IN THE
MISSOURI SUPREME COURT

MATTHEW CARVALHO, Appellant, DIRECTOR OF REVENUE, Respondent.	)))))))))	No. SC97394

APPEAL TO THE MISSOURI SUPREME COURT,
FROM THE CIRCUIT COURT OF FRANKLIN COUNTY
TWENTIETH JUDICIAL DISTRICT
THE HONORABLE STANLEY WILLIAMS

APPELLANT'S REPLY BRIEF

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I. Respondent Failed to Demonstrate Proper Compliance with the Department of Health Regulations, and The Breath Test Result was Inadmissible

A. *Turcotte v. Director of Revenue* Should Be Overruled

Respondent appears to argue that because Section 577.035.5 requires that a breath test be performed according to the relevant statutes and the Department of Health and Social Service's implementing regulations, and does not specifically mention recordkeeping requirements, then compliance with the record keeping requirements is not mandatory. Res. Br. 5-6. This argument is without merit. The record keeping requirements at issue are contained within the DHSS regulations, specifically 19 CSR 25-30. Thus, Section 577.035.5's requirement that a test conform to the regulations necessarily requires compliance with the recordkeeping requirement. To support Respondent's argument, Section 577.035.5 would need to contain some kind of exception for the record keeping requirements. It does not.

It is true that in *Turcotte v. Director of Revenue*, the Court of Appeals rejected the argument advanced by Appellant. *Turcotte v. Director of Revenue,* 829 S.W.2d 494 (Mo. Ct. App. 1992). That is why Appellant has explicit requested that *Turcotte* be overturned. App. Br. 11. The requirement that the report be submitted to the Department of Health within 15 days is part of the same paragraph in the same section of the same rule that contains the requirement that maintenance checks be conducted every 35 days. The 35-day requirement is mandatory. *Sellenriek v. Director of Revenue*, 826 S.W.2d 338, 340 (Mo. 1992). That rule states "A Type II permittee shall perform maintenance checks on breath analyzers under his supervision at

intervals not to exceed thirty-five (35) days. The permittee shall retain the original report of the maintenance check and submit a copy of the report so that it shall be received by the department within fifteen (15) days from the date the maintenance check was performed." 19 CSR 25-30.031(3). Yet, case law suggests that the first requirement is mandatory while the second is not.

The issue presented is whether that distinction continues to be supportable. Both *Turcotte* and *Potts v. State*, to which Respondent cite, ground their ruling in the issue of accuracy. In *Turcotte*, the Court of Appeals stated that "the failure to file timely maintenance reports does not impeach machine's accuracy, which is the main concern here." 829 S.W.2d at 496. Similarly, *Potts* focused on the lack of any allegation that the device was improperly calibrated, or tested contrary to requirements, or that the device used was not approved by the Department of Health. *Potts v. State*, 22 S.W.3d 226, 231 (Mo. Ct. App. 2000). This rationale suggests that the driver objecting to failure to follow the regulations bears the burden of establishing why the failure is relevant. And that concept of burden shifting is what was decisively disposed of in *White v. Director of Revenue,* 321 S.W.3d 298 (Mo. 2010).

B. The Trial Court Had No Evidence Presented to Establish Compliance with 19 CSR 25-30.031(3)

Respondent argues that evidence which this Court can take notice of establishes that the regulation was met. Res. Br. 10. What Respondent leaves unsaid is that this evidence was never presented to the trial court. There is no statute or case that permits a court, whether a trial court or appellate, to supply missing clarification where errors and omissions in the documentation create ambiguity. A court may not function as an advocate for the Director.

McPhail v. Director of Revenue, 450 S.W.3d 842, 847 (Mo. Ct. App. 2014). This Court should not consider evidence raised for the first time on appeal.

II. Appellant's Due Process Rights Were Violated

A. The Applicability of *Teson v. Director of Revenue* and Procedural Versus Substantive Due Process

In Appellant's opening brief, Appellant argued that *Teson vs. Director of Revenue* examined the Missouri Implied Consent Warning with regards to procedural due process. App. Br. 17. As Respondent rightfully points out, *Teson* simply refers to "due process," and does not specify whether the analysis is about procedural due process or substantive due process. Res. Br. 17. Appellant will concede that it is entirely possible that this court was referring to substantive due process in *Teson*, and would ask this Court to so clarify. If that is the case, Appellant would still argue that Missouri's Implied Consent violates his substantive due process rights.

Respondent identified an Iowa case where the Iowa Supreme Court applied *Teson* in the substantive due process arena. In *State [of Iowa] v. Massengale*, a driver was pulled over and read Iowa's implied consent warning, which informed him that if he refused the test, his license would be revoked for a year, and that if he took the test and the results indicated an alcohol concentration of eight hundredths or more, his license would be revoked for a shorter period. *State v. Massengale*, 745 N.W.2d 499, 502 (Iowa 2008). However, it was silent as to the effect a refusal would have on the driver's commercial driver's license. *Id.* at 503. The Iowa Supreme Court identified the governmental purpose embodied in the warning as giving arrested individuals information to make "a reasoned and informed decision" with regards to chemical testing, but found that a misleading (because of an omission) implied consent warning did not

advance that purpose. *Id.* at 504. The Iowa Supreme Court therefore held that the implied consent warning violated the driver's right to substantive due process. [1]

In *Teson*, this Court found that the relevant statutes demand "that a law enforcement officer provide an arrestee with information upon which the arrestee may make a voluntary, intentional and informed decision as to whether or not to submit to the chemical test." This Court further held that that a warning that failed to inform an arrestee of the consequences of a refusal or mislead the arrestee into believing the consequences of a refusal were different than the law required "…prejudices the arrestee's decisional process and, therefore, renders the arrestee's decision uninformed. Uninformed decisions are non-consensual." *Teson v. Director of Revenue*, 937 S.W.2d 195, 197 (Mo. 1996).

Both *Teson* and *Massengale* concentrated on whether the driver was provided with the correct information to make an informed decision, and both cases found that a failure to provide the correct information in a way that leads to an uninformed decision violated due process. Section 577.041 requires the arresting officer to tell a driver the revocation will begin immediately. As argued below, the use of the word "immediately" is misleading, since the driver will be given a 15-day temporary permit and the suspension will not take effect until the required paperwork is received by the Director of Revenue. Section 577.041 requires the

[1] *Massengale* was a criminal case, and the result of the substantive due process violation was suppression of the evidence. However, subsequent cases in Iowa relied on it to find that when a driver was given incomplete information, a revocation was invalid on substantive due process grounds. *Morales v. Iowa Dep't of Transportation*, 798 N.W.2d 349 (Iowa Ct. App. 2011).

driver be given inaccurate information, which renders the decision uninformed and nonconsensual, and therefore violates substantive due process.

More than that, it should be noted that neither Section 577.041 or any other statute or rule describes verbatim language that must be used. What is commonly called the Missouri Implied Consent is nothing more than a convention. Nothing precludes an arresting officer from providing accurate information, which is to say information that includes the consequences of a positive breath test. Respondent argues that *Teson* only requires (misleading) information about a refusal be provided, Res. Br. 14, but that is illogical. A driver does not properly understand the consequences of a refusal is the driver does not understand the consequences of agreement. A one-year revocation that begins immediately, compared to nothing at all, sounds really bad. A one-year revocation that begins in 15 days, that can be stayed, that can possibly be negotiated, compared to a three-month suspension or revocation that cannot be stayed and cannot be negotiated, sounds much different.

The due process issue raised here, and in *Teson*, deal with the effect of misleading and inaccurate information provided to a driver. That exists in the gray area of due process that encompasses both procedural and substantive due process. Clearly, substantive due process is violated by the government misleading a citizen. Equally clearly, a misleading notice would violate procedural due process. Appellant's Motion in Limine raised precisely the issue that the coercive and misleading nature of Missouri's Implied Consent Warning violated due process. LF. Doc. 42. Pg. 7. Appellant's opening brief argued that that the coercive and misleading nature of Missouri Implied Consent Warning violated due process. App. Br. 13. To the extent this Court holds that *Teson v. Director of Revenue* holds that substantive due process

requires a non-misleading Missouri Implied Consent Warning, Appellant would ask this Court to issue a decision on the merits.

B. Respondent Misunderstands Appellant's Procedural Due Process Argument

As an initial matter, Respondent summarizes Appellant's argument incorrectly. Respondent states that "it appears that Carvalho claims to have received constitutionally deficient notice in two ways. First, Carvalho apparently argues that the Implied Consent Warning that he received did not adequately apprise him of the potential consequences of undergoing the breath test, and thus it allegedly led him to believe that consenting to a breath test would carry no license consequences, regardless of the test result. Second, Carvalho apparently argues that the written Notice of Suspension did not identify every element that the Director would have to establish in the revocation proceeding." Res. Br. 13. This is inaccurate.

Rather, Appellant argues that he received constitutionally insufficient notice which violated his right to due process. App. Br. 15. Appellant argues that to the extent that the Implied Consent warning is considered "notice," it is insufficient as it makes no reference to the administrative suspension following an alleged positive breath test and is explicitly misleading. App. Br. 16. Appellant further argues that to the extent that the Notice of Suspension is considered "notice" for the purposes of due process, it is also misleading. App. Br. 17-18. As a result, Appellant was never provided proper notice.

Respondent conceives of these arguments as disconnected and in the alternative, as opposed to understanding them as two parts of a single due process objection. This is also why Respondent's argument that the Appellant was not prejudiced by the deficiencies of the

Notice of Suspension, Res. Br. 26, fails. Respondent argues that because Appellant has "vigorously challenged" his license revocation, he has not been prejudiced. *Id.* at 26-27. Appellant is prejudiced in that he was tricked into taking a breath test that the government would rely on to suspend his license, and the governments post-hoc "notice" is insufficient to cure the misdirection.

C. Respondent Applies the Wrong Standard

The parties agree that Appellant has a property interest in his driving privilege, and that Respondent can only suspend the same within the bounds of constitutionally sufficient due process. However, the parties differ as to the proper rubric for analyzing what is sufficient.

Respondent appears to argue that *Mathew v. Eldridge* is the sole standard by which to determine if procedural due process has been violated. Res. Br. 18. This is untrue. The Supreme Court has made clear that *Mathews* is but one standard for evaluating procedural due process claims, and others may be appropriate. In cases assessing the constitutionality of the "notice" requirement, the Supreme Court has indicated that the proper standard is whether under all the circumstances, the notice was reasonable calculated to apprise interested parties of the action and present an opportunity to raise objections. *Dusenbery v. United States*, 534 U.S. 161, 161–62 (2002). This is another way of stating the well-established principle that "[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950). This is the standard that should be used to evaluate the Missouri Implied Consent and Notice of Suspension.

D. Under a "Reasonableness" Standard, The Implied Consent Fails

There is no interpretation or construction of the Missouri Implied Consent that permits it to serve as constitutionally sufficient notice of the administrative suspension at issue, for two reasons. First, the Missouri Implied Consent makes no reference at all to the administrative suspension. Second, it misstates the law, in arguing that the revocation attendant to a refusal begins immediately.

Respondent does not address the first point, and therefore implicitly concedes that the Implied Consent does not actually provide notice of the pendency (or possibility) of a license suspension following a positive breath test. To address the second point, Respondent claims that upon the surrender of the physical license to law enforcement after a refusal, a driver's privilege is immediately revoked and new, temporary, 15-day privilege begins. Res. Br. 15. In doing this, Respondent conflates the physical license with legal privilege to operate a motor vehicle. This ignores the fact that Missouri law clearly treats the two differently. That is why Missouri has one statute that criminalizes failure to present the license on demand, Section 302.181, and another that criminalizes driving while revoked, Section 302.321. Put simply, one can have the driver's license in one's wallet, and still have the driving privilege revoked. On the other hand, one can have no license on hand, but still be permitted to drive.

More importantly, Section 302.574 clearly and unambiguously states that the revocation that follows a refusal does *not* occur immediately. After a refusal, the arresting officer is directed to complete a sworn report, submit it to the Department of Revenue, and "Upon receipt of the officer's report, the director shall revoke the license of the person

refusing to take the test[.]" RSMo. 302.574.3. The license is not revoked until the report is received.

Read in *pari materia*, it would seem logical that the suspension goes into effect upon receipt of the report, but no earlier than 15 days from the date of arrest. Alternatively, it is possible that the two should be interpreted to read that the suspension goes into effect upon receipt of the report, backdated to the end of the 15-day period. But regardless, it is clear that the license revocation is not immediate.[2]

Respondent fails to mention this statute, which clearly contradicts Respondent's argument. Respondent cannot claim this is a mere oversight, because Respondent's brief cites Section 302.574.3 later. In citing the statute, however, Respondent alters the language. Instead of "revoke," Respondent quotes the statute to say that "Upon receipt of the officer's report, the director shall remove the license of the person refusing to take the test[.]" Res. Br. 21. This omission followed by misquotation is nothing less than a deception on this Court.

E. Under the "Reasonableness" Standard, the Notice of Suspension Fails

The analysis then shifts to whether the Notice of Suspension is reasonably calculated under all the circumstances to notify a driver of the pendency of the actions against them and afford them an opportunity to be heard. The Notice is, again, misleading. It states that the driving privilege is being suspended because of an arrest upon probable cause for driving with a blood alcohol level above the legal limit. LF. Doc. 52 Pg. 2. This ignores the various other

[2] Practically, the revocation cannot go into effect immediately. If the arresting officer seizes the driver's license and does nothing else, Respondent will have no way of knowing that the license should be revoked.

requirements for a suspension. As Respondent notes, it then goes on describe how a driver can seek administrative review of the decision. Res. Br. 28. It should be noted, however, that like the Missouri Implied Consent, the Notice of Suspension does not inform the driver that if she contests the suspension, her driving privilege will remain valid past the 15-day deadline.

By omitting these facts, the Notice of Suspension fails the *Mullane*/reasonableness test. Telling a person under arrest that their license will be suspended because they were arrested does not inform them that, in reality, their license will be suspended because they were arrested upon probable cause, they were found to be driving, and the test result indicated a blood alcohol content greater than the legal limit. A driver cannot make an intelligent decision as to whether to fight a government action, if the driver is being intentionally misinformed about the government action.

Respondent argues that due process does not require the government to inform individuals of the legal principles that will govern an action. Res. Br. 27. That may be true, but it is a much different question then whether the government can misinform individuals about the action. A case cited by Respondent is illustrative. In *Sneil v. Tybe Learning Center*, this Court held that while a notice of tax sale did not have include certain information, in this case information about deadlines, if the party providing notice chose to include the information, it had to be correct. If the information was incorrect, the notice ran the risk of violating the recipient's due process rights. *Sneil, LLC v. Tybe Learning Ctr., Inc.,* 370 S.W.3d 562, 573 and n.10 (Mo. 2012).[3] The information provided in the Notice of Suspension, just like in the

[3] It is also worth noting that despite the fact that *Sneil* deals with whether a particular notice comports with the requirements of "due process," like *Teson,* it never specifies if whether the

Missouri Implied Consent, was not correct. Because it was not correct, the two violate Respondent's due process rights.

F. The Right to An Attorney is Not a Cure for the Misleading Notice

Respondent suggests that the deficiencies present in the Implied Consent and the Notice of Suspension are acceptable, because any person to whom a request for alcohol testing has been made has a statutory right to contact an attorney. Res. Br. 23. Respondent argues that the purpose of that statutory right is to give the driver the opportunity to make an informed decision. *Id.*

This argument might have merit, except that the statutory right is significantly limited. There is no requirement that a driver be informed of the right to contact an attorney. *Norris v. Director of Revenue*, 304 S.W.3d 724, 726 (Mo. 2010). The driver need not be provided with access the opportunity to contact their attorney of choice, just to contact "an" attorney. *Witeka v. Director of Revenue*, 913 S.W.2d 438, 440 (Mo. Ct. App. 1996). The Court of Appeals has even held that the right to speak with an attorney is not the right to speak with an attorney privately, and that law enforcement can record the communication. *Roesing v. Director of Revenue*, No. WD 80585, 2018 WL 1276969, at *5 (Mo. Ct. App. Mar. 13, 2018), *cause ordered transferred to Mo. S. Ct.* (September 25, 2018).

In other words, Respondent believes that it is constitutionally acceptable to provide a driver with an incomplete and inaccurate Implied Consent Warning, followed by an equally

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inclusion of inaccurate information would violate procedural or substantive due process. Perhaps the simple answer is that a misleading or inaccurate or insufficient notice violates both.

misleading Notice of Suspension, because the driver has an undisclosed and limited right to attempt to consult with an attorney, in circumstances where the consultation was not private and could incriminate the driver. This is not a set of circumstances that could conceivably lead to an informed decision.

CONCLUSION

Based on the analysis provided herein, this Court should reverse and remand the decision of the trial court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(g) I certify that on this November 12, 2018, a true and correct copy of the foregoing brief was served via the efiling system to the counsel for Respondent, Director of Revenue. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03. This brief was prepared with Microsoft Word for Windows, uses Garamond 13-point font, and does not exceed the word limit. The word-processing software identified that this brief contains 3,308 words.

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