

IN THE SUPREME COURT OF MISSOURI

**MATTHEW LEVINSON,**

Appellant,

vs.

Appeal No. SC 84703

**THE STATE OF MISSOURI, et al.,**

Respondents.

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**Appeal from the Circuit Court in and for the City of St. Louis, Missouri  
22<sup>nd</sup> Judicial Circuit  
Honorable Thomas C. Grady, Judge, Division No. 3**

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**Reply Brief for Appellant Matthew Levinson**

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## Argument

The State's Brief (hereafter S.Br.) fails almost completely to meet the contentions made in our opening brief. In addition, the state's brief misstates the record. We shall correct that misstatement, first, and then deal with specific matters most in need of correction.

**PLAINTIFF HAD TO CEASE HIS EMPLOYMENT AS A BARTENDER  
BECAUSE IT WOULD HAVE BEEN A STATE CRIME FOR HIM TO  
CONTINUE AND BECAUSE HIS PROBATION OFFICER INSTRUCTED  
HIS TO TERMINATE HIS EMPLOYMENT FOR THAT REASON.**

Defendants appear to argue that Plaintiff voluntarily left employment. Such was not the case. Plaintiff's first condition of probation was that, "The defendant shall not commit another federal, state or local crime. " LF at 17. RSMo § 311.880 makes it a state crime for a licensee to employ Plaintiff to "directly participate in retail sales of intoxicating liquor" for RSMo § 311.880 makes every violation of Chapter 311 a crime. Section 311.880 reads:

311.880. Any person violating *any of the provisions of this chapter*, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than fifty dollars, nor more than one thousand dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence. [emphasis added]

Had Plaintiff continued his employment, there is little doubt he could be found to have violated his probation by committing a state crime worked either by:

Aiding and abetting the licensee, pursuant to RSMO § 562.041.1(2), which provides:

562.041. 1. A person is criminally responsible for the conduct of another when

\* \* \*

(2) Either before or during the commission of an offense with the purpose of promoting the commission of an offense, he aids or agrees to aid or attempts to aid such other person in planning, committing or attempting to commit the offense; or

Conspiring with the licensee, pursuant to RSMO § 564.016.1, which reads:

564.016. 1. A person is guilty of conspiracy with another person or persons to commit an offense if, with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such offense.

Plaintiff would have little ability to contest the mental state required for a finding that he violated the condition of his probation, in light of the 13<sup>th</sup> Standard Condition of Supervision, which reads (LF at 17):

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history

or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

Further, Plaintiff had to be employed, Standard Condition of Supervision 5, but only in a "lawful occupation." It does not seem to Plaintiff that serving liquor at retail, when not permitted to do such, is a lawful occupation. The State would *not* argue that it is a lawful occupation for someone to practice law without a law license.

Plaintiff had to "truthfully answer all inquires by the probation officer and follow the instructions of the probation officer." Plaintiff was instructed by his officer to cease his employment. LF at 10, ¶ 5. Defendants have stipulated this allegation is true. LF at 80.

Last, Plaintiff had to notify his probation officer of his place of employment and any change in his place of employment. Standard Condition of Supervision 6). LF at 17.

**THE STATE'S BASIC MISCONCEPTIONS REGARDING REPEAL OF  
SECTION 311. 060 BY SECTION 561.016**

The State's position rests upon basic errors which reach to the heart of the case.

*First.*—The State's Brief throughout proceeds on the assumption that RSMO § 561.016 is "garden variety" legislation. RSMo § 561.016 is nothing of the sort. It is one piece of a complex Criminal Code. RSMo. § 556.011.

Singer observes (1A *Statutes and Statutory Construction* (Singer 2002) § 23.14, at 505:

The enactment of a code contemplates a systematic and complete body of law designed to function as the sole regulatory law on the subject to which it relates. Enactment of code provisions gives them effect as any other statute. The provisions of a code are liberally interpreted to effectuate the purpose of their enactment.

The enactment of a code operates to repeal all prior laws upon the same subject matter where, because of its comprehensiveness, it inferentially purports to be a complete treatment of the subject or where by express declaration in the code its is prescribed the sole governing statutory law upon the particular subject.

The Criminal Code is comprehensive in its treatment of every aspect of crime and punishment. It is self-evident that the collateral consequences of a conviction impact every facet of the code, from the definition of parties, to the definition of offenses, to the classification of offenses, to the range of punishment.

*Second.*-- The legislative history of the Code declares , expressly, that inconsistent statutes are repealed and uses RSMO § 311.060 as an example of a repealed statute.

Singer observes (1A *Statutes and Statutory Construction* (Singer 2002) § 23.10, at 486-87):

A court may examine legislative history to find whether repeal was intended<sup>1</sup>.

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<sup>1</sup> Singer collects additional cases at § 23.6, page 446 n. 6. 1A *Statutes and Statutory Construction* (Singer 2002) § 23.6, at 446 n.6.

The legislative history for RSMo § 561.016 could not be clearer about the intent to repeal RSMo § 311.060, for such section is used as the example of a repealed section. The history, found in Vernon's Annotated Missouri Statutes following Section 561.016 reads in part (V.A.M.S. § 561.016):

Subsection 1(4) allows a deprivation when it is provided in a judgment, order or regulation of a court, agency or official exercising jurisdiction conferred by law, whenever the commission of the crime of the conviction or the sentence "is reasonably related" to the competency of the offender to exercise the right or right or *privilege*<sup>2</sup> of which he is deprived. This is the most important provision in this section. The present law sometimes contains blanket restrictions against employment in certain regulated areas of persons convicted of crimes. Sometimes conviction is relevant to the public safety interests underlying the regulation, but often it is not. By eliminating irrational barriers to employment, we assist offenders in reintegrating themselves into the community. Thus, instead of providing that no liquor license shall be issued to any person "convicted, since the ratification of the twenty-first amendment to the Constitution of the United States, of a

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<sup>2</sup> Plaintiff's position is that he has a right under the Constitution to engage in the lawful occupation of bartending. However, even if bartending is only a privilege, nonetheless the legislative history makes clear that RSMo § 561.016 repeals all of RSMo § 311.060.2(2) that is inconsistent.

violation of the provisions of any law applicable to the sale of agency or intoxicating liquor, or who employs in his business as such dealer, any person to defining who has been convicted of violating such law since the date aforesaid," § 311.060 RSMO, the Code provides a reasonable rule which would authorize licensing agency to refuse to grant a license to an applicant whose criminal to exercise record and other circumstances indicate that he would endanger the particular group or industry protected by the agency's licensing power. Many Missouri giving statutes now leave the matter of licensing to the discretion of the licensing agency, without arbitrary restrictions. *E.g.* § 334.100 RSMo, giving the state board of registration for the healing arts the power to license individuals guilty of "unprofessional or dishonorable conduct," including "conviction of a felony." A prospective physician might have committed a felony followed by a successful period of rehabilitation. The legislature has wisely given the board the power to decide whether he should be licensed.

*Third.*--The State argues, S.Br. at 10, "We presume that, if the Legislature wanted to repeal §311.060, it would have done so." This argument violates the doctrine of separation of powers. No court may interfere with the fundamental power of the Legislature by attempting to impose duties on how the Legislature conducts its business. Singer explains no legislature has the duty to cite the repealed statute by section or any other description. 1A Statutes and Statutory Construction (Singer 2002) § 23:9 at 457-58:

The legislature cannot be expected to have complete knowledge of the detail contained in the statute laws of a state, nor have they the time to extensively research the mass of statutory provisions in order to specify what statutes should be repealed. In the course of enacting legislation, it is only natural that subsequent enactments should declare an intent to repeal preexisting laws without mention of reference to such laws. A repeal may arise by necessary implication from the enactment of a subsequent act.<sup>3</sup>

For example, when two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first.

*Accord Morrow v. City of Kansas City*, 788 S.W.2d 278, 281 (Mo. Ct. App. 1990):

When two statutes are repugnant in any of their provisions, the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first. *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 63 (Mo. banc 1983); *City of Kirkwood v. Allen*, 399 S.W.2d 30, 34 (Mo. banc 1966).

RSMo § 561.016 and RSMo § 311.060.2(2) are repugnant to each other. The newer act permits a ban from employment **only if** the fact of conviction or sentence is reasonably related to the competency of the offender to exercise the right or right or privilege. Further no automatic ban for life is permitted. Instead, a ban may last only until the offender is rehabilitated. The old law bans employment, for life, without regard to whether the conviction is reasonably related to the competency of the

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<sup>3</sup> Citing with approval *Magruder v Petre*, 690 S.W.2d 830 (Mo.Ct. App. 1985)

offender and without regard to rehabilitation.

Defendants argue the laws are not inconsistent by omitting and failing to mention that the newer act, as part of a comprehensive code, provides ,that debarment is permitted by statute or regulation only "when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived." Neither RSMo § 311.060.2(2) nor 11 CSR 70-2.140(11) are consistent with this command. Both are repugnant to RSMO § 561.016. Both were repealed<sup>4</sup> by RSMo § 561.016.

### **Conclusion**

The question before the Court appears to be a narrow one but it is not. Proper resolution of much of the case only requires the Court to recall and correctly apply sound principles of statutory construction. However, the policy issues imbedded in the case are profound.

The analysis put forth by the State is not serious and not up to the task. The state claims a substantial interest in the regulation of liquor. Perhaps use of such an *ipse dixit* was a workable judicial analysis in 1930. It clearly is not after the events of 9/11.

Missouri's legislative scheme is wholly irrational. Our opening brief set forth that irrationality in detail by discussing the irrational distinction drawn by the State between the treatment of bartenders who commit a felony and the treatment of every other occupation, trade, calling, profession, or employment.

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<sup>44</sup> 11 CSR 70-2.140(11) was adopted prior to the passage of Section 561.016.

Attention also needs to be paid to the circumstantial evidence that the State's scheme is impermissibly class based, as shown by what is not regulated. Clearly social, economic, and political class considerations are behind the disparate treatment of occupations, trades, callings, professions, and employments by the State.

The State, for example, does not prohibit a felon from driving a truck transporting gasoline, toxic chemicals, or hazardous waste. A gasoline truck could be used either ingeniously or by an evil genius as a bomb of mass destruction, just like a 767. Similarly, the State does not prohibit felons from working in laboratories conducting genetic or biological experiments, where a felon would have a hand tools, means, or methods to kill or injure hundreds if not thousands. This discussion is not meant to be exhaustive. The point is only to illustrate the overwhelming evidence of class, social, and economic bias in the State's argument. Section 311.060.2(2) is no real exercise of the police power. It is nothing more or less than class discrimination, based on a bias of the controlling social, economic, and political class that reserves for itself the right to commit felonies and return to work. Nothing about 311.060.2(2) is rational under any equal protection analysis.

The judgment of the circuit court should be reversed for the foregoing reasons.

Respectfully submitted,

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## **Certificate Of Compliance And Service**

The undersigned hereby certifies:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains 2526 words as calculated by Word (tools, word count); and
2. That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this Thursday, February 13, 2003, to:

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