

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC91368</b>
	)	
<b>MELVIN RAY DAVIS,</b>	)	
	)	
<b>Respondent.</b>	)	

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**APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI  
THIRTY FIRST JUDICIAL CIRCUIT  
THE HONORABLE JASON R. BROWN, JUDGE**

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**RESPONDENT’S BRIEF**

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## PRELIMINARY STATEMENT

Article I, Section 13 of the Missouri Constitution applies to criminal prosecutions and punishments as well as civil rights and remedies. The State's reliance on *Ex Parte Bethurum*, 66 Mo. 545, 1877 WL 8778 (Mo. 1877) is untenable. Over the past 134 years since that decision, this Court has developed retrospective jurisprudence to apply to a statute which "creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *Squaw Creek v. Turney*, 235 Mo. 80, 138 S.W.12, 16 (1911). Neither this definition nor the very language of the Missouri Constitution limits this construction to civil rights and remedies. *Ex Parte Bethurum* failed to follow the Missouri standard for constitutional construction, namely that a court is required to use the plain, ordinary, common sense meaning of the word when interpreting statutes. It injected the word "civil" into the language of the provision, without citing any Missouri case law or standards to do so.

This Court correctly applied the retrospective standard in *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. banc 2010) (hereinafter *F.R./Raynor*).<sup>1</sup> There, this Court ruled that "a subsequent law that requires a sex offender to do something - with a criminal penalty for not doing what the new law requires - is the imposition of a new obligation or duty imposed solely as a result of the pre-statute conviction." *Id.* at 62. Here, it is undisputed that Section 566.150 was not in existence at

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<sup>1</sup> Consolidated with *State v. Raynor*, 301 S.W.3d 56 (Mo. banc 2010).

the time of the Respondent's prior conviction nor is it disputed that the sole basis for the restriction resulting in the new charge is that prior 1983 conviction. (L.F. 3).

Respondent's case is practically indistinguishable from the *F.R./Raynor* decision. Instead of a school, Respondent is charged with a park; instead of a 1,000 foot barrier, Respondent is required to stay 500 feet away.

Already since this Court's decision in *F.R./Raynor*, courts throughout the state, as well as other states, have relied on this Court's wisdom when addressing retrospective challenges. *See State v. Molsbee*, 316 S.W.3d 549, 551 (Mo. App. W.D. Aug. 10, 2010); *Brand v. State*, 313 S.W.3d 226, 228 (Mo. App. E.D. June 15, 2010); *Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. Apr 13, 2010); *Doe v. Crane*, 2010 WL 2218624 (W.D. Mo. May 28, 2010); *Doe v. Nixon*, 2010 WL 681095 (E.D. Mo. Feb 08, 2011); *Rentschler v. Nixon*, 311 S.W.3d 783 (Mo. banc Apr 06, 2010); *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W.3d 823, 831 (Tenn. June 24 2010).

Therefore, the *Bethurum* decision has effectively been overruled by *F.R./Raynor* and should be considered inapplicable law in this case.

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## **JURISDICTONAL STATEMENT**

Respondent, Melvin Ray Davis, was charged with one count of being a sex offender present within 500 feet of a public park, Section 566.150, RSMo (Cum. Supp. 2009).<sup>2</sup> The Honorable Jason R. Brown sustained Respondent's motion to dismiss, holding that Section 566.150 violates Article I, Section 13 of the Missouri Constitution. The state appeals. This Court has original jurisdiction over challenges to the validity of a statute of Missouri. Article V, Section 3, Mo. Const. (as amended 1982).

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<sup>2</sup> All statutory references are to RSMo 2000 cumulative through the 2010 supplement, unless otherwise indicated.

## STATEMENT OF FACTS

Respondent was charged by felony complaint filed August 10, 2010, with being a sex offender present within 500 feet of a public park, Section 566.150, in that he allegedly was present in a public park which contained playground equipment. (L.F. 5). Respondent filed a motion to dismiss the complaint, asserting that the statute is unconstitutional as it applied to him. (L.F. 2, 8-10). The motion alleged that the statute violates the Missouri Constitution's ban on retrospective laws. Article I, Section 13, Mo. Const. (L.F. 2, 8-9).

A hearing on the motion to dismiss was held on October 27, 2010, before the Honorable Jason R. Brown. (L.F. 2). The State argued that Section 566.150 was distinguishable from the school residency and Halloween statutes, which have already been declared unconstitutional in *F.R./Raynor*, because Section 566.150 did not require the defendant to take any affirmative action. (L.F. 3). The court found this "argued distinction unpersuasive." (L.F. 3). The court noted that it was undisputed that both the statute in question was not present at the time of Respondent's conviction in 1983 and that the prior conviction was the sole basis for the restriction in the new charge. (L.F. 3). The court found that the statute unquestionably created a new disability on Respondent's rights and imposed an additional punishment. (L.F. 3). The court entered an order sustaining respondent's motion to dismiss the felony complaint on November 4, 2010. (L.F.3). The court found that Section 566.150 "does indeed violate Missouri's ban on

retrospective laws and is thus unconstitutional as applied to defendant.” (L.F. 3). The felony complaint was dismissed without prejudice. (L.F. 3)

**RESPONSE TO POINT RELIED ON**

I. The trial court did not err in dismissing the felony complaint when it found that Section 566.150 is unconstitutional as applied to Respondent, who was convicted in 1983 of his prior offense, because it violates Article I, Section 13 of the Missouri Constitution's ban on retrospective laws, in that Section 566.150, which took effect August 28, 2009, created a new obligation, imposed a new duty and attached a new disability with respect to prior convictions since it barred convicted sex offenders from being within 500 feet of a public park containing a playground or swimming pool and properly applied this ban in a criminal prosecution, as such the trial court's dismissal should be upheld *since*

A. all claims of error must be raised at the trial court level and all constitutional violations must be raised at the earliest possible moment, as such the state is estopped from raising a new and unpreserved constitutional issue;

*State ex rel. York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998).

*State ex rel Selby v. Day*, 929 S.W.2d 286 (Mo. App. 1996).

*Handshy v. Nolte Petroleum Co.*, 421 S.W.2d 198 (Mo. 1967).

B. Using the plain meaning of the constitutional provision, the ban on retrospective laws applies to criminal cases as well as civil;

*King v. Laclede Gas Co.*, 648 S.W.2d 113 (Mo. banc 2006)

*F.R. v. St. Charles County Sherriff's Dept.*, 301 S.W.3d 56 (Mo. banc 2010).

C. The legislative intent is unclear as to whether Section 566.150 is a criminal restriction or civil regulation;

*In re R.W. v. Sanders*, 168 S.W.3d 65 (Mo. banc 2005).

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

D. Even if Section 566.150 is a purely criminal statute, the protections of *ex post facto* would apply.

*Weaver v. Graham*, 450 U.S. 24 (1981).

## ARGUMENT

**The trial court did not err in dismissing the felony complaint when it found that Section 566.150 is unconstitutional as applied to Respondent, who was convicted in 1983 of his prior offense, because it violates Article I, Section 13 of the Missouri Constitution’s ban on retrospective laws, in that Section 566.150, which took effect August 28, 2009, created a new obligation, imposed a new duty and attached a new disability with respect to prior convictions since it barred convicted sex offenders from being within 500 feet of a public park containing a playground or swimming pool and properly applied this ban in a criminal prosecution.**

### *Standard of Review*

In general, this Court reviews issues of law *de novo*. *State v. Justus*, 205 S.W.3d 872, 878 (Mo. banc 2006). This standard, however, is applicable only to issues properly preserved for appellate review. *State v. Johnson*, 284 S.W.3d 561, 568 (Mo. banc 2009) (noting that non-preserved issues are reviewed for plain error). Constitutional issues not properly preserved before the trial court are not permitted to be raised for the first time at the appellate level. *State ex rel York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). “Constitutional violations are waived if not raised at the earliest possible opportunity.” *Id.*

## *Appellant's Brief*

Appellant's brief asserts only one point for why the statute is constitutional: that Article I, Section 13 only applies to civil rights and remedies and does not apply to criminal laws. (App. Br. 8). The State does not address the trial court's determination that Section 566.150 violates the rule on retrospective laws because it creates a new disability, obligation or duty, as was the case in *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. banc 2010) and *R.L. v. Department of Corrections*, 245 S.W.3d 236 (Mo. banc 2008). Nor does Appellant's brief, address the only argument raised by the State at the trial court level: that there is a distinction between Respondent's case and that of the *F.R.* decision because in *F.R.* the statute required an affirmative action by the defendant. (L.F. 3). Rather, the State argues that the decisions in *F.R.* and *R.L.*, "as well as any other decisions which have applied to criminal statutes the ban on retrospective application of laws that is contained in article I, section 13, should thus no longer be followed." (App. Br. 13-14). This argument was not raised before the trial court.

### **A. The State is Estopped from Raising a New and Unpreserved Constitutional Issue at the Appellate Level.**

The State waived its right to raise a new constitutional argument at the appellate level when it failed to argue before the trial court that Section 566.150 is not subject to the prohibition against enacting retrospective laws that is contained in Article I, Section

13 of the Missouri Constitution, despite previous Supreme Court rulings, because that section relates exclusively to civil rights and remedies.

“Constitutional violations are waived if not raised at the earliest possible opportunity.” *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). In determining if a constitutional question has been waived, the “critical issue” is whether the party had a reasonable opportunity to raise the specific constitutional defect by timely asserting the claim before the trial court. *Id.* at 225.

Because an appellate court is not a forum in which new points will be considered, but is merely a court of review to determining whether the rulings of the trial court, as there presented, were correct, a party seeking the correction of error must stand or fall on the record made in the trial court, thus it follows that only those objects or grounds of objections which were urged in the trial court, **without change and without addition**, will be considered on appeal.

*State ex rel. Selby v. Day*, 929 S.W.2d 286, 288 (Mo. App. S.D. 1996)(citing *Handshy v. Nolte Petroleum Co.*, 421 S.W.2d 198, 202 (Mo. 1967)(emphasis added). An “appellate court will not convict a trial court of error on an issue which was not put before it to decide.” *Id.*

Here, Respondent filed a motion to dismiss the complaint as unconstitutional as it applied to Respondent. (L.F.8). In the motion, Respondent argued that the application of the statute to him violated the ban on retrospective laws in Article I, Section 13 of the

Missouri Constitution. (L.F. 8). During oral argument, the State raised only one point that the ban on retrospective laws only applies where the defendant is required to “take or carry out any affirmative act.” (L.F. 3).

While the constitutionality of the statute was debated during oral argument, at no time did the State argue that the retrospective ban relates exclusively to civil rights and remedies and that it had no application to crimes and punishments. Rather than question the applicability of Article I, Section 13 to criminal cases, at oral argument the State assumed the validity of the *F.R./Raynor* decision and merely attempted to distinguish the case from that of Respondents. (L.F. 3). Thus the argument currently asserted by the Appellant, would be considered a change or addition to the previous objection.

The State had a sufficient opportunity to raise this point from the time the motion to dismiss was filed on September 13, 2010, all the way up until the court’s decision on November 4, 2010. At no point was the trial court given the opportunity to entertain or consider the merits of this new argument. As such, the State is estopped from raising the claim now on appeal and given the ruling in *FR/Raynor* the lower court decision should be affirmed.<sup>3</sup>

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<sup>3</sup> Even if this Court were to use plain error review to address Appellant’s argument, the trial court did not plainly err in relying on the 2010 *F.R./Raynor* decision, which is undoubtedly current, applicable and indistinguishable Supreme Court precedent.

**B. Using the Plain Meaning of the Constitutional Provision, the Ban on Retrospective Laws Applies to Criminal Cases as Well as Civil.**

Even if the State preserved this argument, its position is untenable. Article I, Section 13, applies to both criminal cases as well as civil. Article I, Section 13 states that “no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation ...can be enacted.” The *ex post facto* clause has been held to be co-extensive with Article I, Section 10 of the Federal Constitution, however, there is no similar ban on laws retrospective in their operation in the Federal Constitution. *Doe v. Phillips*, 194 S.W.3d 833, 841 (Mo. banc 2006). This Court has repeatedly defined a retrospective law as “one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.” *F.R. v. St. Charles County Sheriff’s Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010) citing *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911).

This Court has a long history of interpreting statutes and constitutional provisions using their plain, ordinary, common sense meaning. *State ex inf. Dalton v. Dearing*, 364 Mo. 475, 263 S.W.2d 381, 484 (Mo. 1954)(noting that it is a well settled rule that the constitution should be interpreted in its plain, ordinary, common sense meaning and should not be subject to “philosophical acuteness or judicial research”). This Court will not interpret a statute or constitutional provision in such a manner that will result in an “unreasonable, oppressive, or absurd” construction. *Elrod v. Treasurer of Missouri*, 138 S.W.3d 714, 716 (Mo. banc 2004). The primary rule for statutory interpretation is to

derive legislative intent by construing words in their plain, ordinary and common sense meaning. *See King v. Laclede Gas Co.*, 648 S.W.2d 113, 115 (Mo. banc 1983). This rule is equally applicable to constitutional construction, with one exception: constitutional provisions are given broader interpretations “due to their more permanent character.” *StopAquila.org v. City of Peculiar*, 208 S.W.3d 895, 899 (Mo. banc 2006). When a disputed term is undefined in the constitution, this Court looks to something as simple as the dictionary. *Id.*

Here, Article 1, Section 13 states:

[t]hat no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation or making any irrevocable grant of special privileges or immunities, can be enacted.

The Missouri Constitution does not provide a definition for retrospective. Webster’s New Collegiate Dictionary (1981), however, provides three definitions for retrospective: (1) Of, relating to or given to retrospection; (2) Based on memory; and (3) Affecting things past. Obviously, the third definition is the most instructive and illuminative about the meaning of the word. Applying that definition, retrospective simply means something that applies to events already past, in this case a prior conviction. *See also Weaver v. Graham*, 450 U.S. 24, 29 (1981)(for purposes of *ex post facto* analysis Justice Marshall defined the word retrospective using the same ordinary meaning, namely that it applies “to events occurring before its enactment”). The

disjunctive use of the word “or” in Article 1, Section 13 indicates that the use of retrospective is a distinct separate phrase from the previous and following lines, whose consequence have no impact on its meaning. To say that retrospective only applies to civil cases unnecessarily injects an extra word into the plain language of the constitution and therefore unduly limits it.

In interpreting what “affecting things past” means, over the past 100 years this court has found that 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.” *Squaw Creek*, 138 S.W. at 16, *see also Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 340 (Mo. banc 1993), *Beatty v. State Tax Comm’n*, 912 S.W.2d 492, 496 (Mo. banc 1995). This Court in *Squaw Creek* did not specifically limit this application to civil rights and remedies. *Squaw Creek*, 138 S.W at 16. During the last decade, this Court has concluded that laws imposing new obligations, duties or disabilities on convicted sex offenders have violated our constitution’s ban on retrospective laws. *See Doe*, 194 S.W.3d at 852, *R.L.*, 245 S.W.3d at 237. This Court correctly applied the retrospective standard in *F.R./Raynor*,<sup>4</sup> *Doe*, and *R.L.*

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<sup>4</sup> Since this decision, jurisdictions throughout this state, as well as other states, have relied on this Court’s wisdom in determining if a law operates unconstitutionally retrospectively. *See State v. Molsbee*, 316 S.W.3d 549, 551 (Mo. App. W.D. Aug. 10, 2010); *Brand v. State*, 313 S.W.3d 226, 228 (Mo. App. E.D. June 15, 2010); *Missouri Real Estate Com’n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. Apr 13, 2010); *Doe*

In *Doe*, a group of convicted sex offenders sued to prevent enforcement of the sex offender registration requirements, known as “Megan’s Law,” against them. 194 S.W.3d at 838. This Court rejected the petitioners’ arguments that Megan’s Law violated their due process and equal protection rights, and that the law violated prohibitions against ex post facto laws, bills of attainder and special laws. *Id.* The Court held, however, that the registration requirements could not be enforced against those whose convictions were before the enactment of Megan’s Law in 1995. *Id.* To do so would violate Missouri’s constitutional prohibition on laws retrospective in their operation. *Id.*

In its opinion, this Court in *R.L.* noted the development of the retrospective jurisprudence from the adoption of the Missouri Constitution. 245 S.W.3d at 237. This Court acknowledged the framework for the analysis that was created in *Squaw Creek* has been routinely applied to all retrospective cases. *Id.* In ruling, this Court applied the “same long standing principles” used by this Court in *Doe* and found that the residency restriction imposed a new obligation and the basis of it was the pre-statute conviction. *Id.* at 238.

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*v. Crane*, 2010 WL 2218624 (W.D. Mo. May 28, 2010); *Doe v. Nixon*, 2010 WL 681095 (E.D. Mo. Feb 08, 2011); *Rentschler v. Nixon*, 311 S.W.3d 783 (Mo. banc Apr 06, 2010); *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W.3d 823, 831 (Tenn. June 24 2010).

In *F.R./Raynor*, this Court specifically found that Article 1, Section 13 applies to criminal statutes. *Id.* at 63 (A “new **criminal** law operates retrospectively if it changes the legal effect of a past conviction.”)(emphasis added). There, both Sections 566.147 and 589.426 were declared unconstitutionally retrospective as they applied to individuals convicted of sex offenses before the enactment date of the statutes. *Id.* at 65. This Court ruled that “a subsequent law that requires a sex offender to do something - with a criminal penalty for not doing what the new law requires - is the imposition of a new obligation or duty imposed solely as a result of the pre-statute conviction.” *Id.* at 62.

Here, it is undisputed that Section 566.150 was not in existence at the time of the Respondent’s prior 1983 conviction nor is it disputed that the sole basis for the restriction resulting in the new charge was that prior conviction. (L.F. 3). The Respondent’s case is practically indistinguishable from the *F.R.* decision. Instead of a school, Respondent is charged with a park; instead of 1,000 foot barrier, Respondent is required to stay 500 feet away. These restrictions are undoubtedly disabilities and duties under the law. Just as in *Raynor*, Respondent faces criminal charges for allegedly failing to perform this new duty that was not in place at the time of his conviction. Respondent cannot divest himself of his status as a sex offender in an effort to not be subjected to the subsequent laws that place new duties, obligations and disabilities on him. *See F.R./Raynor*, 301 S.W.3d at 65. Respondent’s case is thus no different from this Court’s precedent, and the trial court’s dismissal of the felony complaint must be affirmed.

In this appeal, the State now seeks to revive a 134 year old case and in the process undo this Court's numerous decisions that have marked the entire progression of retrospective law. Fortunately, the State's reliance on *Ex Parte Bethurum*, 66 Mo. 545, 1877 WL 8778 (Mo. 1877), is unpersuasive. In *Bethurum*, the Court made a sweeping pronouncement as to the meaning of retrospective without providing any support for its reasoning. *Id.* at \*3-\*5. The only basis for its reasoning was a reliance on case law from New Hampshire and Texas and a belief that the framers would not intentionally use a redundant phrase or enact provisions that would be in conflict with one another. *Id.* at \*3-\*4.<sup>5</sup> The *Bethurum* Court failed to follow this Court's standard for constitutional interpretation when it attempted to ascertain the technical meaning of the word rather than look to the plain language of the provision as well as divine the knowledge of the framers from thin air. *Id.* at \*2, \*4. To accept the State's interpretation would lead to the mindboggling scenario where a revocation of a real estate license would receive greater protections from our constitution than a person who the State is trying to deprive of their very liberty of movement through an unconstitutional prosecution. *See Missouri Real Estate Commission v. Rayford*, 307 S.W.3d 686, 699 (Mo. App. W.D. Apr. 13, 2010).

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<sup>5</sup> It should be noted that the New Hampshire constitution Part 1, Article 23 specifically relates retrospective laws to both civil causes and the punishment of offenses. Article 1, Section 16 of the Texas constitution uses the term retroactive and does not delineate whether the term relates to civil or criminal.

Even if the State’s heavy reliance on the constitutional debates was an appropriate means for statutory interpretation, this Court’s discussion of the 1875 debates in *Doe* demonstrates that such reliance is unfounded. There, this Court noted that the Missouri ban on retrospective laws was an extremely broad one, and encompassed more than other states’ *ex post facto* laws to the point that it “rendered it nearly superfluous to add the prohibition of an *ex post facto* law, or of a law impairing the obligation of contracts, or of a law impairing vested rights.” *Doe*, 194 S.W.3d at 850 (citing Debates of the Missouri Constitutional Convention 1875, vol. IV at 95 (Isidor Loeb & Floyd C. Shoemaker, eds., State Historical Soc’y of Mo. 1938)). Yet even knowing that it was superfluous, the legislature approved the provision. The fact that Article I, Section 13 might be redundant is irrelevant to this Court’s construction of the meaning of retrospective. The legislature had the opportunity to add further descriptive words to its terminology but chose to leave that specific language. Without having the term defined in the constitution, we are left with this Court’s typical method for ascertaining statutory meaning: using the plain, ordinary, common sense interpretation.

Therefore, given this Court’s specific ruling in *F.R./Raynor* that the retrospective ban applies to criminal cases, *Bethurum* has been definitively overruled.

**C. Legislative Intent is Unclear as to Whether Section 566.150 is a Criminal Restriction or a Civil Regulation.**

Even if this Court were to determine that the retrospective application of Article I, Section 13 only applies to civil statutes, Section 566.150 would still be subject to the ban

on retrospective laws. Section 566.150 does not clearly express the legislature's intent as to whether the purpose is civil or criminal. Simply because the statute is included with other criminal statutes or provides a basis for punishment, does not automatically mean a statute is criminal. See *In re R.W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. banc 2005), and *Doe*, 194 S.W.3d at 852.

In *R.W.*, this Court rejected a claim that the registration statutes of Missouri violated the ban on *ex post facto* laws. *Id.* at 70. The issue regarding whether the law was applicable under the retrospective ban was not argued by the appellant, and was therefore not reached by this Court. *Id.* at 68. This Court noted that the legislature's intent was not clearly expressed as to whether the registration statutes were civil or criminal. *Id.* at 68-69.

While evidence showed that registration was intended to be criminal, given the location of the statutes in the section on crimes and punishments, this Court noted that it has previously found that the "obvious legislative intent in enacting [the registration statutes] was to protect children from violence at the hands of sex offenders." *Id.* at 69 (citing *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. 2000)). When that is the case, and a statute is seen as an exercise of the "State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Id.*, (citing *Smith v. Doe*, 538 U.S. 84 (2003)). In weighing the factors, the Court found that it did not constitute an *ex post facto*

punishment, but rather the registration requirements were “civil and regulatory in nature” and thus did not apply to *ex post facto* claims. *Id.* at 69.

Here, the State argues, Section 566.150 was intended to protect children from future harm by providing a deterrent to reoffending and therefore it is a legitimate exercise of the state’s police powers. (App. Br. 21). As the State notes “[t]he legislature’s duty to promote public safety requires it to do more than just punish people who commit crimes.” (App. Br. 22). The State concedes that the use of the retrospective ban in registration cases is appropriate. (App. Br. 16). If this is true, this case is no different from this Court’s conclusions in *Doe* and *R.W.*, and restricting a prior offender from a park is a regulatory action and is thus subjected to the ban on retrospective laws.

Here, Section 566.150 specifically requires Respondent to fulfill a new duty of ensuring he is always over 500 feet away from any park with a pool or playground. This restriction further places a disability on him, in that he no longer has the right to enjoy public parks, a right that he previously had for the past twenty seven years after his registerable offense. He is no longer able to attend church functions or family reunions that are in parks.

Ultimately, this issue is little more than a distinction without a difference. Criminal or civil, Section 566.150 operates retrospectively. It looks solely to past conduct, a previous conviction, and gives legal effect to it. Specifically, it creates a new obligation, duty or disability that was not in place at the time of the previous conviction. If it’s a civil regulation and not a criminal penalty, the regulatory statute would still be

unconstitutionally retrospective as it applies to Respondent and the State could not pursue criminal charges against an individual for allegedly failing to abide by an unconstitutional statute.<sup>6</sup>

**D. If Section 566.150 is a Purely Criminal Statute, the Protections of *Ex Post Facto***

**Would Apply.**

If, as the State assumes, Section 566.150 is a criminal statute, rather than a civil regulatory law, the protection of *ex post facto* would most certainly apply. The Missouri ban on *ex post facto* laws has been held to be co-extensive with Article I, Section 10 of the Federal Constitution. *Doe*, 194 S.W.3d at 841. *Ex post facto* jurisprudence has held that such provisions violate the constitution when the challenged law “provides for punishment for an act that was not punishable when it was committed or that imposes an additional punishment to that in effect at the time the act was committed.” *In re R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005). The U.S. Supreme Court has defined two elements that must be present for an *ex post facto* law to be found: it must be

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<sup>6</sup> The State, however, argues it could. (App. Br. 17, footnote 3). If this were the case, it would create quite a quagmire. Under the State’s scenario a regulation would be a retrospective violation and therefore inapplicable to an individual who pled before its enactment, but the State would be able to bring a criminal charge against that person due to a failure to comply with the unconstitutional regulation. *Id.* Under the State’s scheme, the defendant’s only remedy would be an *ex post facto* claim, which the State would no doubt urge, is inapplicable.

retrospective in its application and it must disadvantage the defendant. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The *Weaver* Court defined retrospective as laws that “apply to events occurring before its enactment.” *Id.* It is not necessary for a law to impair a vested right to be in violation of *ex post facto*. *Id.*

In *Weaver*, the Court found that a Florida statute, which repealed an earlier law by reducing the amount of “gain time” deducted from a prison sentence, was an unconstitutional *ex post facto* violation. *Id.* at 36. This ruling applied only to offenders whose crimes were committed before the enactment of the statute. *Id.* The Court noted that critical to *ex post facto* relief was “the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” *Id.* at 30. Applying the two element test, the Court found that the statute changed the legal effect of the law which resulted in it operating retrospectively. *Id.* at 31. It likewise found that lengthening the period a person is in prison placed the defendant in a worse position from when he was initially sentenced. *Id.* at 33-35.

In *R.W.*, this Court found that registration was not subject to the protections of *ex post facto*, since the statute was a civil regulatory law. 168 S.W.3d at 70. This is distinguishable from what the State argues today, that Section 566.150 is a criminal statute. (App. Br. at 10). If that is the case, the ruling of *R.W.* has a different application in this appeal today. In *R.W.*, the court noted that if the registration requirement was meant to establish or increase punishment, then the analysis would end, and the law would be a direct violation of the *ex post facto* prohibition. 168 S.W.3d at 68.

Using the analysis of *Weaver*, Section 566.150 is clearly unconstitutional as applied to Respondent. Respondent is charged with violating a law based solely upon his prior conviction for a sex offense. It is undisputed that the law was neither in place at the time of his prior offense and that the sole basis for the restriction resulting in the new charge is that prior 1983 conviction. (L.F. 3). The statute creates a new felony charge based solely on a past conviction that was in place before the enactment of the statute. Since the law applies to events that occurred before the passage of the law it is therefore retrospective as it applies to Respondent. The law likewise is to the detriment of the defendant. Failure to comply with the statute results in a new felony conviction. A conviction that would not have been possible at the time of the Respondent's prior offense.

Therefore, if Section 566.150 is a criminal statute, the protections of *ex post facto* would apply and the trial court's decision to dismiss the felony complaint must be upheld.

## **CONCLUSION**

For the reasons presented, Respondent respectfully requests that this Court affirm the trial court's dismissal of the charge of violation of RSMo 566.150.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Ruth K. Russell, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, the brief contains 6,151 words, which does not exceed the 27,900 words allowed for a respondent's brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using Symantec VirusScan, updated in April 10, 2011. According to that program, these disks are virus-free.

On the 12<sup>th</sup> day of April, 2011, two true and correct copies of the foregoing brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to Daniel McPherson, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102.

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Ruth K. Russell

# **APPENDIX**

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