IN THE SUPREME COURT OF MISSOURI

NO. SC97165

JEREME ROESING,

***Appellant*,**

vs.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

***Respondent*.**

On Appeal from the Circuit Court of Jackson County, Missouri
Honorable Robert Trout, Associate Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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INTRODUCTION

Appellant has consistently maintained that he was "he was deprived of his statutory right to consult with counsel, in private, in violation of sections 577.041 *and* 600.048, RSMo."[1] Despite Appellant's consistent reliance on *two* discrete Missouri statutes, the Director of Revenue ("Director") does not even attempt to address section 600.048.3's express mandate of privacy; in fact, not even a single reference to RSMo § 600.048 appears in any of the Director's appellate briefing.[2] Likewise, the Director fails to address *State ex rel. Healea v. Tucker*, 545 S.W.3d 348 (Mo. banc 2018), an analogous criminal case in which this Court recently held that "[t]he [Columbia] police department also violated section 600.048.3, RSMo Supp. 2013, which requires law enforcement officials in charge of jails, sheriffs' offices, or detention facilities 'to make a room or place available therein where any person held in custody under a charge or suspicion of a

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[1] Appellant's Court of Appeals Br. at 15; Appellant's Reply Br. at 8 (same); Appellant's App. for Transfer filed in the Court of Appeals at 10 (same); Appellant's Motion for Rehearing at 10 (same); Appellant's App. for Transfer filed in this Court at 12 (same); Appellant's Sub. Br. at 17 (same).

[2] The majority opinion of the Court of Appeals similarly makes no mention of section 600.048, although the statute is referenced multiple times in the dissenting opinion. *See Roesing v. Director of Revenue*, No. WD80585, 2018 Mo. App. LEXIS 238, at **18, 19, 23 fn. 3 (Mo. App. W.D. Mar. 13, 2018) (G. Witt, dissenting).

crime will be able to talk *privately* with his or her lawyer.'" *Id*. at 352 n. 2 (emphasis in original) (*quoting* RSMo § 600.048.3).

The Director even goes so far as to claim that "[Appellant] acknowledges that any purported right to private communications with an attorney must come from section 577.041.1." Respondent's Sub. Br. at 15.[3] To the contrary, Appellant has not acknowledged anything of the sort. Appellant's position before this Court is the same as it was in the Court of Appeals:

> [Appellant's] right to consult with his attorney in a private setting, free from video or audio recording equipment, where a police officer is not standing three feet away listening to every word that he says, is not an "extra privilege", as Clapp described it. In the criminal context, it is a constitutional right; it is expressly required by RSMo § 600.048.3 in all cases; and it is implicit in the statutory right to counsel provided by RSMo § 577.041.1.

Appellant's Court of Appeals Br. at 14.

As recognized by the Director, Appellant does not dispute that there was probable cause to arrest him for suspicion of driving while intoxicated. *See* Respondent's Sub. Br. at 37 ("The arrest and determination of probable cause … are undisputed here …"). The

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[3] *See also* Respondent's Sub. Br. at 7 ("the only issue before the Court is whether the limited statutory right to contact an attorney, as defined in § 577.041.1, RSMo, includes an implied right to a private consultation.")

sole issue on appeal is "whether or not [Appellant] refused to submit to the test." Appellant's Sub. Br. at 7 (citations omitted). Despite this, the Director's Substitute Brief engages in a discussion of a multitude of irrelevant factual issues surrounding Appellant's arrest, including references to the "two other cases arose [that] out of [Appellant's] drunk driving incident". Respondent's Sub. Br. at 11-12 fn. 2. Factual circumstances surrounding the traffic stop and Appellant's arrest – including sobriety tests that may have been administered and the results of any such sobriety tests, the administration of any blood alcohol tests and the results of any such tests, and other unrelated factual issues that may have taken place after the Appellant's purported refusal – are wholly irrelevant to Appellant's sole point on appeal. As later acknowledged by the Director, whether or not Appellant was driving has no relevance in a revocation proceeding. *See* Respondent's Sub. Br. at 23-24 (*citing Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619-22 (Mo. banc 2002)). Likewise, "whether the driver is under the influence of alcohol or any other substance is [also] irrelevant [in a revocation proceeding]." *Johnson v. Director of Revenue*, 168 S.W.3d 139, 141 (Mo. App. W.D. 2005).

The Director's attempts at injecting unrelated and irrelevant factual issues into the record at this late stage – none of which were raised in the Director's briefing before the Court of Appeals, and some of which are not even properly in the record before this Court (*i.e.*, Appellant's BAC results), are clearly aimed at prejudicing Appellant and distracting from the actual legal issues this case presents. Such tactics violate this Court's rules and should not be condoned. *See* Mo. S. Ct. R. 84.04(b) ("The substitute brief shall conform with Rule 84.04, [and] ... shall not alter the basis of any claim that

was raised in the court of appeals brief, ..."); Mo. S. Ct. R. 84.04(c) ("The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument.").

The Director's focus on irrelevant factual issues makes clear that it has no answer for section 600.048.3's express mandate of privacy, and the Court should disregard such arguments.

ARGUMENTS

I. THE TRIAL COURT ERRED IN SUSTAINING THE REVOCATION OF APPELLANT'S DRIVING PRIVILEGES, BECAUSE APPELLANT WAS DEPRIVED OF HIS STATUTORY RIGHT TO CONSULT WITH COUNSEL, IN PRIVATE, IN VIOLATION OF SECTIONS 577.041.1 *AND* 600.048.3, RSMO.

A. Statutory Context: Missouri's Implied Consent Law (Section II of Respondent's "Background").

The Director relies heavily on *Hinnah,* however, section 577.041.1's right to counsel provision was not at issue in *Hinnah*. As such, *Hinnah* has limited relevance here.[4] While it may generally be true that the overarching purpose of RSMo § 577.041

[4] The Director also relies heavily on *White v. Director of Revenue*, 255 S.W.3d 571 (Mo. App. S.D. 2008), however, *White* has nothing to do with privacy – it involved a driver who was not given the full twenty minutes to contact an attorney. As such, Appellant submits that *White* is wholly inapplicable.

"'is to rid the highways of drunk drivers[,]'" Respondent's Sub. Br. at 10 (*quoting Hinnah*, 77 S.W.3d at 619), there is a separate and distinct purpose underlying 577.041.1's right to counsel provision.

This Court has long held that due process provisions of the United States Constitution, and article I, section 10 of the Missouri Constitution, which "protects Missouri citizens from the deprivation of property without due process of law", apply to suspension or revocation proceedings. *Doughty v. Director of Revenue*, 387 S.W.3d 383, 387 (Mo. banc 2013), *quoting Dabin v. Director of Revenue*, 9 S.W.3d 610, 615 (Mo. banc 2000); *citing* Mo. Const. art. I, sec. 10, *Stone v. Missouri Dept. of Health & Senior Services*, 350 S.W.3d 14, 27 (Mo. banc 2011). Such due process concerns typically arise in the context of the implied consent warning, *i.e.*, whether the warning was accurate or misleading, and whether the driver's refusal was informed and consensual.

> If the purpose of the warning is to provide information, a warning is sufficient for purposes of due process unless the words used either (1) fail to inform the arrestee of all of the consequences of refusal or (2) mislead the arrestee into believing that the consequences of refusal are different than the law actually provides. In each of these instances, the warning fails because it 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. banc 1996).

The purpose of section 577.041.1's right to counsel provision has also been held "to provide the driver with a reasonable opportunity to contact an attorney **to make an informed decision** as to whether to submit to a chemical test." *Norris v. Director of Revenue*, 304 S.W.3d 724, 726-27 (Mo. banc 2010) (emphasis added) (citations omitted). In order to ensure that drivers are able to consult with counsel to assist them in making an informed decision, this Court cautions that "arresting authorities do not have the right to prevent [a driver] from … consult[ing] with counsel." *State v. Ikerman*, 698 S.W.2d 902, 907 (Mo. App. E.D. 1985) (*citing Spradling v. Deimeke*, 528 S.W.2d 759, 764 (Mo. 1975)).

Given that the purpose of the implied consent warning and section 577.041.1's right to counsel provision are one and the same, *i.e.*, to allow the driver to make an informed decision about whether to consent to a chemical test, it follows that the same due process considerations are likewise implicated when arresting authorities interfere with a driver's right to consult with his or her attorney.

In order to make an informed decision, the driver must candidly disclose factual information to his or her attorney, so the attorney has knowledge of the facts prior to advising the driver of the application of the law to the particular facts of the driver's case. *See e.g., State v. Holland*, 147 Ariz. 453, 456 (Ariz. 1985) ("[I]t is impossible to foresee what advice would have been given defendant had he been able to confer *privately* with counsel.") (emphasis added). This open exchange of information is rendered impossible when a police officer is standing three to four feet away listening to everything that the driver says to his or her attorney, and when the entire conversation is video- and audio-

recorded. In circumstances such as those at issue in this case, it is clear that law enforcement has interfered with the driver's ability to engage in frank and open communications with his or her attorney, thus "prejudice[ing] the arrestee's decisional process and, therefore, render[ing] the arrestee's decision uninformed." *Teson*, 937 S.W.2d at 197.

B. The plain text of section 577.041.1's right to counsel provision is silent as to the actual attorney-client consultation; it certainly does not eliminate section 600.048.3's express mandate of privacy (Sections I(A) and (B) of Respondent's Arguments).

The Director makes much of the fact that Appellant does not argue that section 577.041.1's right to counsel provision is ambiguous, however, the statute only provides drivers with 20 minutes to attempt to contact an attorney. The statute is completely silent as to what happens if a driver is able to contact an attorney. The relevant portion of the statute provides as follows:

> If a person when requested to submit to any test allowed pursuant to section 577.020 requests to speak to an attorney, the person shall be granted twenty minutes in which to attempt to contact an attorney.

RSMo § 577.041.1 (2013); Appx. A8.

Because the statute itself is silent as to what happens if the driver *does* contact an attorney, we must look to Missouri case law and other relevant Missouri statutes to determine the scope of the attorney-client consultation. Section 600.048.3 is one such statute, and it explicitly requires law enforcement to provide detainees with a private

room to speak *privately* with his or her attorney. *See, e.g., Healea*, 545 S.W.3d at 352 n. 2. Section 600.048.3 makes no distinction between criminal or civil cases, and it does not contain an exception for drivers who have been arrested on suspicion of driving while intoxicated and requested to submit to a chemical test.

Operating under the presumption that the legislature was aware of the existence section 600.048.3 when it enacted section 577.041.1, as we must, it was not necessary for the legislature to expressly include the word "privacy" in section 577.041.1—because *any* person (including a driver) who has been arrested and is being held under suspicion of a crime already has the statutory right to *privately* consult with counsel. In order to deprive such persons of the statutory right already conferred on them in section 600.048.3, the legislature would have had to expressly eliminate the right to privacy when it enacted 577.041.1—which it certainly did not do.

Given that section 577.041.1 is completely silent as to the scope of the attorney-client consultation, the Court should disregard the Director's lengthy attempts at parsing the "plain language" of the statute. Reading section 577.041.1's right to counsel provision in harmony with section 600.048.3's express mandate of privacy, and considering this Court's mandate that "the attorney-client privilege … *is absolute in all but the most extraordinary situations*," *State ex rel. Ford Motor Co. v. Westbrooke*, 151

S.W.3d 364, 366 n.3 (Mo. banc 2004) (emphasis added),[5] it is clear that a driver's right to counsel includes the right to privacy.

C. Respondent fails to substantiate its claims that private attorney-client consultations could "*potentially* undermin[e] the accuracy and admissibility of chemical test results" (Section I(C) of Respondent's Arguments).

Despite the fact that section 577.041.1 is silent on the scope of the attorney-client consultation, the Director urges the Court to reject Appellant's "anti-absurdity arguments given the absence of ambiguity". Respondent's Sub. Br. at 22. The Director's first point is that "it would hardly be 'absurd'" to deprive drivers that are able to contact an attorney of privacy, when other drivers are unable to contact an attorney in the first place. If a driver is unable to reach an attorney in the first place, then the scope of the attorney-client communications is never at issue, therefore such hypothetical situations are irrelevant to the issues in this case.

The Director goes on to speculate that a private attorney-client consultation could "*potentially* undermin[e] the accuracy and admissibility of chemical test results."

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[5] *See also State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo. banc 1993) ("the sanctity of the attorney-client privilege. … is of greater societal value … than the admissibility of a given piece of evidence in a particular lawsuit.") (*quoting State ex rel. Great American Ins. Co. v. Smith*, 574 S.W.2d 379, 383 (Mo. banc 1978)).

Respondent's Sub. Br. at 25. Appellant does not claim that privacy requires officers to "leave suspects unattended" or to "break visual observation", as the Director claims. Appellant would have been happy with Officer Clapp turning off the video- and audio-recording devices and visually observed him through the glass surrounding the detention room. Even if law enforcement is unable to maintain visual observation while also affording an arrestee privacy, they would merely have to restart the fifteen-minute observation period – a result which is hardly unworkable.

Respondent offers no evidence to support its arguments about the claimed potential impacts of a private attorney-client consultation. As such, the Director's unsubstantiated assertions about what could happen necessarily fail to outweigh the societal importance Missouri courts place on the attorney-client privilege.

D. Respondent's analysis of *Jewett* and *Clardy* is based on factual misstatements, and its analysis of Missouri case law is otherwise flawed (Section I(D) of Respondent's Arguments).

The Director cites to *City of Mandan v. Jewett*, 517 N.W.2d 640 (N.D. 1994), a case which was cited by the Missouri Court of Appeals in *Clardy v. Director of Revenue*, 896 S.W.2d 53 (Mo. App. W.D. 1995), and the Court of Appeals in this case. The Director and the *Clardy* court, however, rely on factual misstatements.

The Director claims that, "[i]n *Jewett*, *officers* were in the same room as the suspect during his phone call with an attorney, and they *heard his end of the conversation*." However, what *Jewett* actually says is much different. *Jewett* provides that "[t]he arresting officer testified that *neither he nor the other officer could hear*

Jewett." *Jewett*, 517 N.W.2d at 643 (emphasis added). Likewise, *Clardy* turned on the fact that "*[t]here is no evidence that his conversation was overheard* though the room was small." *Clardy*, 896 S.W.2d at 55. The Director disclaims this portion of the holding in *Clardy*, arguing that "it is speculative at best to assume they were unable to hear what Clardy said." Respondent's Sub. Br. at 31. However, we are in no position to second-guess the evidence in a case decided more than twenty years ago; and we are certainly not in a position to conclude that the Court's express determination of what evidence was, or was not before it on appeal, is "speculative".

Unlike the Missouri Court of Appeals' decision in *Clardy*, or the North Dakota Supreme Court's decision in *Jewett*, it is undisputed that Appellant's conversation with his attorney was overheard. Not only was it overheard, it was videotaped and audio recorded, burned to a DVD, and distributed to the prosecuting attorney's office for use in the criminal case against Appellant. *See* Appellant's Sub. Br. at 9, 16-17. In sum, Appellant's case is not "virtually identical" to *Clardy* or *Jewett*, as the Director would have this Court believe, and these cases are easily distinguished.

II. RESPONDENT'S REQUEST THAT THE COURT EMPLOY A BALANCING TEST, OR SHIFT THE BURDEN OF PROOF TO THE DRIVER, ARE UNTENABLE.

For its final argument, in the event the Court determines a driver is entitled to privacy, the Director makes two requests. First, the Director requests that the Court adopt the *Jewett* balancing test, *i.e.*, reverse the long line of Missouri cases applying the exclusionary rule to civil *and* criminal cases. Respondent's Sub. Br. at 34-36. Second, the Director requests that the burden of proof be shifted to the driver, because the

Director recognizes that it is impossible for it to "ever disprove that a lack of privacy deprived a driver of a 'meaningful consultation with his attorney.'" Respondent's Sub. Br. at 36-38.

As to the Director's first request, while some states do not require the exclusion of breathalyzer results obtained in violation of the right to counsel, Missouri courts do – regardless of whether the case is civil or criminal in nature. *See Whisenhunt v. Dept. of Public Safety*, 746 P.2d 1298, 1300 (Ak. 1987) (noting that state courts are divided on the question of "whether violation of an accused's right to counsel requires suppression of breathalyzer test results in civil license revocation proceedings.") (*citing Gooch v. Spradling*, 523 S.W.2d 861 (Mo. App. 1975)). In *Norris*, this Court made clear that a violation of section 577.041.1's right to counsel provision renders the driver's decision uninformed and nonconsensual, thereby resulting in exclusion of the refusal.[6]

North Dakota courts, however, do not apply the exclusionary rule in civil revocation proceedings.[7] This distinction alone renders the *Jewett* balancing test a nullity in Missouri courts.

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[6] *See, e.g., Id.* at 727 (affirming the circuit court's reinstatement of Norris's driving privileges because "the director did not show that Norris was not prejudiced by being denied his statutory right of a reasonable opportunity to contact an attorney, as provided in section 577.041.1.").

[7] *See Fasching v. Backes*, 452 N.W.2d 324, 326 (N.D. 1990) (Levine, dissenting) (noting his disagreement with the majority opinion, the dissenting judge argues

With regards to the Director's second request, *i.e.*, that the burden of proving prejudice be shifted to the driver, notwithstanding the decades of Missouri jurisprudence that would be dismantled, such a rule would also significantly infringe on the attorney-client privilege. For instance, in order for a driver to meet his or her burden of showing they were prejudiced by the denial of privacy, they would necessarily be required to disclose confidential attorney-client communications, to show that they were unable to adequately consult with counsel. For this reason, the Director's second request is just as untenable as its first.

CONCLUSION

Section 577.041's right to counsel provision is meant to ensure that drivers are able to make an "*informed decision* about exercising [their] rights." *Akers v. Director of Revenue*, 193 S.W.3d 325, 328 (Mo. App. W.D. 2006) (emphasis added) (*citing Brown v. Director of Revenue*, 34 S.W.3d 166 (Mo. App. W.D. 2000)); *see also Norris, supra*. The legislature chose to confer this right on drivers because a license revocation proceeding "carries with it immense repercussions for a petitioner." *McPhail v. Director of Revenue*, 450 S.W.3d 842, 847 (Mo. App. E.D. 2014).

If law enforcement interferes with or prevents a driver from consulting with his or

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that "we should apply the exclusionary rule in this case and follow the lead of the Alaska Supreme Court which held that the result of a test secured in violation of the right to counsel should be excluded in a civil license-revocation proceeding.") (*citing Gooch v. Spradling*).

her attorney, *i.e.*, from making an "informed decision about exercising [his or her] rights", the driver's refusal is rendered uninformed and non-consensual. *Akers*, 193 S.W.3d at 328; *see also Teson*, 937 S.W.2d at 197 ("Uninformed decisions are non-consensual."). If the court determines that the driver's refusal was uninformed or non-consensual, "the court shall order the director to reinstate the license or permit to drive." *Hinnah,* 77 S.W.3d at 620 (*quoting* RSMo § 577.041.5).

As part of the Director's burden of proof, he must show that Appellant "was not prejudiced by the violation of the implied consent law." *Weil v. Director of Revenue*, 304 S.W.3d 768, 770 (Mo. App. E.D. 2010) (*quoting Schussler v. Fischer*, 196 S.W.3d 648, 653 (Mo. App. W.D. 2006)) (additional citations omitted). Under existing law, the "[r]evocation of [Appellant's driver's] license demonstrates that [Appellant] was prejudiced by the violation of section 577.041.1." *Id.* at 770. Additionally, Appellant submits that he was deprived of a reasonable opportunity to engage in a meaningful consultation with his attorney, in violation of sections 577.041 and 600.048, RSMo, and his refusal is therefore presumed to have been uninformed and non-consensual. Thus Appellant was prejudiced by the violation of the implied consent law. To hold otherwise would allow law enforcement to continue to (1) deny drivers the right to a private consultation with an attorney in violation of section 577.041, (2) deny persons arrested and held under suspicion of a crime the right to a private consultation with an attorney in violation of section 600.048, and/or (3) eavesdrop on, and video- and/or audio-record, privileged attorney-client communications—and yet claim that there is no prejudice because the driver (or detainee) was allowed to engage in a limited and completely

ineffective consultation with their attorney, which may be distributed to the prosecution to be used in subsequent civil or criminal prosecutions.

Because the Director cannot meet his burden of proof of showing that Appellant was not prejudiced by the violation of his statutory right to counsel, Appellant requests reversal of the Director's revocation of his driver's license, and for such other and further relief as the Court deems just and proper.

Dated: December 28, 2018

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 84.06(b) of the Missouri Rules of Civil Procedure, because it contains 3,93 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief and its supplements have been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 13 of Times New Roman. This brief also includes the information required by Rule 55.03.

/s/ Bill Kenney
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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2018, the foregoing Substitute Reply Brief has been electronically filed with the Clerk of the Court for the Missouri Supreme Court using the Court's electronic filing system, and will be served on all counsel of record.

/s/ Bill Kenney
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