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*In the  
Supreme Court of Missouri*

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**STATE OF MISSOURI,**

**Respondent,**

**v.**

**WILLIAM HOLDEN,**

**Appellant.**

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**Appeal from Marion County Circuit Court  
Tenth Judicial Circuit  
The Honorable Robert M. Clayton, II, Judge**

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**RESPONDENT’S BRIEF**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a conviction obtained in the Circuit Court of Marion County for failing to register as a sex offender, in violation of section 589.414, RSMo Supp. 2006; and section 589.425, RSMo Supp. 2006, for which Appellant was sentenced to four years imprisonment. This appeal involves the validity of a state statute, section 589.414, RSMo, which is being challenged by Appellant as being retrospective as applied in this case, in that Appellant's underlying offenses were committed before the effective date of the statute, although he pled guilty after the effective date of the statute. The appeal was originally filed in the Missouri Court of Appeals, Eastern District, which ordered the case transferred to this Court prior to disposition upon Appellant's Application for Transfer. Therefore, jurisdiction lies in this Court. Mo. Const. art. V, §§ 3, 11; Supreme Court Rule 83.01.

## STATEMENT OF FACTS

On March 13, 2008, Appellant was charged as a prior felony offender in an amended information with failing to register as a sex offender, in violation of section 589.414, RSMo Supp. 2006, and section 589.425, RSMo Supp. 2006. (L.F. 47-48). Appellant was tried by a jury on that same day, before Judge Robert M. Clayton, II. (L.F. 70-72; Tr. 2-5). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant pled guilty on March 7, 1995, in the Circuit Court of the City of St. Louis, to two counts of sodomy with a child under the age of fourteen years. (Tr. 16-17, 154, 169; State's Ex. 5). The charged acts occurred on April 26, 1994. (State's Ex. 5). Appellant was released from custody and moved to Hannibal, where he registered with the Marion County Sheriff's Department as a sex offender on May 7, 2001. (Tr. 154; State's Ex. 1). Appellant listed his address as 1720 Chestnut in Hannibal. (State's Ex. 1).

Sergeant Lisa Jones handled Appellant's registration. (Tr. 108-09; State's Ex. 1). She testified that she would not have let Appellant sign the registration without his acknowledgement that he understood the requirement that he notify the sheriff's department of any change of address within ten days of his move. (Tr. 110-11). Appellant's signature appears on the registration below a box explaining the registration requirements, including the requirement of reporting a change of address within ten days.

(State's Ex. 1). By signing the line below that box, Appellant acknowledged that he had been informed of those requirements. (State's Ex. 1).

Between 2001 and 2007, Appellant continued to register with the sheriff's department as required. (Tr. 115). On May 29, 2007, Appellant signed a registration form, and initialed the section explaining the requirement that he report a change of address within ten days. (Tr. 117; State's Ex. 2). He also initialed the section acknowledging that he had to verify his registration every ninety days. (State's Ex. 2). The form listed an address of 2815 Marion Street in Hannibal. (State's Ex. 2).

After signing that form, the sheriff's department did not hear from Appellant until he called on August 22, 2007. (Tr. 117-18). Appellant spoke to Janice Stewart, who was then handling sex offender registrations. (Tr. 114, 117-18). Appellant told Stewart that he had moved out of his residence about two weeks previously, and was living in his car. (Tr. 120-22). Appellant did not mention having lived at any other addresses. (Tr. 123).

An investigator from the sheriff's department interviewed Appellant two days later. (Tr. 124). The investigator gave Appellant the *Miranda*<sup>1</sup> warnings. (Tr. 124). Appellant signed a *Miranda* waiver and agreed to talk with the investigator. (Tr. 125). Appellant gave the investigator a written statement that said, "Over a month ago I moved from 2815 Marion Street to 725 Bridge Street because of unsanitary conditions; a septic tank inside the house in a basement room where I was living." (Tr. 126).

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Appellant testified and said that when he first registered in Marion County as a sex offender, he was living at a house on Chestnut. (Tr. 155). He testified that he then moved to an address on Center Street, before moving to 2815 Marion Street just under a year later. (Tr. 155). Appellant said that he lived in the basement at the Marion Street address, and stayed there for six-and-a-half years. (Tr. 155-56). Appellant testified that there was a septic tank in the basement that overflowed many times. (Tr. 156). He sometimes cleaned up the overflow himself, and sometimes called O'Brien's Sewer Service company. (Tr. 157). Appellant testified that he became extremely sick from cleaning up the sewage, and that a church group helped him move out. (Tr. 158-59). Appellant lived at 725 Bridge Street for about two weeks, before being kicked out for drinking beer on the premises. (Tr. 159-60). Appellant said that he then lived in his car near the river. (Tr. 160).

Appellant said that he was going through some papers when he came across his previous registration form, and realized the ninety-day deadline for verifying his registration was almost due. (Tr. 161). Appellant acknowledged signing the May 29, 2007, registration form, but said he was unaware of the ten day requirement for reporting a change of address. (Tr. 164-65, 166). Appellant said he did not bother reading the form, but "just initialed them things and signed them and go." (Tr. 167). Appellant admitted that he did not timely notify the sheriff's department of his move from Marion Street to Bridge Street. (Tr. 169). Appellant did admit to filling out a change of address card for the post office on July 13, 2007. (Tr. 170-71).

Appellant also called as a witness Mark O'Brien, who worked for the sewer service company. (Tr. 145). O'Brien testified that he had serviced a septic tank in the basement at 2815 Marion Street. (Tr. 147-48). O'Brien said that the 500 gallon tank was full, but was not leaking. (Tr. 148). He first pumped out the tank on January 28, 2005, and also pumped it out on August 21, 2005; May 25, 2006; September 2, 2006; and October 3, 2007. (Tr. 149). O'Brien said that Appellant was usually present when he pumped out the tank. (Tr. 148).

The jury found Appellant guilty of failing to register as a sex offender. (Tr. 207; L.F. 69). The court had previously found beyond a reasonable doubt that Appellant was a prior felony offender due to his 1995 guilty pleas to the sodomy charges. (Tr. 16-17). The court sentenced Appellant on April 7, 2008 to four years imprisonment. (Supp. Tr. 27; L.F. 97). This appeal follows. (L.F. 99-103).

## **ARGUMENT**

### **I.**

**The trial court properly denied Appellant's motion to dismiss because section 589.414, RSMo is not retrospective as applied.**

Appellant claims the trial court erred in denying his motion to dismiss because section 589.414, RSMo is unconstitutional as applied to him. Appellant contends the statute is retrospective in that the offenses underlying his March 1995 guilty plea occurred in April 1994, before the effective date of the statute. The statute is not retrospective because Appellant pled guilty after the statute took effect, and this Court, in *Doe v. Phillips*, invalidated the registration requirement only as to persons who pled

guilty or who were found guilty prior to the effective date of the registration statutes. That holding has not been overruled or extended by any subsequent cases.

Also, the registration requirement is triggered by a plea or verdict of guilty, so the commission of the offense is only an antecedent fact that helped to establish Appellant's status on the date that the registration requirement became effective. Additionally, one of the underlying purposes behind the prohibition against retrospective laws is to respect the finality of judgments, and application of the registration law to Appellant does not disturb the finality of the judgment in his sodomy case.

**A. Underlying Facts.**

On December 18, 2007, Appellant filed a Motion to Dismiss, on the basis that section 589.414, RSMo is retrospective. (L.F. 21). In the motion, Appellant noted that he was charged with forcible sodomy for events that occurred on April 26, 1994, and pleaded guilty to those charges on March 7, 1995. (L.F. 21). The motion argued that section 589.414, RSMo, was retrospective because it became effective on January 1, 1995, after the acts of sodomy had been committed. (L.F. 22-23).

The court conducted a pre-trial hearing on January 7, 2008, during which it denied the motion. (Tr. 11-12). Appellant asked the court to reconsider the motion at a pre-trial hearing before the commencement of voir dire. (Tr. 17). The court overruled the motion to reconsider. (Tr. 19). Appellant raised his constitutional claim in his Motion for Judgment of Acquittal at the Close of All the Evidence, in his Motion for New Trial filed on March 19, 2008, and in an Amended Motion for New Trial filed on March 28, 2008. (L.F. 49, 77-80, 85-88).



**B. Standard of Review.**

This Court reviews constitutional claims *de novo*. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). Statutes are presumed to be valid and will not be found unconstitutional unless they clearly contravene a constitutional provision. *Id.*

**C. Analysis.**

Sections 589.400 to 589.425, RSMo (also known as “Megan’s Law”), originally became effective on January 1, 1995.<sup>2</sup> *Id.* at 850. Megan’s Law set forth the registration requirements for persons who have been convicted of, or pled guilty to, an enumerated sex offense. *Id.* at 837. The purpose of the law is to protect children from violence at the hands of sex offenders, and to respond to the known danger of recidivism among sex offenders. *Id.* at 839.

One of the provisions taking effect in 1995 requires a person subject to registration to provide written notification of a change of address within ten days of moving.<sup>3</sup> § 589.414, RSMo Supp. 2006.

1. This Court has not extended its previous holdings that the registration requirement is retrospective only as to those who pled guilty or were convicted prior to the statute’s effective date.

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<sup>2</sup> 1994 Mo. Laws 1137-39, originally codified as sections 566.600 to 566.620, RSMo.

<sup>3</sup> 1994 Mo. Laws 1138, originally codified as section 566.614, RSMo.

In *Phillips*, this Court considered whether the obligation to register as a sex offender under Megan's Law was retrospective as applied to certain offenders. *Phillips*, 194 S.W.3d at 849-50. Missouri's Constitution bars the enactment of laws that are retrospective in operation. Mo. Const. art. I, § 13. A law is considered retrospective if it impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a disability in respect to transactions already past. *Phillips*, 194 S.W.3d at 850.

The Court found that the registration requirement of Megan's Law was retrospective because the obligation to register imposed a new duty or obligation. *Id.* at 852. The Court carefully limited the scope of that holding, however:

Missouri's constitutional bar on laws retrospective in their operation compels this Court to invalidate Megan's Law's registration requirements as to, *and only as to*, those persons who were convicted or pled guilty prior to the law's January 1, 1995, effective date. This ruling applies only to the registration requirements. All other provisions of Megan's Law remain in effect as to these and all other persons subject to it. Further, the law is fully in effect as to all persons whose pleas or judgments of conviction were entered on or after its effective date of January 1, 1995, more than 11 years ago, or who committed additional crimes subject to Megan's Law thereafter, and is fully effective as to SVP's.

*Id.* at 852-53 (emphasis in original).

One year after *Phillips*, this Court decided a declaratory judgment action also claiming a retrospective application of the registration requirements of Megan’s Law. *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. banc 2007). *Blunt* involved a defendant who pled guilty in May 2004, to the public display of sexually explicit material. *Id.* At the time of the plea, Megan’s Law did not apply to that offense. *Id.* The statute was changed in August 2004 to add that offense to the registration requirement, and the defendant received a probation violation report for failing to register. *Id.* In finding that Megan’s Law was retrospective as applied to that defendant, this Court stated:

In *Phillips*, the Court determined that a law requiring registration as a sex offender for an offense that occurred prior to the registration law’s effective date was retrospective in operation in violation of Mo. Const. article I, section 13.

*Id.* Appellant in this case argues that the above-quoted sentence in *Blunt*, “indicates the Court’s intention to extend the prohibition against applying the statute retrospectively to those whose offenses predate the effective date of the statute in addition to those who were convicted before the effective date.” (Appellant’s Brf., p. 16). Appellant then argues that the registration requirement is retrospective as applied to him, because the charged crimes were committed before January 1, 1995, even though he pled guilty after Megan’s Law took effect.

If *Blunt* had really been intended to expand the holding of *Phillips* in the way that Appellant suggests, one would have expected this Court to do so more explicitly than through a one sentence summarization of *Phillips*. That’s especially true when

considering how careful the Court was to define the scope of its holding in *Phillips*, including the use of italics to emphasize that the registration requirement was retrospective “*only as to*” those who were convicted or pled guilty prior to the Act’s effective date.<sup>4</sup> *Phillips*, 194 S.W.3d at 852. After so carefully defining its holding in *Phillips*, this Court would not expand that holding in the casual and offhand manner that Appellant suggests.

Appellant’s argument also overlooks language in *Blunt* that follows the sentence that he relies on. In concluding that the registration requirement was retrospective as applied to that particular defendant, the Court said:

*When he pleaded guilty*, Doe had no obligation to register; his duty to register arose from a change in the law. Because the new law imposed a new duty, it is a retrospective law prohibited by Mo. Const. article 1, section 13.

*Blunt*, 225 S.W.3d at 422 (emphasis added). The holding in *Blunt*, like the holding in *Phillips*, focused on the date of the guilty plea, not the date of the offense. *Blunt*, by its own terms, thus does not stand for the proposition that the registration requirements of

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<sup>4</sup> The Court specifically found that Megan’s Law was not restrospective as to one of the plaintiffs, identified as “Jane Doe III,” who pled guilty in 1998. *Phillips*, 194 S.W.3d at 852. It is not clear from the opinion or from the briefs whether the underlying crime to which she pled guilty was committed before or after Megan’s Law took effect.

Megan's Law are retrospective when applied to persons who committed the charged crimes before the statute's effective date, but who pled guilty or who were convicted after the statute took effect.

2. Further clarification of *Phillips* is necessary.

Respondent must point out, however, that the Court has employed language in *Phillips* and in subsequent cases that can lead to some confusion in determining the triggering event that makes the sex offender registration law retrospective. *Phillips* contains a statement that Megan's Law imposed a new duty on the appellants based solely on their offenses prior to enactment of the statute. *Phillips*, 194 S.W.3d at 852. But the Court then immediately went on to limit the scope of its holding to those who had pled guilty or been convicted prior to the statute's effective date. *Id.* The inconsistency of those statements is reflected in the language from *Blunt* that is quoted above, and in another opinion issued subsequent to *Blunt*.

In *R.L. v. Department of Corrections*, a registered sex offender challenged the application of a 2006 law<sup>5</sup> that prevented him from living within one-thousand feet of a school. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237 (Mo. banc 2008). The statute was applied to the appellant based on a guilty plea made in 2005. *Id.* at 236. As it had in *Blunt*, the Court summarized *Phillips* in reaching its decision. *Id.* at 237. The Court initially characterized *Phillips* as holding that the sex offender law was retrospective to the extent that it required registration for offenses that occurred prior to the statute's effective date. *Id.* But the Court then went on to say:

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<sup>5</sup> Section 566.147, RSMo Supp. 2006.

The registration requirement was invalid because *when Doe pled guilty*, he had no obligation to register and his duty to register stemmed only from a subsequent change in the law.

*Id.* (emphasis added). But then, after summarizing *Phillips* in that manner, the Court found that the residency restriction at issue in *R.L.* was retrospective as to the appellant because it was based solely upon offenses committed prior to enactment of the statute.

*Id.*

This case provides the Court with the opportunity to clarify whether the triggering event for determining when a sex offender registration statute operates retrospectively is the date of the offense or the date of the guilty plea or verdict of guilty. This Court's prior precedents and the general principles that govern the determination of whether a law is retrospective point to the date of plea or verdict as the triggering event.

3. Linking retrospective application to date of plea or verdict is appropriate.

This Court has rejected a claim of retrospective application in a case presenting similar circumstances to the instant case. The relator in *State ex rel. Sweezer v. Green* was charged in July of 1949 for an assault that occurred the previous month. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1252, 232 S.W.2d 897, 901 (Mo. banc 1950), *overruled on other grounds*, *State ex rel. North v. Kirtley*, 327 S.W.2d 166 (Mo. 1959). In October of 1949, the prosecuting attorney filed a petition to have the relator declared a criminal sexual psychopath, pursuant to a statute that had become effective on August 1, 1949, and that applied to “any person . . . charged with a criminal offense.” *Green*, 360 Mo. at 1251-52, 232 S.W.2d at 899. The relator challenged the statute as retrospective because

the charged assault occurred before the effective date of the statute. *Id.*, 360 Mo. at 1252-53, 232 S.W.2d at 899. This Court rejected that argument:

In the instant case the Act relates to facts prior to August 1, 1949, and a portion of the requisites for action here antedate the effective date of the Act. But that does not make the Act retrospective. Those antecedent facts may be thus used to establish relator's status as of the effective date of the Act. Upon that date he was a 'person \* \* \* charged with a criminal offense'.

*Id.*, 360 Mo. at 1255, 232 S.W.2d at 901. This Court has subsequently applied that same principle in ruling that an act prohibiting issuance of a hazardous waste management license to habitual violators of past hazardous waste laws was not retrospective. *Jerry-Russell Bliss v. Hazardous Waste Mgmt. Comm.*, 702 S.W.2d 77, 81 (Mo. banc 1985).

Similarly, the registration requirements of Megan's Law apply to those who have been "convicted of, been found guilty of, or pled guilty or nolo contendere to committing or attempting to commit a felony offense of chapter 566, RSMo . . . or any offense of chapter 566, RSMo, where the victim is a minor . . . ." § 589.400.1(1), RSMo Supp. 2006. The obligation to register is thus not triggered by the commission of the offense, but by the conviction or plea. In this case, the offense itself, while antecedent to the effective date of the statute, served only to establish Appellant's status after the statute took effect. It was on March 17, 1995, that Appellant became a person who had pled guilty to committing a felony offense of Chapter 566, RSMo, and thus came within the

ambit of the registration requirement. Thus, any obligation that the statute imposed on Appellant arose after the statute was enacted.

That finding is consistent with this Court's articulation of an underlying purpose of the ban on retrospective application of laws: "Courts respect the finality of judgments. The law bars retrospective application of the laws to cases that have achieved final resolution." *Strait v. Treasurer of Missouri*, 257 S.W.3d 600, 602 (Mo. banc 2008) (internal citation omitted). Appellant's case did not achieve a final resolution until he pled guilty and was sentenced, after the effective date of the registration requirement. The registration requirement is thus not retrospective as applied to Appellant because that requirement was in place before his case was resolved, and Appellant would have been aware of that requirement at the time that he chose to plead guilty. Application of the law to Appellant does not, therefore, disturb the finality of the judgment in his sodomy case.

The registration requirements of Megan's Law are not retrospective as applied to Appellant. The trial court correctly denied Appellant's Motion to Dismiss, and Appellant's point should be denied.

## II.

**The trial court did not err, plainly or otherwise, in overruling Appellant’s amended motion for a new trial because the State did not fail to disclose material and exculpatory information.**

Appellant contends the trial court abused its discretion in overruling his amended motion for a new trial, because the State failed to disclose sex offender registration forms signed by Appellant, that he contends were material and exculpatory. Appellant’s claim should be deemed waived because he was aware of the alleged nondisclosure during trial, but failed to bring it to the trial court’s attention. Appellant is not entitled to relief in any event because the undisclosed registration forms were not material to his guilt, as they did not provide a legal defense to the charged offense.

### **A. Underlying Facts.**

Appellant served a request for discovery on the State on or about November 5, 2007.<sup>6</sup> (L.F. 15-16). The discovery request asked for, *inter alia*, “[a]ny material or information within the possession or control of the State or its agents which tends to negate the guilt of the defendant as charged, mitigate the degree of the offense charged, or reduce punishment.” (L.F. 16). Among the exhibits entered into evidence by the State

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<sup>6</sup> The Legal File contains a document entitled “State’s Response to Defendant’s Request for Discovery,” that was served on Appellant on or about October 23, 2007. (L.F. 9-10). The Legal File contains no discovery request from Appellant predating that response.

were the original sex offender registration form completed and signed by Appellant on May 7, 2001 (State's Ex. 1), and a sex offender registration notification form signed by Appellant on May 29, 2007 (State's Ex. 2). Both forms required Appellant to sign or initial a space acknowledging that he understood the requirements of the registration law, including the requirement to report a change of address within ten days of moving. (State's Exs. 1, 2).

On direct examination at trial, Appellant acknowledged signing State's Exhibit 2 on May 29, 2007. (Tr. 164). When asked how many of those forms he had signed, Appellant replied, "There's several different types and I've been filling them out for six and a half, almost seven years." (Tr. 165). Appellant also acknowledged that he signed State's Exhibit 1, his original registration form, in two places. (Tr. 165). When asked if he saw the advisory on the form of a ten-day deadline for registering a change of address, Appellant said, "I know where it's at now." (Tr. 165). When asked why he did not register his change of address within ten days, Appellant said that he did not know anything about that deadline. (Tr. 166).

Appellant was asked on cross-examination whether he had initialed the box on State's Exhibit 2 containing the ten day change of address notification requirement:

A. I just initialed them things and signed them and go.

Q. Even though you knew that violating these terms might send you to prison you didn't bother to read any of them, is that what you're telling this jury?

A. Yes, sir.

Q. The same form that you had been signing over and over again every ninety days, the whole time you lived in Marion County?

A. Uh-huh. And like I said, I moved from the Pop House to Center, Center to Marion or – yeah, Marion Street, and I never did a ten day then either.

Q. Are you admitting that you committed some other crime? Is that what you're saying?

A. I'm not admitting to a crime. I didn't know about that ten day. I knew I had ninety days. That's how I always –

Q. The ten day notification was on every form that you signed, wasn't it?

A. All I wanted to do was to get that thing signed and get out of there.

Q. Yes, sir. The ten day notification was on every form that you signed for six years, wasn't it?

A. As far as everybody tells me. There's a different form that doesn't have all that on there.

Q. Okay. How many –

A. And I saw that most of the time.

Q. Okay. How many forms did you sign, sir, that had the ten day notification on it?

A. Six and a half years, almost seven years worth.

(Tr. 167-68). The prosecutor referred in his closing argument to State's Exhibits 1 and 2, and to Appellant's testimony that he "signed the same forms over and over again," as demonstrating that Appellant knew of the ten day notification requirement. (Tr. 182-83, 191).

Appellant filed a Motion for New Trial on March 19, 2008. (L.F. 77-84). On March 28, 2008, he filed an Amended Motion for New Trial. (L.F. 85-96). The amended motion added an allegation that at trial, counsel had noticed a State's witness with a file folder that appeared to be filled with Appellant's prior registration forms. (L.F. 92). The motion alleged that counsel had conducted an investigation following the trial and discovered twenty-three undisclosed sex offender registration forms dated between May 17, 2001 and August 24, 2007, and that twenty of those forms contained no reference to the ten day change of address notification requirement. (L.F. 92-95). The motion noted the November 5, 2007 discovery request seeking disclosure of any exculpatory evidence. (L.F. 92). The motion alleged that the undisclosed forms were material and exculpatory, that failure to disclose the forms violated his rights to due process, and that he was entitled to a new trial under *Brady v. Maryland*, 373 U.S. 83 (1963). The trial court denied the amended motion for new trial, finding that the contents of the registration form did not change the requirements of the law. (Supp. Tr. 12).

**B. Standard of Review.**

Appellant should be deemed to have waived his claim of error. The Amended Motion for New Trial asserts that counsel was aware during trial that a State's witness had brought to court additional registration forms that had not been provided to the

defense. (L.F. 92). Counsel did not bring this to the attention of the trial court and request any appropriate relief, such as a continuance to obtain and review the forms. (Tr. 114-24). *See* Supreme Court Rule 25.18. Counsel instead waited to raise the claim of error at a time when the only relief that the court could grant would be a new trial. In a similar situation, the Court of Appeals for the Western District held that a defendant who was aware of nondisclosure at the time of trial could not wait until a motion for new trial, when the opportunity for any other remedy had passed, to complain of incomplete disclosure by the State. *State v. Hutson*, 646 S.W.2d 822, 826-27 (Mo. App. W.D. 1982).

If this Court reviews Appellant's claim, that review should be for plain error only. Supreme Court Rule 30.20. Plain error is found when the alleged error facially establishes substantial grounds for believing that a manifest injustice or miscarriage of justice that has occurred. *State v. Salter*, 250 S.W.3d 705, 713 (Mo. banc 2008).

When properly preserved, review of the trial court's denial of a motion for new trial is for an abuse of discretion. *State v. White*, 81 S.W.3d 561, 567 (Mo. App. W.D. 2002). Judicial discretion is abused when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. *Id.* Rulings made within the trial court's discretion are presumed correct, and as a consequence, Appellant has the burden of showing that the trial court abused its discretion. *Id.*

### **C. Analysis.**

Under *Brady*, due process is violated where the prosecutor suppresses evidence favorable to the defendant that is material to either guilt or punishment. *Salter*, 250

S.W.3d at 714. Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* *Brady*, however, only applies in situations where the defense discovers information *after* trial that had been known to the prosecution at trial. *Id.* If the defendant had knowledge of the evidence at the time of trial, the State cannot be faulted for nondisclosure. *Id.*

The registration forms were not the type of evidence to which *Brady* applied, because Appellant was aware of the forms at the time of trial. *See id.* When cross-examined about State’s Exhibits 1 and 2, which contained the advisory on the ten day change of address notification requirement, Appellant said, “[t]here’s a different form that doesn’t have all that on there.” (Tr. 168). Appellant went on to say that he saw that “different” form most of the time. (Tr. 168). Also, as noted previously, the Amended Motion for New Trial alleged that counsel had noticed during the trial that a State’s witness had additional registration forms that had not been disclosed to her. (L.F. 92). Counsel did not raise any objection, or otherwise bring to the court’s attention any claim that the State committed a discovery or *Brady* violation. Counsel could have sought a continuance to examine the forms that the witness brought to court, but she did not do so. Supreme Court Rule 25.18.

There is also no *Brady* violation because the registration forms were not material. Appellant’s defense was that he did not knowingly violate the ten-day notification requirement for a change of address because he did not know about that requirement. The requirements for asserting a defense of ignorance or mistake of the law are defined

by statute. § 562.031, RSMo 2000. That statute provides that a mistaken belief of law is a defense only if that belief is (1) reasonable; and (2) based on the defendant's reasonable reliance on an official statement of the law, afterward determined to be invalid or erroneous, that is contained in a statute, an opinion or order of an appellate court, or an official interpretation of the statute made by a public official or agency legally authorized to interpret the statute. § 562.031.2, RSMo 2000.

The registration forms that Appellant signed do not fall within the categories set forth in the statute. Appellant cannot claim a *reasonable* belief that he was not required to provide notice of a change of address with ten days, based on forms that did not explicitly reference that notification requirement.<sup>7</sup> That's particularly true when the last form that Appellant signed before moving from the Marion Street address contained the information about the ten day registration requirement. (State's Ex. 2). Appellant placed his initials next to the box containing that information. (State's Ex. 2).

Appellant further cannot claim a reasonable reliance on the registration forms because he testified at trial that he did not bother to read them. (Tr. 167-68). That testimony is somewhat at odds with the testimony that he was aware of signing other forms that did not contain the information about the ten-day requirement. (Tr. 168). But

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<sup>7</sup> It should be noted, however, that those forms did contain various boxes noting the purpose for which the form was being submitted. *See* (Def. Ex. A filed with this Court). Those boxes are for: 90 day and annual verification; change of address within county; and moved out of county, either to another county or another state. *Id.*

Appellant cannot claim to be ignorant only of the forms containing information harmful to his position, while claiming to rely on different forms that he claims support his position. That testimony, taken as a whole, does not establish a reasonable belief that the ten-day notification requirement did not apply.

The additional registration forms were not material or exculpatory, and the State did not have a duty to disclose them. There was no discovery or *Brady* violation by the State, and Appellant's point should be denied.

### III.

**The trial court did not abuse its discretion in admitting into evidence a sex offender registration form completed by Appellant that listed the victim's age.**

Appellant contends that the trial court abused its discretion in admitting State's Exhibit 1, his initial sex offender registration form, without redacting information revealing the victim's age. The trial court did not err in admitting the evidence because it helped to establish an element of the State's case, and any prejudice caused by the evidence is the result of Appellant's own conduct in the underlying offense.

#### **A. Underlying Facts.**

Appellant filed a pre-trial motion in limine seeking to prevent the State from eliciting the details of Appellant's underlying sex offense, except as to: (1) the charge of two counts of forcible rape; (2) Appellant's plea; and (3) the age of the complaining witness. (L.F. 45). The motion went on to list the elements that the State had to prove on the instant charge, including that the victim was under fourteen years at the time of the offense. (L.F. 45-46). The motion alleged that any details beyond that were not relevant and were not admissible. (L.F. 46).

At a pre-trial hearing on the motion, defense counsel said that she anticipated the State would introduce Appellant's original sex offender registration form, which contained information that the victim from that previous case was five years old. (Tr. 22). Counsel argued that the victim's specific age was not relevant and was highly prejudicial. (Tr. 22). Counsel asked that the victim's age be redacted from the form. (Tr. 23). The prosecutor responded that he had to prove that the victim was under the age

of fourteen, and that the victim's age as listed on the form proved that fact. (Tr. 23). The prosecutor also noted that it was Appellant who had written the victim's age on the form. (Tr. 23). The court overruled the motion in limine. (Tr. 23).

Defense counsel renewed her objection when the State offered the form, marked as State's Exhibit 1, into evidence. (Tr. 111). The trial court overruled the objection and admitted the form into evidence. (Tr. 112). Appellant included an allegation of error in the amended new trial motion that the court erred in allowing evidence of the victim's age because that evidence was inflammatory. (L.F. 88-89).

#### **B. Standard of Review.**

A trial court has broad discretion to admit evidence at trial. *State v. Forrest*, 183 S.W.3d 218, 223 (Mo. banc 2006). A trial court's ruling on the admission of evidence can only be reversed if the court has clearly abused its discretion. *Id.* A clear abuse of discretion occurs when a ruling is so clearly against the logic of the circumstances and is so unreasonable as to indicate a lack of careful consideration. *Id.* Additionally, on direct appeal, this Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *Id.* at 223-24. Trial court error is not prejudicial unless there is a reasonable probability that the trial court's error affected the outcome of the trial. *Id.* at 224.

#### **C. Analysis.**

Evidence is admissible if it is both logically and legally relevant. *State v. Barriner*, 111 S.W.3d 396, 400 (Mo. banc 2003). Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence, or if it tends to corroborate evidence which is itself relevant and bears on the principal issue of the case. *Id.* at 400-01. Evidence is legally relevant if its probative value outweighs its costs – prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or cumulativeness. *Id.* at 401.

The recitation of the victim’s age on State’s Exhibit 1 was logically relevant because it established one of the elements that the State had to prove, namely that the victim in the sex offense to which Appellant had previously pled guilty was under the age of fourteen at the time of that offense. (L.F. 61). Furthermore, because Appellant wrote the victim’s age on State’s Exhibit 1, that statement would be considered an admission, which is relevant and admissible if it is material to the issues in the case. *State v. Simmons*, 233 S.W.3d 235, 237 (Mo. App. E.D. 2007). That handwritten admission tended to corroborate the court documents reflecting the judgment and sentence in the sodomy case, that were admitted as State’s Exhibit 5, which is another basis on which evidence will be found to be logically relevant. *Barriner*, 111 S.W.3d at 400-01.

Appellant disputes the logical relevance of the information, saying that the State did not have to reveal the victim’s precise age to prove that element. As this Court has noted, however, “[t]he state, because it must shoulder the burden of proving the defendant’s guilt beyond a reasonable doubt, should not be unduly limited in its quantum of proof.” *State v. Smith*, 32 S.W.3d 532, 546 (Mo. banc 2000). State’s Exhibit 1 contained factual information that established the elements of the charged crime, and the State was entitled to rely on that evidence in proving its case.

Appellant also claims that the evidence was not legally relevant because it was inflammatory. That argument is based on the questionable premise that sexual conduct directed by an adult at a child is somehow less objectionable if the child is twelve or thirteen years old, than if the child is five. Any reasonable person would view an act of sexual abuse directed towards any child to be appalling, no matter the child's age.

Furthermore, to the extent that the victim's age is inflammatory, that is a consequence of Appellant's own conduct. This Court has previously noted that "defendants are not prejudiced by the fact that graphic evidence is a consequence of brutal actions." *Id.* at 546-47. In a similar vein, the Court of Appeals for the Eastern District has stated, "the mere fact that evidence is revolting and harmful to the defense does not justify its exclusion. In certain trials, evidence that is revolting is to be expected. The adjudication of crimes is not for the faint of heart." *State v. Kaiser*, 139 S.W.3d 545, 558 (Mo. App. E.D. 2004). This Court has frequently been asked to exclude photographic evidence on the basis that it is inflammatory. In rejecting those arguments, this Court has stated, "even if a photograph is inflammatory, it should not be excluded if it is relevant. Generally, if photographs are gruesome, it is because the crime itself was gruesome." *State v. Johnson*, 244 S.W.3d 144, 161 (Mo. banc 2008) (internal citation omitted).

The evidence that Appellant seeks to exclude in this case is analogous to "gruesome" photographs. It is relevant, and to the extent that it is inflammatory, it is so only because Appellant engaged in behavior that would inflame any reasonable person. In that sense, this case resembles a recent decision from the Eastern District, which

rejected a claim that the defendant was prejudiced by evidence of racial slurs that he directed towards the victim. *State v. McDaniel*, 254 S.W.3d 144, 147 (Mo. App. E.D. 2008). In that case, as in this case, a defendant is claiming prejudice by evidence of his own actions that are related to the charged crime. As the court noted in *McDaniel*, any prejudice that results from such evidence “can be attributed to the very probativeness of the challenged evidence.” *Id.* (quoting *State v. Johnson*, 201 S.W.3d 551, 557 (Mo. App. S.D. 2006)).

Appellant has not shown that the trial court abused its discretion in admitting the evidence. Appellant’s point should be denied.

**IV.**

**The trial court did not plainly err in permitting the State to question Appellant on cross-examination about the victim's age.**

Appellant claims the trial court plainly erred in permitting the State to ask Appellant on cross-examination if he had been convicted of sodomizing a five-year-old girl. No error occurred because the prosecutor's question was within the permissible scope of cross-examination about a prior conviction.

**A. Underlying Facts.**

During his cross-examination of Appellant, the prosecutor asked about Appellant's previous conviction:

Q. Okay. On March 7<sup>th</sup>, 1995, you pled guilty to sodomy of [the victim] - -

[DEFENSE COUNSEL]: I object. Asked and answered.

[THE PROSECUTOR]: I didn't – did somebody ask him that before?

THE COURT: [Defense counsel] asked him if he was convicted of a felony.

[THE PROSECUTOR]: Yes, sir. I'm required to prove when it happened. So that was not asked.

THE COURT: All right. Overruled.

Q. (By [THE PROSECUTOR]) On March 7<sup>th</sup>, 1995, in the Circuit Court of the City of St. Louis you pled guilty to sodomizing [the victim] who was five years old, didn't you?

A. Yes. I was told to plead guilty.

Q. Well, you did plead guilty, didn't you?

A. Yes, sir.

(Tr. 168-69).

**B. Standard of Review.**

Defense counsel objected to the question at trial on the basis that it had been “asked and answered.” (Tr. 168-69). The amended motion for new trial did not specifically reference the State’s cross-examination of Appellant, but did contend that the court erred in allowing evidence of the victim’s age, because that evidence was inflammatory. (L.F. 88-89). Appellant’s Point Relied On contends that the testimony was legally irrelevant. (Appellant’s Brf., p. 12).

An issue is not properly preserved for review when the appellant fails to argue at trial the grounds asserted upon appeal. *State v. Lewis*, 243 S.W.3d 523, 524 (Mo. App. W.D. 2008). An appellant cannot broaden or change allegations of error on appeal. *Id.* at 525. The point raised on appeal must be based upon the same theory of the objection as made at trial and preserved in the motion for new trial. *Id.* Because Appellant did not properly preserve his point he is entitled, if at all, to plain error review only. *Id.* Plain error review requires this Court to find that manifest injustice or a miscarriage of justice resulted from trial court error. *Salter*, 250 S.W.3d at 713.

**C. Analysis.**

Cross-examination of a criminal defendant about prior convictions is authorized by section 491.050:

Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

§ 491.050, RSMo 2000. This Court has interpreted that statute to confer an absolute right to impeach a criminal defendant with his prior convictions. *M.A.B. v. Nicely*, 909 S.W.2d 669, 671 (Mo. banc 1995).

While a prosecutor should not delve into the details of the crime leading to that prior conviction, he is permitted to elicit the nature, dates and places of the occurrence and the sentences resulting therefrom. *State v. Light*, 871 S.W.2d 59, 63 (Mo. App. E.D. 1994). “In literary terms who, what, when and where are in order but why and how are not.” *Id.* Thus, where a defendant was cross-examined about his prior conviction for a sex offense, disclosure of the victim’s age was not an improper disclosure of the details of the crime. *State v. Miller*, 821 S.W.2d 553, 556 (Mo. App. E.D. 1991). While the court noted that defense counsel had requested that disclosure, the opinion gives no

indication that a different result would have been warranted had defense counsel objected. *Id.*

In *Light*, the Eastern District found that the prosecutor's question that elicited the gender of the victims of his prior crimes were permissible within the "who" category:

The State did not elicit more than the gender of victims, dates and locations of the prior crimes. Questions as to gender were permissible so long as the State did not elicit details about how or why the crimes took place.

*Id.* No plain error was found where the prosecutor cross-examined the defendant about his previous conviction for carrying a concealed weapon, and elicited an admission that the weapon involved in that crime was a handgun. *State v. Hill*, 823 S.W.2d 98, 102 (Mo. App. E.D. 1991). The court found that question went to the nature of the prior crime. *Id.* The court further noted that the prosecutor did not dwell on the information, explore details, or use the prior conviction to suggest guilt. *Id.*

As was the case in the above-cited cases, the prosecutor herein asked a question that went to the who, what, when, and where of Appellant's prior conviction. The prosecutor did not ask any questions about the how or why of the crime. The information about the victim's age went to the nature of the crime, and the prosecutor did not dwell on that fact, or use it to suggest that Appellant was guilty of the charged crime. As the question was appropriate and within the proper bounds of cross-examination, there was no error, much less a manifest injustice or miscarriage of justice. Appellant has not shown plain error and his point should be denied.



## CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 8,195 words as calculated pursuant to the requirements of Missouri Supreme Court Rule 84.06, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this 12<sup>th</sup> day of November, 2008, to:

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**APPENDIX**

SUPREME COURT RULE 25.18..... A1  
SECTION 562.031, RSMo 2000..... A2  
SECTION 491.050, RSMo 2000..... A3