

THE MISSOURI SUPREME COURT

F. R.

Appellant

vs.

**ST. CHARLES COUNTY
SHERIFF'S DEPARTMENT**

Respondent

No. SC 89834

**Appeal from the Circuit Court of St. Charles County
Hon. Ted House, Circuit Judge**

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction of this appeal pursuant to Mo. Const. Art. V, § 3, because the appeal arises from an action in which the plaintiff F. R. challenged the constitutionality of Mo. Rev. Stat. § 566.147.

F. R. pled guilty to five sex offenses on March 5, 1999. Legal File at 27. He was sentenced to a term of imprisonment on the same date. *Id.* at 28. The legislature enacted Section 566.147 during 2004 and amended the statute during 2006 and 2008. The statute prohibits convicted sex offenders from “resid[ing] within one thousand feet of any public [or] private school . . . or child-care facility.” F. R. maintains that the statute is unconstitutional in two respects: he contends first that § 566.147 violates Mo. Const. Art. I, § 13, which prohibits the enactment of any law that is retrospective in its application; and second he contends that the statute violates the due process guarantees of U. S. Const. amend. XIV and Mo. Const. Art. I, § 10, because the prohibition of “resid[ing] within one thousand feet of any public [or] private school . . . or child-care facility” fails to give sufficiently definite warning of the proscribed conduct or to protect against arbitrary enforcement. F. R. also challenges the Circuit Court’s interpretation of the statute on a basis other than constitutional infirmity.

The Circuit Court entered its judgment declaring § 566.147 constitutional and denying relief to F. R. on September 19, 2008. Legal File at 40. F. R. filed his notice of appeal to this Court on October 28, 2008. *Id.* at 48.

STATEMENT OF FACTS

F. R. pled guilty to five felony sex crimes in the St. Louis County Circuit Court on March 5, 1999. Legal File at 27. The court sentenced him at that time to serve seven years and six months in the Department of Corrections. *Id.* Because he was convicted of sexual assault of a child under Chapter 566, statutes in effect at the time of F. R.'s offense conduct imposed obligations and disabilities upon him in addition to incarceration within the state prison system:

- He was required to attend an appropriate treatment program in prison and in particular to successfully complete the Missouri Sexual Offender Program before he could be released on parole.

Mo. Rev. Stat. §§ 566.141 and 589.040 (1990).

- He was required to register as a sex offender with the chief county law enforcement official within 10 days after coming into any county. Mo. Rev. Stat. § 589.400 (1998).

- He was required to provide the chief county law enforcement official with his fingerprints and a completed sexual offender registration form reporting his name, address, social security number, telephone number, place of employment, offenses of conviction requiring registration, dates and locations of offense conduct, date and place of conviction, age and gender of offense

victim, as well as additional information. Mo. Rev. Stat. § 589.407 (1998).

The Department of Corrections released F. R. from prison on February 28, 2004. Legal File at 28. The record reflects that F. R. had complied with each of the statutory requirements for sex offenders from the time of his release from custody through the time that this case was submitted to the Circuit Court. *Id.*

The legislature enacted Mo. Rev. Stat. § 566.147 during 2004 and amended it in 2006 and 2008. The present version of the statute, which was not altered materially by the 2008 amendment, prohibits certain categories of sex offenders including F. R. from “resid[ing] within one thousand feet of any public . . . or any private school . . . or child-care facility.” Mo. Rev. Stat. § 566.147 (2006). The enactment defines a first violation of that requirement as a Class D felony and any subsequent violation as a Class B felony. § 566.147.4. Section 566.147 thus imposes upon F. R. an obligation to determine whether any school or child-care facility stands in proximity to a prospective residence and, in order to avoid criminal liability, to obtain a reliable measurement of the distance between the school or child-care facility and the residence.

On June 1, 2008, F. R. moved to 305 Abingdon Court in O’Fallon, where he intended to reside with Michelle Barry and her son. Legal File at 28. He notified Det. Chris Doten of the St. Charles County Sheriff’s Department of his intent to reside at that address three days later. *Id.* at 29. Det. Doten advised F. R. to contact him again on the following day because he believed that the residence

might be located within 1,000 feet of a school. *Id.* F. R. contacted Det. Doten as directed. *Id.* Det. Doten advised him that he could reside at 305 Abingdon Court without offending the statute. *Id.*¹

On June 14, 2008, someone distributed flyers in the Abingdon Court neighborhood bearing F. R.'s photograph, address, and criminal record. *Id.* The flyers stated: "Look who's moved into your neighborhood." *Id.* Two days later, Det. Doten notified F. R. that the property line of his home was 913.34 feet from the property line of the Kid's Academy child-care facility, and thus that his residence there violated § 566.147. *Id.* Det. Doten attributed the new information to "measurements made through the St. Charles County Planning and Zoning Division Geographic Information System. *Id.* Det. Doten told F. R. that he would be arrested and charged with a crime under the statute if he did not move "within 24 to 48 hours." *Id.* at 29-30.

F. R. moved out of the house on June 17, 2008, the day after Det. Doten's warning. *Id.* at 29-30. He lived in a motel room through the time of trial. *Id.* at 30. A survey obtained by F. R. from a private surveying company later in June,

¹ The parties stipulated in the Circuit Court that Det. Doten "advised [F. R.] that 305 Abingdon Ct. satisfied the requirements of § 566.147" and allowed his registration of that residence address. Legal File at 29. The stipulation also advised the Circuit Court that Det. Doten had "no independent recollection" of his conversation with F. R. *Id.*

2008, determined that the corners of the residence at 305 Abingdon Court and the child-care facility are 1,077.9 feet apart from one another and that the entryways of the two structures are approximately 1,096.6 feet apart. Legal File at 30, 32. The St. Charles County Sheriff's Department assured F. R. that he will be arrested if he moves back into the residence. *Id* at 30.

F. R. filed a petition seeking a declaratory judgment and injunctive relief on August 4, 2008. *Id.* at 4. He contended that § 566.147 was unconstitutional on its face and as it applied to him because it was retrospective in its application, was an ex post facto law, and was impermissibly vague. *Id.* at 7-8. F. R. also claimed that the statute was ambiguous and that the application of the rule of lenity required a finding that the home at 305 Abingdon Court was not within 1,000 feet of a school or child-care facility. *Id.* at 8.

The Circuit Court denied the relief requested by F. R. in a judgment entered on September 19, 2008. *Id.* at 40-47. With respect to the contention that § 566.147 operated retrospectively to impair a right or impose a disability upon F. R., the court concluded:

Section 566.147, RSMo (2007 Supp.) does not impose a new obligation upon Plaintiff to abandon a longstanding residence, but rather prevents Plaintiff from moving into a new residence at 305 Abingdon Court in which there is no evidence that Plaintiff holds a vested right . . . As the operation of Section 566.147 upon Plaintiff does not impair a vested right or create a new obligation, duty or

disability, Section 566.147 as applied to Plaintiff is not retrospective in its operation.

Id. at 44.

The court also explained its rationale for rejecting F. R.’s contention that § 566.147 is an ex post facto law as applied to him:

Section 566.147 was enacted in 2004 and at that point criminalized the act of a sex offender residing within one thousand feet of certain public and private schools and child-care facilities . . . There is no violation of the ex post facto clause because Plaintiff would not be punished for a crime that he committed prior to the 2004 effective date of Section 566.147, but for [moving into the Abingdon Court residence] in 2008.

Id. The court added that residency restriction did not increase the punishment for F. R.’s sex offenses “as the intent of the restriction is to regulate where sex offenders may reside in order to protect public health and safety, not to punish.”

Id. at 45.

The court rejected F. R.’s contention that the measurement language of the statute was unconstitutionally vague, finding that “[t]he . . . statutory language is easily understandable to people of ordinary intelligence” and notifies them “what conduct is prohibited, i.e., residing within one thousand feet of a school or child-care facility.” *Id.* at 45-46. The court concluded that the distance between a sex

offender's residence and a school or child-care facility should be measured from property line to property line, explaining:

As a common meaning of "location" is "position in space; place where a factory, house, etc. is or is to be; situation," Webster's New World College Dictionary 793 (1997), the use of the word "location" with "reside" or "residence" strongly suggests that that residence includes more than just the . . . residential structure.

Id. at 46. The court also rejected F. R.'s contention that the measurement language was ambiguous and found no need to apply the rule of lenity. *Id.* at 45-46.

F. R. appealed to this Court after the Circuit Court denied his petition for declaratory judgment and injunctive relief. *Id.* at 48-52.

POINTS RELIED ON

I.

The Circuit Court erred in refusing to declare § 566.147 unconstitutional on its face and as applied to R. L. because the statute imposes new obligations to ascertain the presence of schools or child-care facility in proximity to any prospective residence and obtain a measurement of the distance between the school or facility and the residence, takes away or impairs R. L.'s previously vested right to choose where he would live without respect to his status as a convicted person, attaches the new disability of residency restriction on account of considerations already past, in that at the time that he admitted and was convicted of sex offenses he was free to choose to reside where and with whom he would live subject only to obligations and restrictions applicable to the populace as a whole, and he was under no restriction or disability in the exercise of that freedom on account of the criminal conduct for which he was otherwise and fully punished.

R. L. v. State of Missouri Department of Corrections, 245 S.W.3d 236 (Mo. 2008)

Squaw Creek Drainage District v. Turney, 138 S.W.12 (Mo. 1911)

Doe v. Phillips, 194 S.W. 3d 833 (Mo. 2006)

II.

The Circuit Court erred in refusing to declare § 566.147 unconstitutionally vague on its face and as applied to R. L. because the criminalization of residing within 1,000 feet of a school or child-care facility fails to afford R. L. or other individuals subject to the prohibition sufficient notice of the proscribed conduct or to prevent arbitrary or discriminatory application of the law, in that ordinary citizens and law enforcement officials of common intelligence and good reason could differ with respect to the beginning and ending points of the measurement necessary to determine criminal liability.

Connally v. General Construction Co., 269 U.S. 385 (1926)

Kolender v. Lawson, 461 U.S. 352 (1983)

United States v. Harriss, 347 U.S. 612 (1994)

State v. Schleiermacher, 924 S.W.2d 269 (Mo. 1996)

III.

The Circuit Court erred in finding that the measurement language of § 566.147 is unambiguous, concluding that the statute required the distance between a residence and a school or child-care facility to be measured from property line to property line, and ruling that F. R. was prohibited from residing in the home at 503 Abingdon Court, because that decision violated the rule of lenity and resulted in an incorrect interpretation of the statute, in that (A) individuals of ordinary intelligence and good reason could differ with respect to the beginning and ending points of the measurement necessary to determine criminal liability, and (B) the statute thus is ambiguous, (C) the rule of lenity is applicable and requires a construction of the statutory measurement language favorable to the putative criminal defendant or, in this case, F. R., and (D) the distance between the residential structure on Abingdon Court and the child-care structure was more than 1,000 feet and F. R. was entitled to live in that home with impunity under § 566.147.

State v. Graham, 204 S.W.3d 655, 656 (Mo. 2006)

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

J. S. v. Beaird, 28 S.W.3d 875 (Mo. 2000)

State v. Rowe, 63 S.W.3d 647 (Mo. 2002)

ARGUMENT

I.

The Circuit Court erred in refusing to declare § 566.147 unconstitutional on its face and as applied to R. L. because the statute imposes new obligations to ascertain the presence of schools or child-care facility in proximity to any prospective residence and obtain a measurement of the distance between the school or facility and the residence, takes away or impairs R. L.’s previously vested right to choose where he would live without respect to his status as a convicted person, attaches the new disability of residency restriction on account of considerations already past, in that at the time that he admitted and was convicted of sex offenses he was free to choose to reside where and with whom he would live subject only to obligations and restrictions applicable to the populace as a whole, and he was under no restriction or disability in the exercise of that freedom on account of the criminal conduct for which he was otherwise and fully punished.

Standard of Review: “The standard of review for constitutional challenges to a statute is *de novo*.” *Phillips v. Edmundson*, 240 S.W.3d 691, 693 (Mo. 2007).

When F.R. admitted and was sentenced for sex offenses in 1999, the law imposed no restraint on where he might choose to reside after incarceration on account of his conduct and conviction, and no obligation to obtain a survey establishing the distance between a prospective residence and any school or child-

care facility.² In 2004 and 2006 the legislature passed and amended Mo. Rev. Stat. § 566.147, restricting F. R.’s choice of a place to live solely on account of his conduct and conviction. The Missouri Constitution prohibits the enactment of any law that is “retrospective in its application.” Mo. Const. Art. I, § 20. Because § 566.147 imposes a new obligation upon F. R. to find any school or child-care facility that might be proximate to a place he wants to live and to ascertain the distance between the school or child-care facility and his intended home, and because it imposes a profound disability by precluding him from taking up residence in many places, the statute violates the bar against retrospective legislation. The Circuit erred in finding § 566.147 constitutional and this Court should reverse its judgment.

The prohibition of retrospective laws has been a part of Missouri law “since this State adopted its first constitution in 1820.” *R. L. v. State of Missouri Department of Corrections*, 245 S.W.3d 236, 237 (Mo. 2008) (citing *Doe v.*

² This Court recently made it clear that the focal date for identifying and evaluating any retrospective effect of Mo. Rev. Stat. § 589.400, the sex offender registration act, is the date of plea or conviction. *State v. Holden*, 278 S.W.3d 674, 678 (Mo. 2009). The definitional language of § 566.147.1 effectively tracks that of § 589.400.

Phillips, 194 S.W. 3d 833, 850 (Mo. 2006)).³ Almost a century ago this Court defined a retrospective law within the contemplation of Mo. Const. Art. I, § 13, as follows:

A retrospective law is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past. It must give to something already done a different effect from that which it had when it transpired.

Squaw Creek Drainage District v. Turney, 138 S.W.12, 16 (Mo. 1911). The Court reiterated that definition in *R. L.* last year. 245 S.W.3d at 237. Section 566.147 satisfies that definition in its application to F. R. and any other individual whose plea of guilty or conviction occurred prior to the statute's enactment.

Section 566.147 “attaches a new disability” to F. R. by imposing a stunning limitation on the places in which he qualifies to reside within Missouri. The statute precludes him from residing within 1,000 feet of any public or private school or any child-care facility. The Missouri Department of Elementary and Secondary Education maintains a list of public school buildings on its web site. <http://dese.mo.gov/directory/download.html> (last visited on May 2, 2009). The

³ Missouri's constitutional debates of 1875 “note the constitutional bar on retrospective laws is broader than the ex post facto bars in other states.” *R.L.* (citing *Doe v. Phillips, supra*, and IV Debates of the Missouri Constitutional Convention 1875 at 95 (Isidor Loeb & Floyd c. Shoemaker eds., 1938)).

list, which purports to be current as of February 25, 2009, identifies and provides the locations of some 2,315 public elementary and high school buildings in the state. *Id.* According to one non-public accounting, Missouri has 680 additional private schools. [http://www. privateschoolreview.com/state_statistics/stateid/MO](http://www.privateschoolreview.com/state_statistics/stateid/MO) (last visited on May 2, 2009). An internet search gateway provided by the Missouri Department of Health and Senior Services lists 186 licensed and license-exempt “child care facilities” in St. Charles County alone. http://www.dhss.mo.gov/ChildCare/find_childcare.html#provider (last visited May 2, 2009). The number of schools and child-care facilities in the City of St. Louis is 362 and in St. Louis County 630. *Id.* The site lists 95 facilities in Cole County, 289 in Jackson County, and 186 in Greene County. *Id.* Section 566.147 prohibits F. R. from living anywhere within a circle more than one-third of a mile across drawn around each such sites in any of the state’s 114 counties or in the City of St. Louis. With due regard for the certainty that some of those circles overlap, any suggestion that § 566.147 does not attach a “new disability” to F. R. could not be taken seriously.

The statute also imposes that disability “with respect to . . . considerations already past.” The sole trigger for the disability of being unable to live within a circle 2,000 feet in diameter surrounding thousands of school and child-care buildings throughout Missouri is a guilty plea or conviction that occurred prior to the law’s enactment. Nor is there any doubt that the restriction imposed by § 566.147 “give[s] to something already done a different effect from that which it had when it transpired”: the legal consequences attendant to F. R.’s plea and

conviction in 1999 did not include restriction on where he might choose to live after his freedom was restored.

There is of course nothing trivial about the right to customary liberty with respect to the choice of where one will reside. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court identified “the right of the individual to . . . establish a home” as one of “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Id.* at 399-400. In a dissent that became famous and has often been cited, Justice Brandeis identified the right to be free from “every unjustifiable intrusion by the government upon the privacy of the individual”—“the right to be let alone”—as “the most comprehensive of rights and the right most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); *see also Barber v. Time, Inc.*, 159 S.W.2d 291, 294 (Mo 1942) (citing *Olmstead*, recognizing “the right to be let alone” as the basis of a right to privacy that “is, or at least grows out of, a constitutional right,” and endorsing in principle the California state constitution’s recognition of the natural “inalienable [right of] acquiring, possessing, and protecting property”).

F. R. acknowledges the police power of the State to impose restrictions upon individual liberty that may be necessary for the common welfare. *See, e.g., State ex rel. Drury Displays, Inc. v. City of Shrewsbury*, 985 S.W.2d 797, 800 (Mo.App.E.D. 1998) (noting that “[o]ur constitutional history has seen a continuing tension between the police power and owners’ freedom to use their property as they choose”). But if that authority can be invoked to justify the

enactment of a statute that imposes a substantial new disability on one or more individuals on account of their past conduct, the prohibition of retrospective laws will have been legislated and adjudicated out of the constitution.

In *R. L.*, this Court held that § 566.147 was unconstitutional when applied to a convicted sex offender who lived in a residence within 1,000 feet of a school or child-care facility when the legislation was amended in 2006 and whom the state thereafter threatened with prosecution for remaining in his home. 245 S.W.3d at 237-238. The enactment is no more valid as an exercise of the police power in the present case than it was in *R. L.* There the statute imposed a new obligation to relocate on the convicted individual. *Id.*⁴ Here the statute creates the

⁴ *R. L.* was premised in large part upon this Court's decision in *Doe v. Phillips*, *supra*. *Doe* held that a law requiring registration as a sex offender for an offense that occurred prior to the effective date of the statute was invalid because the obligation to register was imposed retrospectively. 194 S.W.3d at 237-38. The new obligation found unconstitutional *Doe*—to provide pertinent information to officials and submit to having a photograph taken—was no more burdensome than the obligation to search for schools and child-care facilities near a prospective residence, obtain reliable measurements of the distances between such facilities and the residence, and thereafter continue to become aware of and report the opening of a new school or child-care operation near the residence.

new disability discussed above—as well as a new obligation discussed below—solely because of F. R.’s past conduct.

The new obligations imposed on F. R. by § 566.147 are the identification of schools or child-care facilities near a prospective home, the accurate measurement of distances between those facilities and the residence, and the ongoing requirement of learning of and reporting the establishment of a new school or child-care operation in proximity to the residence. By subjecting F. R. to felony liability if he takes up residence within 1,000 feet of a school or child-care facility or fails to discover and report the establishment of a new school or child care operation nearby, the statute imposes significant new obligations and new risks upon him solely because of his past plea and conviction. As the price for a want of diligence in reporting or measuring well might include prosecution and imprisonment, F. R.’s own eventual decision to retain the services of a professional surveyor was well advised. Legal File at 30-32. As in *R. L. and Doe*, the new statutory obligation imposed upon F. R. cannot be reconciled with the constitutional prohibition of retrospective laws.

Section 566.147 “attaches a new disability” when it is applied to F. R. because it precludes him from choosing to live in many locations. The statute “creates a new obligation” for F. R. by requiring him to identify schools or child-care facilities near any home he would like to or does occupy and to ascertain the distance between the former and the latter. Both the new disability and the new obligation are imposed “with respect to transactions or considerations already

past,” because only F. R.’s pre-enactment plea and conviction make the statute applicable to him. Section 566.147 thus “give[s] to something already done a different effect from that which it had when it transpired.” If the prohibition of retrospective laws continues to mean what it has from the decision of *Squaw Creek Drainage District* in 1911 through the announcement of *R. L.* in 2008, the Circuit Court erred in declaring § 566.147 constitutional and its judgment should be reversed.

II.

The Circuit Court erred in refusing to declare § 566.147 unconstitutionally vague on its face and as applied to R. L. because the criminalization of residing within 1,000 feet of a school or child-care facility fails to afford R. L. or other individuals subject to the prohibition sufficient notice of the proscribed conduct or to prevent arbitrary or discriminatory application of the law, in that ordinary citizens and law enforcement officials of common intelligence and good reason could differ with respect to the beginning and ending points of the measurement necessary to determine criminal liability.

Standard of Review: “The standard of review for constitutional challenges to a statute is *de novo*.” *Phillips v. Edmundson, supra*, 240 S.W.3d at 693.

Under § 566.147, a convicted sex offender who “reside[s] within one thousand feet of any public . . . or any private school . . . or child-care facility” may be punished for a felony. Due process requires that a criminal statute afford a person of normal intelligence fair notice that conduct he may be contemplating is forbidden. *State v. Schleiermacher*, 924 S.W.2d 269, 275 (Mo. 1996) (citing *United States v. Harriss*, 347 U.S. 612, 617 (1994)). It also requires that a statute be specific enough and create standards clear enough to prevent arbitrary or discriminatory enforcement. *Id.* (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972)). The failure of § 566.147 to specify the beginning and

ending points of the measurement that determines criminal liability—and the patent need for such definition—renders the statute unconstitutionally vague. The Circuit Court erred in concluding otherwise and its judgment should be reversed.

The parties’ stipulation in this case provides stark illustration of the unconstitutional lack of clarity in the statute. The prosecution obtained a measurement of 913.34 feet from the property line of Ms Barry’s land to the property line of the Kid’s Academy child-care facility. Legal File at 29. F. R. obtained a surveyor’s measurement of 1,096.6 feet from building entrance to building entrance and 1,077.9 feet from building corner to building corner. *Id.* at 30. The state’s measurement would make F. R.’s residence in Ms Barry’s house felonious. The surveying company’s measurement would allow him to live in the house without criminal consequence.

The Circuit Court concluded that the “operative language” of § 566.147—“that a sex offender ‘shall not reside within one thousand feet of any public school . . . or any private school . . . or child-care facility’”—is “easily understandable to people of ordinary intelligence.” Legal File at 45-46. The court found that the understanding of such a person necessarily would be that the measurement should be from property line-to-property line rather than from structure to structure. *Id.* at 46. The court arrived at that conclusion through the following reasoning:

Section 566.147 speaks not solely of “reside” and “residence,” but of residing “at the location” . . . The statutory definition of “resides” also states that a residence “may include more than one location” . . .

As a common meaning of “location” is “position in space; place where a factory, house, etc. is or is to be; situation,” Webster’s New World College Dictionary 793 (1997), the use of the word “location” with “reside” or “residence” strongly suggests that residence includes more than just the bedroom or residential structure . . . especially as Plaintiff would have access to the entire residential property, not just the dwelling or a bedroom within the dwelling.

Legal File at 46.

Even if that is a compelling interpretation of the statute, the rationale for measurement from structure to structure is at least as reasonable. Subsection (1) of the statute states that a convicted sex offender “shall not reside within one thousand feet of any public school . . . or any private school . . . or child-care facility . . . which is in existence at the time the individual begins to reside at the location.” The specification that the school or child-care facility must be “in existence” suggests a physical structure. Subsection (2) imposes a continuing obligation to report whenever a school or child-care facility “is subsequently *built or placed* within one thousand feet of such person’s residence.” Again, this language refers to a structure. Subsection (3) defines the term “resides” as “sleep[ing] in a residence,” which strongly suggests that the residence contemplated by the statute is a structure.

The legislature knows how to draft a statute that clearly prohibits a sex offender from living on property that is within 1,000 feet of property upon which a

school or child-care facility is located. It also knows how to draft a statute that clearly prohibits a sex offender from living in a structure that is within 1,000 feet of a structure in which a school or child-care facility is operated. It did neither of things, but rather wrote a law susceptible to either interpretation, and neither with confidence sufficient to pass constitutional muster.

The statute at issue in *Schleiermacher* made it a crime to violate a court order “prohibiting harassment by ‘lingering outside’ the residence of the protected party.” 924 S.W.2d at 275. This Court stated that statutory language susceptible to more than one interpretation “are to be given a reasonable reading rather than an absurd or strained reading,” and “construed in a manner consistent with the legislative intent, giving meaning to the words used within the context of the legislature’s purpose in enacting the law.” *Id.* at 276. The Court noted that the context of that language was an “adult abuse statute . . . designed to discourage and prevent domestic violence by limiting contact between members of a family or former residents of a household.” *Id.* From there the Court readily concluded that “a person of ordinary understanding” would understand the phrase “lingering outside of the residence” to mean “stopping or slowing” near a residence so as to enable “monitoring those who come to or go from the residence.” *Id.* The bottom line for this Court was that the statute was not “so unclear that persons of common intelligence must guess at its meaning.” *Id.*

In the present case, the statutory reference to residing “within one thousand feet” of a school or child-care facility is susceptible to at least two

interpretations with respect to the beginning and ending points of measurement. Neither of the interpretations discussed in this brief is “absurd or strained.” The context of the language is a statute designed to diminish the opportunity for and likelihood of recidivist sex crimes against or other danger to children; both interpretations of the less than clear language are consistent with that legislative purpose, and there is no reasonable basis for arguing that one interpretation is more consistent than the other with the statute’s intent. People of ordinary understanding might pick one interpretation or they might pick the other.

In *Connally v. General Construction Co.*, 269 U.S. 385 (1926), the Supreme Court recognized that a statute so vague in its prohibition or mandate “that men of common intelligence must . . . guess at its meaning and differ as to its application” cannot be squared with fair play or due process. That problem is front and center in § 566.147 and the statute is unconstitutional for that reason.

In addition to providing notice to citizens who otherwise might violate a statute’s prohibition unknowingly, a criminal enactment must provide “explicit standards for those who apply it.” *Chain v. Coombe*, 186 F.3d 82, 87 (2nd Cir. 1999). Otherwise “a criminal statute may permit ‘a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.’” *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). That threat to fundamental fairness also is illustrated by the present case: Det. Doten elected to measure property line to property line in F. R.’s case; with another offender or at a different time, either he or another police

officer might opt to measure from structure to structure. The want of clearly stated criteria for law enforcement officials to make uniform enforcement likely also places § 566.147 at odds with due process.

As a practical matter, neither F. R. nor any other person subject to § 566.147 can safely move into a residence without first requesting that local law enforcement officials confirm that no school or child-care facility is located within 1,000 feet of the prospective home. Because the governing statutory language is susceptible to more than one interpretation, § 566.147 fairly invites arbitrary and discriminatory interpretation and application.

Any reasonable notion of due process or fundamental fairness would be offended by the prosecution and conviction of a former sex offender for residing in a home that is more than 1,000 feet from the structure in which a school or child-care facility is maintained, but situated on property having a border located within 900 feet of school or child-care property. This Court should declare § 566.147 unconstitutionally vague for that reason.

III.

The Circuit Court erred in finding that the measurement language of § 566.147 is unambiguous, concluding that the statute required the distance between a residence and a school or child-care facility to be measured from property line to property line, and ruling that F. R. was prohibited from residing in the home at 503 Abingdon Court, because that decision violated the rule of lenity and resulted in an incorrect interpretation of the statute, in that (A) individuals of ordinary intelligence and good reason could differ with respect to the beginning and ending points of the measurement necessary to determine criminal liability, and (B) the statute thus is ambiguous, (C) the rule of lenity is applicable and requires a construction of the statutory measurement language favorable to the putative criminal defendant or, in this case, F. R., and (D) the distance between the residential structure on Abingdon Court and the child-care structure was more than 1,000 feet and F. R. was entitled to live in that home with impunity under § 566.147.

Standard of Review: This Court reviews a trial court's interpretation of a statute *de novo*. *Holtcamp v. State*, 259 S.W.3d 537, 539 (Mo. 2008).

The distance element that determines criminal liability under § 566.147 may contemplate measurement from property line to property line. It may with equal reason contemplate measurement from structure to structure. In this very case those differing standards would make the difference between guilt and

innocence: the distance between the pertinent property lines was less than 1,000 feet and the distance between the structures was more than 1,000 feet. Legal File at 29-30.

The rule of lenity applies to the resolution of this statutory ambiguity because no other rule of construction can yield the legislative intent with satisfactory certainty. *See Turner v. State*, 245 S.W.3d 826, 827 (Mo. 2008) (recognizing that the rule of lenity “is a default rule” to be used for the resolution of statutory ambiguity “in the event the other canons are inapplicable”). Under the rule of lenity an ambiguous criminal statute “must be interpreted in favor of the defendant.” *Id.* at 828. The beginning and ending points for the measurement required by § 566.147 thus are the residential and school or child-care structures, because that distance is greater than the distance between the borders of properties upon which the structures are situated. This Court should reverse the judgment of the Circuit Court for that reason.

“The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language.” *State v. Graham*, 204 S.W.3d 655, 656 (Mo. 2006). “Words are to be given their plain and ordinary meaning wherever possible.” *J. S. v. Beaird*, 28 S.W.3d 875, 876 (Mo. 2000). When the words of a statute are clear and susceptible to only one reasonable interpretation, “there is nothing to construe beyond applying the plain meaning of the law.” *State v. Rowe*, 63 S.W.3d 647, 649 (Mo. 2002). Where the words of a statute may be read in more than one way,

a court must afford the measure “a reasonable reading rather than an absurd or strained reading.” *J. S.*, 28 S.W.3d at 876. But when the language chosen by the legislature is susceptible to more than one *reasonable* interpretation, the statute is ambiguous and the rule of lenity applies. *Graham*, 204 S.W.3d at 656.

Section 566.147 prohibits convicted sex offenders from residing “within one thousand feet” of a school or child-care facility and imposes felony liability for violations of that proscription. The statutory limitation upon the proximity of an offender’s residence and a school or child-care facility is susceptible to at least two interpretations with respect to the beginning and ending points of measurement. *See* Point II, *supra*. Neither of those interpretations is “absurd or strained.” Reasonable individuals of common intelligence might pick one interpretation or they might pick the other. Thus the rule of lenity applies and the ambiguity must be resolved in favor of F. R.

The Circuit Court did not directly address F. R.’s contention for application of the rule of lenity. But that court appears to have concluded that the statutory language is not ambiguous and is susceptible only to a requirement of property line to property line measurement. Legal File at 46. The court erred in failing to recognize the ambiguity of § 566.147, to apply the rule of lenity, and to conclude that the measurement between residence and school or child-care facility must be made from structure to structure. This Court should reverse the judgment that ensued.

CONCLUSION

The judgment of the Circuit Court should be reversed for the reasons set forth in this brief. This Court should declare Mo. Rev. Stat. § 566.147 unconstitutional on its face and as applied to F. R. Alternatively, the Court should apply the rule of lenity and construe the statute as prohibiting a former sex offender from residing in a structure located within 1,000 feet of another structure in which a school or child-care facility is operated. Because F. R. requested injunctive relief in the Circuit Court, this Court's judgment should enjoin the respondent St. Charles County Sheriff's Department from interfering with F. R.'s establishment of residence at 305 Abingdon Court in O'Fallon, Missouri, pursuant to § 566.147.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief contains the information required by Mo.R.Civ.P. 55.03 and complies with the limitations contained in Mo. R. Civ. P. 84.06. The brief contains 6,680 words as determined by the software application Microsoft Word for Macintosh version 2008. The compact disk filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

Two copies of this brief and one diskette bearing a copy of the brief were sent by first class mail on May 4, 2009, to:

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