests at the police

department (LF 21). Those observations, though, were clearly post-arrest and should not be and, obviously, were not considered by the trial court.

Appellant also asks this court to place great significance on the presence of two bottles of tequila in Mr. Guhr's possession. Again, though, the appellant is requesting this Court to jump to conclusions that the trial court refused to make. In Dixon, *infra*, the court noted that the arresting officer "found a 750 ML Barton liquor bottle that was about 2/3 empty on the floorboard." In Chancellor v. Lohman, 984 SW2d 857 (W.D. 1998), another case the appellant cites for support, the record indicates that "the deputy found a glass with whiskey in it inside the car." Obviously, immediate access to alcohol and evidence of recent consumption are factors that an arresting officer can, and should, consider. However, in the instant case, there is no indication that the bottles were open, 1/2 full, 2/3 full, empty or even if the seal had been broken (LF 20). Again, the appellant is asking this court to make assumptions to justify overturning the decision of the trial court.

Respondent also takes issue with the Appellant's repeated references to Mr. Guhr's behavior on the night of his arrest as 'combative'. While Mr. Guhr's behavior certainly would qualify as 'uncooperative', comparing Mr. Guhr to Dixon is yet another leap of logic attempted by the Appellant. Mr.

Dixon refused to get out of his vehicle, was pulled out of his vehicle through the window after being maced, was leg-swept to the ground, hand-cuffed and continued to spew profanities at the law-enforcement officers. Mr. Dixon's behavior is correctly characterized as 'combative' and the court used his behavior in its probable cause determination. Mr. Guhr walked away from the officers and initially refused to obey verbal commands (LF 20). This writer is unaware of any correlation between being uncooperative and being intoxicated. Once the arresting officer took him by the arm, there are no other references to Mr. Guhr resisting the arresting officer (LF 20). Further, there is no indication in the record that Mr. Guhr faced any additional charges based on his uncooperative behavior.

Finally, the Appellant notes the case of Smith v. DOR, 77 SW3d 120 (Mo.App. W.D. 2002) and asks this Court to draw adverse conclusions from the fact that Mr. Guhr did not testify at the hearing of this matter. However, this case is a two-edged sword. The Court should also note that the arresting officer did not appear or testify at the hearing. All of the discrepancies noted in this argument could have been easily resolved by the officer. Why was Mr. Guhr initially arrested? When were glassy eyes observed? When was swaying observed? What was the odor of alcohol detected on Mr. Guhr? 'Strong' as indicated in the narrative (LF 20) or 'Moderate' as noted on page

1 of the Alcohol Influence Report (LF 16)? What about the tequila bottles? Open? Full? Old? ½ empty? When was ‘poor ability to follow instructions’ observed and what specifically does that refer to? All of these questions could have been answered by the arresting officer.

The burden of proof lies with the Director of Revenue in these cases. By relying solely on inconsistent, incomplete police reports, the Director failed to carry that burden and the trial court correctly found that no probable cause to effect an arrest existed. The Appellant contends that this Court should make a series of assumptions, conjectures, inferences and leaps of logic to overturn that decision. Respondent respectfully requests the Court to decline that invitation and affirm the trial court’s decision.

## **Conclusion**

The trial court's judgment, setting aside the refusal revocation, should be affirmed.

Respectfully submitted,

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**Certification of Service and of Compliance with  
Rule 84.06(b) and (c)**

The undersigned hereby certifies that on this 17<sup>th</sup> day of January 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 2,149 words according to Microsoft Word.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Timothy R. Cisar