

No. SC91368

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Appellant,

v.

MELVIN RAY DAVIS,

Respondent.

**Appeal from Greene County Circuit Court
Thirty-First Judicial Circuit
The Honorable Jason R. Brown, Judge**

APPELLANT'S BRIEF

**CHRIS KOSTER
Attorney General**

**DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182**

**P.O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391
Dan.McPherson@ago.mo.gov**

**ATTORNEYS FOR APPELLANT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES2

JURISDICTIONAL STATEMENT5

STATEMENT OF FACTS6

POINT RELIED ON8

ARGUMENT10

 The trial court erred in dismissing criminal charges against the
defendant by applying the ban on retrospective laws contained in article I,
section 13 of the Missouri Constitution because that provision is limited to
civil rights and remedies10

CONCLUSION23

CERTIFICATE OF COMPLIANCE24

APPENDIX.....25

TABLE OF AUTHORITIES

Cases

<i>Doe v. Phillips</i> , 194 S.W.3d 833 (Mo. banc 2006).....	11, 16, 16 n.2, 17 n.3, 20
<i>Ex parte Bethurum</i> , 66 Mo. 545 (1877).....	8, 12, 16 n.2, 17 n.3
<i>F.R. v. St. Charles County Sheriff's Dept.</i> , 301 S.W.3d 56 (Mo. banc 2010)	11, 17, 18 n.4, 20
<i>Farmer v. Kinder</i> , 89 S.W.3d 447 (Mo. banc 2002)	14
<i>Franklin County ex rel. Parks v. Franklin County Comm'n</i> , 269 S.W.3d 26 (Mo. banc 2008).....	11
<i>In re R.W.</i> , 168 S.W.3d 65 (Mo. banc 2005)	16, 19
<i>Jefferson County Fire Prot. Dists. Ass'n v. Blunt</i> , 205 S.W.3d 866 (Mo. banc 2006)	8, 14
<i>Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n</i> , 702 S.W.2d 77 (Mo. banc 1986).....	19
<i>Kansas City v. Keene Corp.</i> , 855 S.W.2d 360 (Mo. banc 1993)	20
<i>Lincoln Credit Co. v. Peach</i> , 636 S.W.2d 31 (Mo. banc 1982).....	15
<i>Missouri Real Estate Comm'n v. Rayford</i> , 307 S.W.3d 686 (Mo. banc 2010) ..	15
<i>Moore v. Brown</i> , 350 Mo. 256, 165 S.W.2d 657 (Mo. banc 1942).....	8, 14
<i>R.L. v. Department of Corrections</i> , 245 S.W.3d 236 (Mo. banc 2008)	13, 15, 16, 17, 20

<i>State v. Brown</i> , 140 S.W.3d 51 (Mo. banc 2004).....	5
<i>State v. Grady</i> , 649 S.W.2d 240 (Mo. App. E.D. 1983).....	21 n.5
<i>State v. Mathews</i> , 328 S.W.2d 642 (Mo. 1959)	21 n.5
<i>State v. Parker</i> , 890 S.W.2d 312 (Mo. App. S.D. 1994)	21 n.5
<i>State v. Pribble</i> , 285 S.W.3d 310 (Mo. banc 2009).....	21 n.5
<i>State v. Smothers</i> , 297 S.W.3d 626 (Mo. App. W.D. 2009).....	5
<i>State v. Thomaston</i> , 726 S.W.2d 448 (Mo. App. W.D. 1987).....	15
<i>State v. Wadsworth</i> , 203 S.W.3d 825 (Mo. App. S.D. 2006).....	21 n.5
<i>State v. Young</i> , 801 S.W.2d 378 (Mo. App. E.D. 1990).....	21 n.5
<i>State ex rel. Ashcroft v. Blunt</i> , 813 S.W.2d 849 (Mo. banc 1991)	15
<i>State ex rel. North v. Kirtley</i> , 327 S.W.2d 166 (Mo. banc 1959).....	20
<i>State ex rel. Sweezer v. Green</i> , 360 Mo. 1249, 232 S.W.2d 897 (1950) ..	8, 20, 21
<i>State ex rel. Webster v. Myers</i> , 779 S.W.2d 286 (Mo. App. W.D. 1989)	15
 <u>Statutes and Constitution</u>	
Section 566.100, RSMo 1978	6
Section 566.147, RSMo Cum. Supp. 2006	13
Section 566.150, RSMo Cum. Supp. 2009	5, 6, 8
Section 589.426, RSMo Cum. Supp. 2008	13
Mo. Const. art. I, § 13 (1945).....	5, 8, 11
Mo. Const. art. I, § 28 (1865).....	8, 11 n.1

Mo. Const. art. II, § 15 (1875) 8, 11 n.1

Mo. Const. art. V, § 3 (as amended 1982).....5

Mo. Const. art. XIII, § 17 (1820) 8, 11 n.1

Other Authority

Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p.
1512, at <http://digital.library.umsystem.edu> 8, 14

Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a
Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62
Okla. L. Rev. 273 (2010) 8, 19

JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the Circuit Court of Greene County dismissing a felony complaint that charged Respondent Melvin Ray Davis with one count of being a sex offender present within 500 feet of a public park in violation of section 566.150, RSMo Cum. Supp. 2009, on the basis that application of the statute to the Respondent violated the prohibition contained in article I, section 13 of the Missouri Constitution on the enactment of laws that are restrospective in their operation. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. banc 2004). Although the dismissal was denominated as being without prejudice, refiling the charge would be a futile act given the reasons underlying the trial court's ruling. The dismissal thus had the practical effect of terminating the litigation and constituted a final and appealable judgment. *State v. Smothers*, 297 S.W.3d 626, 630-31 (Mo. App. W.D. 2009). This appeal involves the validity of a state statute, section 566.150, RSMo Cum. Supp. 2009. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. Mo. Const. art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

A felony complaint was filed in Greene County Circuit Court on August 10, 2010, charging Respondent Melvin Ray Davis with one count of being a sex offender present within 500 feet of a public park, in violation of section 566.150, RSMo Cum. Supp. 2009. (L.F. 1, 5). The complaint alleged that Davis was a convicted sex offender, based on a May 17, 1983 conviction in the Circuit Court of Greene County for sexual abuse under section 566.100, RSMo 1978. (L.F. 5). The complaint further alleged that on June 17, 2010, Davis was present in Grant Beach Park, a public park containing playground equipment. (L.F. 5).

Counsel was appointed to represent Davis on August 16, 2010. (L.F. 1). On September 13, 2010, defense counsel filed a motion to dismiss the felony complaint and to declare section 566.150, RSMo unconstitutional as applied to Davis. (L.F. 2, 8-10). The motion alleged that section 566.150, RSMo, was enacted twenty-six years after Davis pled guilty to a registerable sex offense, and that the statute imposed a new obligation on him that was not present at the time of his conviction, by prohibiting him from being within 500 feet of a public park. (L.F. 8-9). The motion went on to allege that the statute as applied to Davis violated article I, section 13 of the Missouri Constitution, which prohibits the enactment of a law that is retrospective in its operation.

(L.F. 8-9). A hearing on the motion was conducted on October 27, 2010, before the Honorable Jason R. Brown. (L.F. 2).

The court entered a judgment on November 4, 2010, dismissing the complaint without prejudice. (L.F. 3). The court found that it was undisputed that the statutory prohibition against a sex offender being within 500 feet of a public park did not exist when Davis was convicted of sexual abuse in 1983. (L.F. 3). The court also found that it was undisputed that the 1983 conviction was the sole basis for the restriction that resulted in Davis being charged with violating section 566.150, RSMo. (L.F. 3). The court concluded that section 566.150, RSMo changed the legal effect of Davis's prior conviction because it placed a new disability on his qualifications or rights. (L.F. 3). The court found that section 566.150, RSMo violated the ban on retrospective laws contained in the Missouri Constitution. (L.F. 3). It sustained Davis's motion and dismissed the felony complaint. (L.F. 3).

POINT RELIED ON

The trial court erred in dismissing the felony complaint filed against Respondent Melvin Ray Davis because the statute under which Davis was charged, section 566.150, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 566.150, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

Ex parte Bethurum, 66 Mo. 545 (1877).

Jefferson County Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006).

Moore v. Brown, 350 Mo. 256, 165 S.W.2d 657 (1942).

State ex rel. Sweezer v. Green, 360 Mo. 1249, 232 S.W.2d 897 (1950).

Mo. Const. art. I, § 13 (1945).

Mo. Const. art. II, § 15 (1875).

Mo. Const. art. I, § 28 (1865).

Mo. Const. art. XIII, § 17 (1820).

Section 566.150, RSMo Cum. Supp. 2009.

Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, at <http://digital.library.umsystem.edu>.

Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62 Okla. L. Rev. 273 (2010).

ARGUMENT

The trial court erred in dismissing the felony complaint filed against Respondent Melvin Ray Davis because the statute under which Davis was charged, section 566.150, RSMo, is not subject to the prohibition against enacting retrospective laws that is contained in article I, section 13 of the Missouri Constitution, in that section 566.150, RSMo is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

The trial court dismissed the felony complaint filed against Respondent Davis on the grounds that section 566.150, RSMo was retrospective as applied to him, in that the statute changed the effect of his prior conviction by prohibiting Davis from being within 500 feet of a public park when such a prohibition did not exist when he was convicted of sexual abuse in 1983.

(L.F. 11). But the trial court erred in applying the constitutional ban against retrospective laws to the criminal statute under which Davis was charged because the ban on retrospective laws relates exclusively to civil statutes and has no application to criminal statutes.

A. Standard of Review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed to be valid and will not be found unconstitutional unless it clearly contravenes a constitutional provision. *Id.* The person challenging the statute's validity bears the burden of proving that the act clearly and undoubtedly violates the constitution. *Id.*

B. Analysis.

The prohibition against retrospective laws is contained in article I, section 13 of the Missouri Constitution, which states:

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grants of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13 (1945). A similar provision has been a part of Missouri law since this State adopted its first constitution in 1820.¹ *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

¹ See Mo. Const. art. XIII, § 17 (1820); Mo. Const. art. I, § 28 (1865); Mo. Const. art. II, § 15 (1875).

The term “retrospective” that appears in each of Missouri’s constitutions, including article I, section 13 of the present constitution, had acquired a definite, legal meaning long before the adoption of Missouri’s first constitution. *Ex parte Bethurum*, 66 Mo. 545, 548 (1877). When a constitution employs words that have long had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense, unless there is something to show that they were employed in a different sense. *Id.*

The Court noted in *Ex parte Bethurum* that the prohibition against *ex post facto* laws served to prevent the retrospective application of criminal laws, while the phrase “law retrospective in its operation” related to civil rights and proceedings in civil causes. *Id.* at 550. Applying the technical meaning of retrospective that existed when the constitution was adopted, this Court stated, “A retrospective law, as the phrase is employed in our constitution, is one which relates exclusively to civil rights and remedies.” *Id.* at 550. And the Court found that the phrase retained that same meaning in both the 1865 and 1875 constitutions. *Id.* at 552. The Court went on to conclude, “[W]e think there can be no doubt that the phrase ‘law retrospective in its operation,’ as used in the bill of rights, has no application to crimes and punishments, or criminal procedure” *Id.* at 552-53.

Despite that limitation, this Court has recently declared criminal statutes unconstitutional as violating the constitutional ban on retrospective laws. In *R.L. v. Department of Corrections*, the Court applied the ban on retrospective laws to section 566.147, RSMo Cum. Supp. 2006, a statute making it a felony for certain sex offenders to reside within one-thousand feet of a school or a child care facility. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237, 238 (Mo. banc 2008). In *F.R. v. St. Charles County Sheriff's Dept.*, the Court again declared that section 566.047, RSMo was retrospective. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 65-66 (Mo. banc 2010). The Court also applied the ban on retrospective laws to uphold the dismissal of misdemeanor charges filed for a violation of section 589.426, RSMo Cum. Supp. 2008, a statute that requires registered sex offenders to comply with certain requirements on Halloween. *Id.* The trial court in the present case relied on *F.R.* to dismiss the felony charge filed against Respondent Davis, on the basis that section 566.150, RSMo was retrospective as applied to him. (L.F. 11).

Appellant respectfully suggests that *R.L.* and *F.R.* are contrary to this Court's precedents, to the intent of the drafters of the constitution and the voters who approved it, and to the standards that this Court uses to construe the constitution. Those decisions, 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.

Adopted by a vote of the people, the Missouri Constitution is a direct expression of the public will. Accordingly, “It is the duty of this Court to be faithful to the constitution. [I]t cannot ascribe to it a meaning that is contrary to that clearly intended by the drafters. Rather, a court must undertake to ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.” *Jefferson County Fire Prot. Dists. Ass’n v. Blunt*, 205 S.W.3d 866, 872 (Mo. banc 2006) (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)). The present article I, section 13 was adopted at the constitutional convention of 1943-1944. Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, at <http://digital.library.umsystem.edu>. The only discussion prior to the vote approving the amendment was to note that the new amendment was identical to article II, section 15 of the 1875 Constitution. *Id.* Both the delegates to the 1943-1944 convention and the voters who adopted the constitution in 1945 are presumed to have known of the construction that this Court had placed on the term “retrospective” when they approved the present article I, section 13. *Moore v. Brown*, 350 Mo. 256, 266-67, 165 S.W.2d 657, 662 (1942). And because the term “retrospective” has been retained in the same context in every version of the Missouri

Constitution since *Ex parte Bethurum*, it is presumed to retain the original meaning ascribed by the Court. *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991).

When the rules that this Court has established for construing constitutional provisions are applied to article I, section 13, the term “retrospective” must be construed as applying exclusively to civil rights and remedies because that is how the term was understood by the convention that adopted that provision and by the voters who approved it. And since the passage of the present constitution, both this Court and the Court of Appeals have continued to expressly recognize the distinction that *ex post facto* laws as described in article I, section 13 are limited to crimes and punishment and criminal procedure, while retrospective laws as described in that same provision are limited to civil rights and remedies. *See, e.g., Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34-35 (Mo. banc 1982); *Missouri Real Estate Comm’n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010); *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. W.D. 1989); *State v. Thomaston*, 726 S.W.2d 448, 459, 460 (Mo. App. W.D. 1987).

Even in *R.L.*, the Court noted that, “The constitutional bar on retrospective **civil** laws has been a part of Missouri law since this State adopted its first constitution in 1820.” *R.L.*, 245 S.W.3d at 237 (emphasis

added). But despite that acknowledgement of the limited scope of the ban on retrospective laws, the Court applied that ban to invalidate a felony statute barring certain sex offenders from residing within one-thousand feet of a school or a child care facility. *Id.* at 237, 238. That holding relied on the Court’s previous opinion in *Doe v. Phillips*, where the Court held that a statute requiring registration as a sex offender for crimes committed before the effective date of the registration law imposed new obligations on the offender, and was thus retrospective as applied to those offenders. *Id.* at 237 (citing *Phillips*, 194 S.W.3d at 850). But the Court stated in *Phillips* that “the thrust of the registration and notification requirements are civil and regulatory in nature.” *Phillips*, 194 S.W.3d at 842 (quoting *In re R.W.*, 168 S.W.3d 65, 70 (Mo. banc 2005)).²

The Court was thus right to apply the bar on retrospective laws to the registration statute in *Phillips* since the statute was one that involved civil rights and remedies, and thus fell within the scope of the provision banning

² The Court also rejected a claim that the registration requirement was an *ex post facto* law on the basis that the bar on *ex post facto* laws applied only to criminal laws. *Phillips*, 194 S.W.3d at 842. That limitation on *ex post facto* laws is also found in *Ex Parte Bethurum*, 66 Mo. at 550.

retrospective laws.³ In *R.L.*, the Court appears to have extended *Phillips* to the school residency statute simply because both laws involved restrictions placed on persons convicted of sexual offenses. *See R.L.*, 245 S.W.3d at 237. In *F.R.* the Court in turn relied on *R.L.* and *Phillips* to again declare as retrospective the criminal statute prohibiting convicted sex offenders from living within one-thousand feet of a school or child care facility, and to also invalidate as retrospective criminal charges filed under the statute creating a misdemeanor offense when registered sex offenders fail to comply with certain requirements on Halloween. *F.R.*, 301 S.W.3d at 65-66.

Undersigned counsel has reviewed the briefs filed in *R.L.* and *F.R.*, and none of them address whether article I, section 13 can be applied to criminal statutes. Instead, the parties seemed to assume that since the ban on retrospective laws was applied in *Phillips* to the statute requiring sex

³ While the registration statute at issue in *Phillips* authorized criminal penalties for failure to comply, the Court found that provision was unimportant to the retrospective law analysis. *Phillips*, 194 S.W.3d at 852. Indeed, were a litigant to challenge enforcement of that criminal penalty under article I, section 13, the claim would have to be brought as an alleged *ex post facto* violation, not as a retrospective law. *Ex parte Bethurum*, 66 Mo. at 550.

offender registration, it would equally apply to any statute restricting the activities of sex offenders. The Court thus was not asked to consider the long-standing construction of article I, section 13, and the majority extended *Phillips* to the statutes being challenged in *R.L.* and *F.R.*⁴ But in doing so, the Court construed article I, section 13 in a manner that was contrary to the meaning of “retrospective” as understood when that provision was adopted.

Rather than continue down that path, Appellant respectfully suggests that this Court should, consistent with the intent of the drafters of the constitution and the voters who approved it, reaffirm that article I, section 13’s ban on retrospective laws is limited to civil rights and remedies, and that it does not apply to criminal statutes like section 566.150, RSMo.

In addition to honoring the intent of the Constitution’s drafters, there are other sound reasons why the ban on retrospective laws should not extend

⁴ The dissent did discuss the 1875 Constitutional Convention and noted that the chief concern expressed in the debates over the prohibition against retrospective laws was to prevent the legislature from passing a retrospective law that would tread on citizens’ financial or property interests. *F.R.*, 301 S.W.3d at 68-69 (Russell, J., dissenting). But the dissent did not discuss this Court’s previous construction limiting the application of that prohibition to civil rights and remedies.

to criminal laws and punishments. The concern motivating the ban on retrospective laws is to prevent situations where a person cannot avoid liability because all of the events necessary to impose liability have already occurred before the law's passage. Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62 Okla. L. Rev. 273, 305 (2010). Applying the ban on retrospective laws to a civil obligation like sex offender registration comports with the purpose behind the ban because once a person is convicted of a qualifying offense there is no way to avoid the civil registration requirement.

But the same is not true of criminal statutes like section 566.150, RSMo. The concern that motivates the ban on retrospective laws is already addressed in the criminal law through the ban on *ex post facto* laws, which operates to prevent the legislature from retrospectively criminalizing conduct that was not criminal at the time it was committed. *In re R.W.*, 168 S.W.3d at 68. Criminal statutes are thus forward looking. Section 566.150, RSMo, in particular, does not attempt to punish or adjudicate behavior that occurred prior to its effective date. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1986). It instead uses a person's prior convictions for sex offenses involving children to fix that person's status as one who is subject to the statutory restrictions and is liable for knowingly

violating those restrictions. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1255, 232 S.W.2d 897, 901 (1950), *overruled on other grounds by*, *State ex rel. North v. Kirtley*, 327 S.W.2d 166, 167 ((Mo. banc 1959). That is something that even the ban on retrospective laws permits. *Id.*; *Phillips*, 194 S.W.3d at 851. In *Phillips* this Court suggested that prior criminal convictions could be used to bar certain future conduct by the offender. *Id.* at 852. That is precisely what section 566.150, RSMo does. And unlike the civil registration requirement that was found to be retrospective in *Phillips*, a prior sex offender can avoid criminal liability under section 566.150, RSMo simply by refraining from the activities prohibited under the statute.

But this Court has broadly applied the ban on retrospective laws to invalidate statutes that impose criminal liability for activity that occurs after the statute's effective date. *R.L.*, 245 S.W.3d at 236, 237; *F.R.*, 301 S.W.3d at 65-66. Applying the ban on retrospective laws in that manner unduly restricts the legislature's ability to enact legislation that furthers the purpose of the criminal laws, which is "to protect and vindicate the interests of the public as a whole, to punish the offender and deter others." *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993). In enacting laws to fulfill that purpose, the legislature is free to recognize degrees of harm. *Sweezer*, 360 Mo. at 1255, 232 S.W.2d at 901. The legislature is entitled to determine that sexual crimes against children are so serious that any level of recidivism

is unacceptable and that affirmative steps aimed at deterring reoffending are necessary. *See id.* (legislature is entitled to exercise its police power by extending statutes to cases where it deems the need to be greatest and the evil most apparent). The wisdom of that determination is not subject to judicial second-guessing. *Id.* Section 566.150, RSMo seeks to prevent future harm by providing a deterrent that will keep offenders with a history of preying on children away from areas that are frequented by large numbers of children and that have been targeted in the past by pedophiles seeking victims, in this case public parks and public swimming pools.⁵

⁵ *See, e.g., State v. Parker*, 890 S.W.2d 312, 314 (Mo. App. S.D. 1994) (defendant abducted 13, 11, and 10 year old girls in public park and molested two of the girls in park bathroom); *State v. Young*, 801 S.W.2d 378, 379 (Mo. App. E.D. 1990) (defendant attempted to sodomize nine-year-old girl in restroom of public park); *State v. Grady*, 649 S.W.2d 240, 242 (Mo. App. E.D. 1983) (defendant forced nine-year-old boy into nearby park and sodomized him); *State v. Mathews*, 328 S.W.2d 642, 643 (Mo. 1959) (defendant approached eleven-year-old girl at public swimming pool and molested her). *See also State v. Pribble*, 285 S.W.3d 310, 312-13 (Mo. banc 2009) *and State v. Wadsworth*, 203 S.W.3d 825, 830 (Mo. App. S.D. 2006). In both cases the defendant drove to a public park for an arranged meeting to

The legislature's duty to promote public safety requires it to do more than just punish people who commit crimes. It also requires the enactment of laws designed to prevent crimes from happening in the first place. That duty is thwarted if the legislature cannot use a person's prior criminal history to fix that person's status under a statute prohibiting activity that is reasonably seen as increasing the risk of that person committing future crimes. Extending the ban on retrospective laws to criminal statutes cripples the legislature's ability to assess degrees of harm and take reasonable steps to decrease those risks. The concern over retrospective application of criminal statutes is adequately addressed by the prohibition against *ex post facto* laws. This Court should therefore reaffirm the long-standing construction placed on article I, section 13 and find that the trial court erred in dismissing the charge against Respondent.

engage in sexual acts with a person that he thought was a young teenage girl that he had corresponded with over the internet, but who was actually an undercover police officer. The cases cited in this footnote by no means represent a comprehensive listing of cases involving actual or intended sexual assaults against children in public parks or swimming pools, but are merely illustrative.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing the felony complaint filed against Respondent Melvin Ray Davis should be reversed, the felony complaint should be reinstated, and the case should be remanded to the trial court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

CHRIS KOSTER
Attorney General

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-5391

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 3,964 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 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 15th day of March, 2011, to:

Ruth Russell
Office of the State Public Defender
630 N. Robberson
Springfield, MO 65806

DANIEL N. McPHERSON
Assistant Attorney General
Missouri Bar No. 47182

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321
Fax (573) 751-5391

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

APPENDIX

JUDGMENT.....	A1
SECTION 566.150, RSMo CUM. SUPP. 2009	A2
Mo. CONST. ART. XIII, SEC. 17 (1820).....	A3
Mo. CONST. ART. I, SEC. 28 (1865)	A4
Mo. CONST. ART. II, SEC. 15 (1875).....	A5
Mo. CONST. ART. I, SEC. 13 (1945)	A6
DEBATES OF THE 1943-1944 CONSTITUTIONAL CONVENTION OF MISSOURI, VOL. 6, p. 1512	A7