IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI
Repondent,

v.

MICHAEL WADE,
Appellant.

No. SC92382

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE ST. LOUIS COUNTY CIRCUIT COURT, 21ST JUDICIAL CIRCUIT
THE HONORABLE CAROLYN C. WHITTINGTON, JUDGE

Appellant's Reply Brief

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JURISDICTIONAL STATEMENT

Micheal Wade, Appellant, incorporates the Jurisdictional Statement appearing at page 5 of Appellant's Opening Brief.

STATEMENT OF FACTS

Mr. Wade, also, incorporates the Statement of Facts appearing at pages 6-8 of Appellant's Opening Brief.

REPLY

This Court must decide whether § 566.150, RSMo 2009, violates Article I, § 13 of the Missouri Constitution. It does. The respective laws follow:

> § 566.150. Certain offenders not to be present or loiter within five hundred feet of a public park or swimming pool – violation, penalty
>
> 1. Any person who has pleaded guilty to, or been convicted of, or been found guilty of:
>
> (1) Violating any of the provisions of this chapter or the provisions of subsection 2 of section 568.020, incest; section 568.045, endangering the welfare of a child in the first degree; subsection 2 of section 568.080, use of a child in a sexual performance; section 568.090, promoting a sexual performance by a child; section 573.023, sexual exploitation of a minor; section 573.025, promoting child pornography; or section 573.040, furnishing pornographic material to minors; or
>
> (2) Any offense in any other state or foreign country, or under federal, tribal, or military jurisdiction

> which, if committed in this state, would be a violation listed in this section;
>
> shall not knowingly be present in or loiter within five hundred feet of any real property comprising any public park with playground equipment or a public swimming pool.
>
> 2. The first violation of the provisions of this section shall be a class D felony.
>
> 3. A second or subsequent violation of this section shall be a class C felony.

Article I, § 13 of the Missouri Constitution, in turn, reads:

> That no *ex post fac*to 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.

Mr. Wade moved to dismiss this prosecution as the § 566.150 is unconstitutional. LF 15-26, *relying on F.R. v. St. Charles County Sheriff's Department*, 301 S.W.3d 56 (Mo. banc 2010) and its companion case *State v. Raynor*, 301 S.W.3d 56 (Mo. banc 2010). The trial court overruled that motion, found Mr. Wade guilty and sentenced him.

This Court reviews the trial court's ruling *de novo*. *F.R.*, *supra*. To reverse Mr. Wade's conviction, this Court need only adhere to its own decisions within the past three years. There is no dispute that Article I, § 13 forbids the State of Missouri from enacting a law that "creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *F.R.*, 301 S.W.3d at 60-61; *Squaw Creek Drainage Dist. V v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (Mo.banc 1911).

Respondent Seeks a 2nd Bite at *F.R.* and *Raynor*

The State's objection, here, is nothing more than a relitigation of the nearly identical issue that it lost in *F.R.* and *Rayno* – something of a collateral motion for rehearing. Respondent undertakes to craft a complex argument that, in the end, leaves the reader scratching his head. This Court need not veer off course with Respondent's invitation to dust off the Constitutional Conventions of 1865, 1875 and 1943-44, or to wade through mid-19th Century opinions from Texas and New Hampshire. Resp.Br. 17-25 (citations omitted). This Court need simply to apply the KISS[1] principle and "keep it simple

[1] I.e., "most systems work best if they are kept simple rather than made complex; therefore simplicity should be a key goal in design and unnecessary complexity should be avoided." *See* http://en.wikipedia.org/wiki/KISS_principle.

stupid" by following this Court's consistent understanding of retrospective laws.

Retrospective Laws

More than 100 years ago, this Court explained,

> In interpreting Missouri's broad constitutional bar, this Court said:
>
> > 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. It must give to something already done a different effect from that which it had when it transpired.
>
> *Turney*, 138 S.W. at 16. The language used to bar laws retrospective in operation remained the same in the 1945 constitution. Mo. Const art. I, sec. 13.

Jane Doe I v. Phillips, 194 S.W.3d 833, 850 (Mo. banc 2006) (emphasis added).

The *Phillips* Court referred to the Debates of the Missouri Constitutional Convention 1875 to explain that the bar on retrospective laws "is broader than the *ex post facto* bars in other states." *Id.*

> [T]he prohibition of retrospective legislation or forbidding the General Assembly to pass a law retrospective in its character did at one breath accomplish the prohibition of a more extensive kind of a more comprehensive nature than was to be found in any of the constitutions of but three states in the Union. So that the prohibition of an act retrospective in its operation in the Constitution of 1820 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….

194 S.W.3d at 850, *quoting* Debates of the Missouri Constitutional Convention 1875, vol. IV at 95 (Isidor Loeb & Floyd C. Shoemaker, eds., State Historical Society of Mo., 1938).

At oral argument in *State v. Peterson*, No. SC92491 on November 8, 2012, The Honorable Laura Denvir Stith noted the absurdity that this broader protection would allow criminal statutes to escape its reach. To paraphrase a hypothetical posed to the State by Judge Stith during that argument:

1. The General Assembly passes a bill rendering anyone with a DWI conviction – city or state – from obtaining a license to sell alcohol.

a. May this be applied to persons with such a conviction that predates the passage of this bill?

b. The State agreed that it would violate Article I, § 13 to apply this licensing limitation to persons with such prior convictions.

2. The General Assembly passes a bill making it a crime for anyone with a DWI conviction – city or state – to hold a license to sell alcohol.

a. May this be applied to persons with such a conviction that predates the passage of this bill?

b. The State argues that it could be applied to those with prior convictions because the retrospective clause does not apply to criminal laws.

The absolute absurdity of such a result cannot be overstated. This would be akin to saying: a) the State could not pass a law that simply precludes a prior sex offender from entering a park with a playground, but b) it could make that such mere entry a crime. Criminal defendants receive broader protection from state action; not narrower!

Respondent Misplaces Reliance on *Bethurum, et al.*

The State's thesis is that, beginning with *Ex parte Bethurum*, 66 Mo. 545 (Mo. 1877), this Court has applied the retrospective ban in Article I, § 13 only to civil laws and not criminal. Respondent insists that *Bethurum*, and cases that followed, preempt this Court's opinions in *F.R.* and *Raynor*. Resp.Br. at 12-28. In an exhausting discussion of *Bethurm*, et al., however, Respondent never puts *Bethurum* in its proper context – i.e., Respondent ignores the facts and the statute at issue in *Bethurm*.

In November 1875,

> Bethurum was tried and convicted of forgery in the third degree, and sentenced to imprisonment in the penitentiary for a term of eight years, the maximum punishment for that offense being fixed by law at seven years imprisonment in the penitentiary, and he now asks to be discharged from said imprisonment on the ground that it was illegal.

Id. at 547 (emphasis added). In March 1877, the General Assembly passed "[a]n act to prevent the discharge of persons by the *habeas corpus* act, who have been convicted of crime and erroneously sentenced…." *Id.* (emphasis added). The bill provided,

> No person shall be entitled to the benefit of the provisions of the *habeas corpus* act, for the reason that the judgment, by virtue of which such person is confined, was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court, or officer, before whom such relief is sought, to sentence such person to the proper place of confinement, and for the proper length of time, from and after the date of the original sentence, and to cause the officer, or other person having such prisoner in charge, to convey him forthwith to such designated place of imprisonment.

Id. at 547-548 (internal quotation omitted).

The 1877 law did not create a crime by imposing new obligations, duties or disabilities based purely on Bethurum's prior forgery conviction. Rather, the 1877 law created a new remedy to cure a prior sentencing error. This Court concluded that the new remedy was not *ex post facto* because it merely provided a procedure for resentencing an improperly-sentenced defendant. *Id.* at 549.

In addressing "retrospective" laws, the *Bethurum* Court relied on *De Cordova v. The City of Galveston*, 4 Tex. 470 (1849):

> *Ex post facto* laws, and such as impair the obligation of contracts, are retrospective; but there may be retrospective laws which are not necessarily *ex post facto*, or which do not impair the obligation of contracts; and by the use of the term 'retrospective,' cases were, doubtless, intended to be included, not within the purview of the two former classes of laws.

Bethurum, 66 Mo. at 551, *quoting De Cordova*, *supra*. In other words, there could be a criminal law that is retrospective, but which is not necessarily *ex post facto.*

De Cordova described retrospective laws as "generally unjust." ***Id.*** While the *Bethurum* Court opined that the retrospective clause does not apply to crimes or punishment, that language was not necessary to its holding and is merely dicta. Indeed, the *Bethurum* Court explicitly withheld judgment on anything other than the constitutionality of the Act of 1877:

> It is a less difficult task to determine whether the act of 1877 is a retrospective law, or not, than to lay down a rule aptly and exactly to govern all cases, and <u>we shall make no such attempt</u>. <u>The case we are considering does not require it</u>, even if we had the capacity for the performance.

Id. at 553. This Court must not be distracted by Respondent's effort to overstate *Bethurum*. Long before *Bethurum*, the *Fry* and *De Cordova* courts had explained that the State of Missouri may not enact a law that takes away a right based solely on past conduct and then create new consequences for exercising the removed right.

The *Bethurum* Court did not have occasion to decide the specific question now before this Court – to wit: May the State of Missouri create a new crime that imposes new obligations, duties or disabilities based solely on someone being a prior sex offender?

Nevertheless, Respondent clings to *Bethurum* and seeks to validate his interpretation of *Bethurum*, asserting, "The Court reaffirmed that position in a pair of cases decided in the following years." Resp.Br. 13-14. Respondent then discusses two cases: *State v. Johnson*, 81 Mo. 60, 61 (1883) and *State v. Kyle*, 166 Mo. 287, 303, 65 S.W. 763, 768 (1901). Both cases are inapposite, here.

In *Johnson*, without further analysis, this Court summarily dismissed Johnson's retrospective challenge to a criminal law, simply stating, "The principle involved, in the opinion of the court, is covered by the decision in *Ex parte Bethrum*, 66 Mo. 545. Following that adjudication, the objection in question must be overruled." *Johnson*, 81 Mo. at 62. Respondent extrapolates,

"While the Court did not further explain its holding, it appears to conclude…" Resp.Br. at 13-14. Respondent's speculation must be ignored as the *Johnson* Court did not explain itself further.

Respondent's follow-up discussion of *Kyle* is incomplete. Resp. Br. at 14. Respondent argues, "the Court found that the constitutional amendment in question was not an *ex post facto* law, and did not consider whether the amendment could be invalidated as a law retrospective in its operation." Resp. Br. at 14. What Respondent leaves out is the *Kyle* Court's discussion of criminal statutes in the context of "retrospective:"

> The legislature may abolish courts, and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. Statutes giving the government additional challenges, and others which authorized the amendment of indictments, have been sustained and applied to past transactions, as doubtless would be any similar statute, calculated merely to improve the remedy, and in its operation working no injustice to the defendant, and depriving him of no substantial right.

65 S.W. at 768 (emphasis added) (internal citations and quotations omitted).

The teaching of *Kyle* is that, if a law is retrospective in its operation but does not work an injustice on the defendant or deprive him of a substantial right, then it is lawful. *Kyle*'s discussion clearly demonstrates that a criminal statute could be unlawfully retrospective if it works an injustice upon the defendant or deprives him of a substantial right.

§ 566.150 Works an Injustice by Divesting a Vested Right

In November 1996, Mr. Wade pleaded guilty to sexual abuse in the first degree, child molestation in the second degree and statutory sodomy in the first degree. TR 30-31. At that time, and for the next 13 years, those convictions did not preclude him from being in, *inter alia*, a public park with a playground within its boundaries. Then, in 2009, the Legislature passed (and the Governor signed) § 566.150, which divested him of that right. With § 566.150, the State of Missouri made it unlawful for anyone with certain prior sex related convictions to "knowingly be present in or loiter within five hundred feet of any real property comprising any public park with playground equipment or a public swimming pool."

The statute contains no savings clause to limit its application to defendants who get convicted after the law's enactment; it clearly seeks to be retrospective in its reach. Nearly 180 years ago, this Court recognized,

> When a person is possessed of a right or benefit, which the public law of the land authorizes him to possess, no power in the government can take that right, nor any portion of it from him, without some fault committed or wrong done by him, which acts must have been, before they were committed, declared to be faults and wrongs by public law; otherwise a law declaring them to be so, and fixing consequences which did not exist before, would be retrospective.

State use of Gentry v. Fry, 4 Mo. 120, 188 (Mo. 1835) (emphasis added). Here, the State of Missouri created consequences for acts committed long before the new disability. *Fry* clearly teaches that such legislation is unconstitutionally retrospective.

Recent Holdings Go Beyond *F.R.* and *Raynor*

In *Phillips*, *supra*, this Court directly confronted whether the "retrospective" clause applies to punitive (i.e. criminal) statutes. 194 S.W.3d at 850. The Court relied on established Missouri law[2] interpreting the breadth of the reach of Missouri's retrospective laws ban and unanimously concluded that a criminal law operated unconstitutionally retrospectively. 194 S.W.3d at 152; § 589.400 et seq., RSMo 1994; *see also In re R.W. v. Sanders*, 168 S.W.3d 65

[2] *Squaw Creek Drainage Dist. V. Turney*, 138 S.W.12 (1911).

(Mo. banc 2005) (criminal statute analyzed for retrospective, punitive effect by unanimous court). The *Phillips* Court explained that the plaintiff in *R.W.* had argued that Megan's Law violated Missouri's bar against *ex post facto* laws. *Phillips*, *supra*.

> This Court rejected the claim not because the law was not retrospective, but because the law was civil rather than punitive in nature. In so doing, R.W. specifically acknowledged, "*The registration statutes operate retrospectively in this case*." *Id*. at 68 (emphasis added).

Phillips, 194 S.W.3d at 850.

Stare Decisis

Finally, it is worth briefly discussing *stare decisis*. Having pulled generic legal statements from *Bethurum* with no factual context, Respondent insists that *F.R.* and *Raynor* are aberrations that should be tossed aside. As discussed above, Respondent's reliance on *Bethurum* is misplaced. At issue here is not the proper remedy for an unlawful sentence, it is the imposition of criminal liability based on Mr. Wade's prior conviction. This Court must reject the State's invitation to overrule *F.R.* and *Raynor*. These are very recent opinions that do address the issue before this Court – i.e., whether the

imposition of new obligations, duties or disabilities based solely on a prior conviction violates Article I, § 13.

Stare decisis does not ask a court blindly to fix its holdings in stone; rather, it insists that a court vest its holdings with the sense of stability needed for the proper administration of law. "For the sake of law's stability, a court will not reexamine a recent decision . . . unless given a compelling reason to do so." Barrett, A., *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1041 (Summer, 2003). The State has no compelling reason for this Court to overrule *F.R.* and *Raynor*; it simply wants a do-over of those cases. The only intervening event has been the turn-over on this Court.

Associate Supreme Court Justice Roberts criticized the Stone Court for just what Respondent invites from this Court:

> The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only. I have no assurance, in view of current decisions, that the opinion announced today may not shortly be repudiated and overruled by justices who deem they have new light on the subject. In the present term the court has overruled three cases.

Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting) (emphasis added).

Summary

With § 566.150, the State of Missouri undertook to deprive Mr. Wade – and all prior sex offenders – of his vested right in moving about freely. This Court's jurisprudence has always recognized that Article I, § 13's prohibition against retrospective laws gives the people broader protections than the bar against *ex post facto* laws alone.

CONCLUSION

For the foregoing reasons, Michael Wade, appellant, prays that this Court reverse his conviction and discharge him from his sentence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Gary E. Brotherton, hereby certify the following.

- The attached brief complies with the limitations contained in Rule 84.06(b); it was completed using Microsoft Word, Office 2003, in Times New Roman size 14-point font; and it includes the information required by Rule 55.03.

- Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _3,348_ words, which does not exceed the 7,750 words allowed for an opening brief.

- On May 20, 2013, the attached reply brief was served on opposing counsel, Daniel N. McPherson, by filing same via this Court's e-Filing System.

/s/ Gary E. Brotherton___
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