

**IN THE
SUPREME COURT OF MISSOURI**

SC92380

JOHN DOE,

Plaintiff/Respondent,

v.

GARY F. TOELKE, Sheriff, et al.,

Defendants/Appellants.

**Appeal from the Circuit Court of the County of Franklin,
The Honorable Gael D. Wood, Circuit Judge**

REPLY BRIEF OF APPELLANT COL. RONALD K. REPLOGLE

**CHRIS KOSTER
Attorney General**

**Jeremiah J. Morgan
Deputy Solicitor General
Missouri Bar No. 50387
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov**

**Mary D. Delworth
Assistant Attorney General
Missouri Bar No. 60921
P.O. Box 861
St. Louis, MO 63188
(314) 340-7875
(314) 340-7029 (facsimile)
Mary.Delworth@ago.mo.gov**

ATTORNEYS FOR APPELLANT REPLOGLE

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SUMMARY OF THE ARGUMENT

Doe admits in his brief that at least until 2009 he was required to register as a sex offender because of the federal Sex Offender Registration and Notification Act (“SORNA”). *See* Respondent’s Br. at 19 (noting that his “twenty-five year registration period would have expired on January 17, 2009”); *see also Doe v. Keathley*, 290 S.W.3d 719 (Mo. banc 2009) (holding that SORNA provides an independent basis for sex offender registration in Missouri). Not only does he admit he was required to register in Missouri as late as 2009, but Doe further “agrees that out-of-state offenders become constitutionally subject to SORA when they move to Missouri.” *Id.* at 16. These admissions, along with the plain language of Missouri’s SORA, completely undermine Doe’s arguments.

First, we examine the admission that Doe was required to register in Missouri at least until 2009. If that is true, and it is, then Doe was admittedly required to register at a time when Missouri law required (and it still does) lifetime registration for a sex offender that “has been or is required to register under tribal, federal, or military law.” § 589.400.1(7), RSMo (2011 Cum. Supp.).^{1/} That is exactly the situation in this case.

^{1/} All references to the Revised Statutes of Missouri will be to the 2011 Cumulative Supplement, unless otherwise indicated.

Missouri law continues to require lifetime registration, and there is no exemption for sex offenders who are no longer required to register in another jurisdiction or under federal law. Furthermore, the law is not retrospective in its operation because it looks at a current condition, not a past conviction.

Doe's second admission is also telling. He acknowledges the obvious and practical consequences of Missouri's SORA – sex offenders residing in Missouri must comply with the requirements of SORA regardless of where they were convicted or under what law they were required to register. To conclude otherwise would require Missouri law enforcement officials to apply the registration requirements of multiple jurisdictions. This is not the law, as Doe recognizes, and therefore he is subject to all of Missouri's registration requirements.

ARGUMENT

Missouri's SORA applies to Doe because he meets the express conditions of the statute; namely, he "has been or is required to register under tribal, federal, or military law." § 589.400.1(7). It is that condition, which plaintiff admits existed until at least 2009, that makes SORA applicable to Doe and subjects him to Missouri's registration laws. *See* 28 C.F.R. § 72.3 (Pursuant to statutory authority, the United States Attorney General issued a rule, effective February 28, 2007, which made the requirements of the Sex Offender Registration and Notification Act apply to all sex offenders retroactively).

Regardless of when he was convicted, Doe must register in accordance with Missouri law if he is (or has been) required to register as a "sex offender" within the meaning of 42 U.S.C. § 16913(a). *See Keathley*, 290 S.W.3d at 720. Absent any showing that Doe is exempt from SORA, he is subject to the lifetime registration requirements. In his brief, however, Doe argues that if he is no longer required to register under federal law, he somehow falls outside the purview of Missouri law. He does not, and his arguments fail.

I. Application of SORA to Doe is Not Retrospective in its Operation, and Therefore Does Not Violate Article I, § 13 of the Missouri Constitution.

Contrary to Doe's arguments, application of SORA in this case is not retrospective. Doe's obligation to register is not based on his prior conviction. Instead, the obligation arises from his existing condition as a registered sex offender who has been or is required to register under federal law. It is that condition (which according to Doe was present at least until 2009) that triggers the obligation to register in accordance with Missouri law.

Similarly, in *State ex rel. Koster v. Olive*, 282 S.W.3d 842 (Mo. banc 2009), the obligation of the dam owner to obtain a permit was not based on some type of future dangerousness; instead, it was based on the present condition and existence of the dam. Similarly, Doe admits he has been obligated to register under federal law, and was doing so as recently as 2010. Respondent's Br. at 7, 13. Therefore, Doe's obligation to register does not derive from past criminal conduct, but from his present condition as a sex offender who has been or is required to register under federal law.

For purposes of retrospective operation, this Court has found that the obligation under federal law to register is independent of the obligation to register under SORA. *Keathley*, 290 S.W.3d at 720. The constitutional prohibition against retrospective laws cannot provide relief to offenders who

are “subject to the independent, federally mandated registration requirements under the Sexual Offenders Registration and Notification Act (SORNA).” *Id.* Once required to register in Missouri, Doe must register in accordance with Missouri law.

A. SORA Requires That Doe Register in Accordance with Missouri Law.

The plain language of Missouri’s SORA makes clear that it applies to Doe. Yet, even if it were a close case SORA was enacted for the protection of the citizens of the state and is for the public good. As such, it is a remedial statute in nature, and therefore must be given a liberal construction. *See City of St. Louis v. Carpenter*, 341 S.W.2d 786 (Mo. 1961) (citing 82 C.J.S. Statutes § 388, p. 918; 50 Am.Jur., Statutes § 395, p. 420; *Barbieri v. Morris*, 315 S.W.2d 711, 714 (Mo. 1958); *State ex. rel Whatley v. Mueller*, 288 S.W.2d 405, 409 (Mo. App. 1956)). Doe does not dispute either the plain language of the statute, its remedial nature, or that it should be given a liberal construction.

The first sentence of the provision at issue, § 589.400.1, provides that “Sections 589.400 to 589.425 **shall apply** to” any person who meets certain enumerated conditions. § 589.400.1 (emphasis added). Specifically, the provisions of SORA shall apply to any person who: has been convicted of specific crimes under chapter 566, RSMo; has been committed to the

department of mental health as a criminal sexual psychopath; . . . and has been or is required to register in another state or has been or is required to register under tribal, federal, or military law. *See* § 589.400.1(1)-(8).

The directives of the statute are mandatory, in that SORA “shall apply” to sex offenders who meet certain conditions. There is no dispute that Doe is a sex offender who has been or is required to register under federal law, therefore meeting the requirements of subdivision (7) (requiring registration of any person who is a resident of this state who has been or is required to register under tribal, federal, or military law). Although Doe argues that the obligation to register under federal law may have expired, any alleged expiration does not change the *condition* that Doe has been or is required to register under federal law. Because he meets that condition, he is subject to SORA.

SORA applies to Missouri residents as well as nonresident sex offenders. SORA provides that a nonresident worker or nonresident student “shall register for the duration of such person’s employment or attendance at any school of higher education.” § 589.400.10. This subsection further provides that “[a]ny registered offender from another state who has a temporary residence in this state and resides more than seven days in a twelve-month period shall register for the duration of such person’s temporary residency.” *Id.*

When an out-of-state sex offender temporarily resides in Missouri, there is no dispute that the offender is subject to Missouri's registration requirements. Missouri is not required to impose or enforce another jurisdiction's registration requirements, whether they are more stringent or more lenient. Rather, the out-of-state sex offender is subject to Missouri's registration laws, even though the residency may be as short as eight days in a twelve-month period. To find otherwise would require Missouri law enforcement agencies to administer other state's laws and reporting requirements. The result of applying the law of other jurisdictions would be confusing at best.

The legislature contemplated the confusion of requiring registration in Missouri using different requirements from jurisdictions, and expressly provided that even temporary residents are subject to registration under Missouri law rather than require Missouri law enforcement agencies to learn the registration requirements of other jurisdictions and apply them within the state. To now find that permanent residents who are or were required to register in another state or under federal law are not subject to SORA requirements would create discord within the plain language of the statute, not to mention the liberal construction it must be accorded. Rather, SORA requires that a sex offender, even one required to register because of federal law, must fully comply with the registration obligations of SORA.

There is no dispute that Doe is a sex offender required to register under federal law. Doe concedes that he was required by law to register at least until 2009. Respondent's Br. at 7. He also admits, as he must, that out-of-state offenders become constitutionally subject to SORA when they move to Missouri. Respondent's Br. at 16. It logically follows, based on Doe's own admissions, that a sex offender residing in Missouri who is obligated to register under federal law is subject to SORA and its registration requirements.

For Doe to concede that an out-of-state offender becomes "constitutionally subject to SORA when they move to Missouri", but then argue that a sex offender who has been or is required to register under federal law in Missouri is not subject to SORA does not make sense. Respondent's Br. at 16. As noted in *State v. Boeji*, 352 S.W.3d 625, 628 (Mo. App. S.D. 2011), "SORNA, a federal law, compelled Boeji to register in Missouri. This, *and* his prior registration in Illinois, required Boeji to register under SORA as well." *State v. Boeji*, 352 S.W.3d at 628. So it is in this case as well. Under the plain language of the statute, Doe is required to register in accordance with SORA because he has been or is required to register under federal law.

B. Doe is Not Exempt, But Must Register for the Duration Designated by SORA.

SORA provides that the requirements of sections 589.400 through 589.425 are lifetime registration requirements unless:

- (1) All offenses requiring registration are reversed, vacated or set aside;
- (2) The registrant is pardoned of the offenses requiring registration;
- (3) The registrant is no longer required to register and his or her name shall be removed from the registry under the provisions of subsection 6 of this section; or
- (4) The registrant may petition the court for removal or exemption from the registry under subsection 7 or 8 of this section and the court orders the removal or exemption of such person from the registry.

§ 589.400.3. Doe does not meet any of these exemptions, nor does he attempt to meet any. Furthermore, there is no exemption for a circumstance where registration requirements run out in another state or under federal law. In

fact, the exact opposite is the case – a sex offender must register if the sex offender “has been” required to register.

In addition to the exemptions noted above, SORA provides certain permissive exemptions. For example, § 589.400.8 provides that any person on the registry may petition the court after two years have passed since the date of conviction for removal “if such person was nineteen years of age or younger and the victim was thirteen years of age or older at the time of the offense and no physical force or threat of physical force was used in the commission of the offense.” Any person petitioning the court for removal must demonstrate to the court, in addition to meeting the elements, that “he or she has complied with the provisions of this section and is not a current or potential threat to public safety.” § 589.400.9. Absent meeting the requirements of one of the exemptions, the registration requirements are lifetime.

Once again, Doe does not argue, nor could he prove, that he qualifies for an exemption from registration. And there is no exemption for circumstances in which registration has run out in another state or under federal law. Therefore, Doe is subject to the registration duration designated under SORA – lifetime registration.

II. The Circuit Court Was Required to Determine Doe's Registration Requirement Under Federal Law or Determine That the Issue is Moot.

Doe contends that the circuit court correctly deferred to a federal court for determination of the issue of registration under the federal Sex Offender Registration and Notification Act. Respondent's Br. at 17. But Doe fails to provide any citation or authority for this proposition. The reason is because there is no authority for such a proposition. Indeed, precedent indicates that the contrary is true.

As courts of general jurisdiction, circuit courts are "obligated to determine questions which fall within their jurisdiction." *Carlson v. Central Trust Bank*, 838 S.W.2d 483, 485 (Mo. App. S.D. 1992). As noted in Appellant's opening brief, it is reversible error for a court to refuse to determine questions which fall within their jurisdiction. *See Carlson*, 838 S.W.2d at 485 (citing 21 C.J.S. Courts § 68, p. 85 (1990)). There are no applicable rules of abstention permitting the circuit court in this case to decline or defer jurisdiction to a federal court.

Even this Court considered and decided federal issues in *Doe v. Keathley*, 290 S.W.3d 719 (Mo. banc 2009). Contrary to Doe's unsupported and illogical argument, there is no basis for the circuit court to have refused or deferred jurisdiction in this case, and the circuit court erred in not

determining whether Doe is required to register under SORNA. Alternatively, because Doe is required to register under SORA, regardless of his continuing requirement to register under SORNA, the issue is likely moot.

III. Doe Cannot Complain of the Circuit Court's Refusal to Destroy Missouri State Highway Patrol Records.

Finally, Doe did not file an appeal or cross-appeal of the circuit court's decision not to order the destruction of records. He cannot now complain of that ruling for the first time in a responsive brief. *See, e.g., Goldberg v. State Tax Commission*, 618 S.W.2d 635, 642 (Mo. 1981) (The general rule of appellate procedure is that, in the absence of a cross-appeal, the reviewing court is concerned only with the complaint of the party appealing and that the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him). Even if he did appeal the issue, it would be irrelevant because Doe is required to comply with Missouri's lifetime registration requirement.

CONCLUSION

For the foregoing reasons, as well as those set forth in Appellant's opening brief, this Court should reverse the judgment of the trial court and hold that Doe has an obligation to register in accordance with Missouri's Sex Offender Registration Act. §§ 589.400, *et seq.*

Respectfully submitted,

CHRIS KOSTER
Attorney General

By: /s/ Jeremiah J. Morgan
Jeremiah J. Morgan, Mo. #50387
Deputy Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
Jeremiah.Morgan@ago.mo.gov

and

Mary D. Delworth, Mo. #60921
Assistant Attorney General
P.O. Box 861
St. Louis, Missouri 63188
(314) 340-7875
(314) 340-7029 (facsimile)
Mary.Delworth@ago.mo.gov

ATTORNEYS FOR APPELLANT
REPLOGLE

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on the 27th day of August, 2012, the foregoing brief was filed electronically via Missouri CaseNet and served to:

Matthew Radefeld
Tory Bernsen
FRANK, JUENGEL, &
RADEFELD
7710 Carondelet Ave.
Suite 350
Clayton, MO 63105

Robert Parks
Franklin Co. Prosecuting Attorney
15 S. Church, Room 204
Union, MO 63084

Attorney for Gary Toelke

Attorneys for Respondent

I further certify that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 2,781 words.

/s/ Jeremiah J. Morgan
Assistant Attorney General