No. SC92229

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

JOEY D. HONEYCUTT,

Respondent.

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

The trial court erred in dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt because the statute under which Honeycutt was charged, section 571.070, 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 571.070, 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.

Respondent Honeycutt argues that the question of whether the ban on retrospective laws contained in article I, section 13 of the Missouri Constitution applies to criminal statutes was answered by this Court's decisions in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006); *R.L. v. Dep't of Corrs.*, 245 S.W.3d 236 (Mo. banc 2008); and *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 61 (Mo. banc 2010). As noted in the State's opening brief, those cases were decided without reference to the Court's decision in *Ex Parte Bethurum*, which declared that the constitutional prohibition on retrospective laws related exclusively to civil rights and remedies. *Ex Parte Bethurum*, 66 Mo. 548, 550 (1877). While the more recent decisions cited above might be viewed as implicity overruling *Ex Parte*

Bethurum, "[u]nder the doctrine of *stare decisis*, a decision of this court should not be lightly overturned, particularly where, as here, the opinion has remained unchanged for many years." *Southwestern Bell Yellow Pages, Inc. v. Dir. of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002). The rule of *stare decisis* does not prevent this Court from overruling *Ex Parte Bethurum* should it find that decision to be clearly erroneous and manifestly wrong. *Id.* at 390-91. But such a finding should be made explicitly and not by mere implication.

The State's argument in its opening brief was that the holding in *Ex Parte Bethurum* was consistent with the understanding of the scope of the ban on retrospective laws at the time the provision was adopted, as reflected in the debates of the Constitutional Convention of 1875.[1] Honeycutt argues first that legislative history has been criticized as irrelevant in the interpretation of plain and unambiguous language found in statutes. The criticism that Honeycutt refers to comes from a concurring opinion by Justice Scalia in *Zedner v. United States*, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring). Of course, Justice Scalia had to write that concurring opinion

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[1] As noted in the State's opening brief, the present article I, section 13 that was adopted at the 1945 Constitutional Convention is identical to the provision contained in the 1875 Constitution. (Appellant's Brf., pp. 15-16).

because the opinion of the Court, authored by Justice Alito and joined by all the remaining justices, had relied on legislative history to construe the provisions of the Speedy Trial Act. *Id.* at 501-02.

When it comes to construing the scope of constitutional provisions, which is the issue here, Justice Scalia has shown a willingness to rely on the records of the Constitutional Convention itself, the state ratifying conventions, and the outside writings of delegates to the Constitutional Convention in order to determine how the text of the Constitution was originally understood.[2] *See*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 919 (1997) (citing records of the Constitutional Convention, in addition to *The Federalist*, to explain change of approach from Articles of Confederation); *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988) (references to records of Constitutional Convention for expectation about background principles that would govern interpretation of Full Faith and Credit Clause); *Harmelin v.*

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[2] For that matter, Justice Scalia has not been averse to citing legislative history where he believes that it clearly indicates the intended scope of the statute at issue. *See*, *e.g.*, *Babbitt v. Sweet Home Chapter of Cmtys for a Great Or.*, 515 U.S. 687, 727 (1995) (Scalia, J., dissenting) (citing to statements of House and Senate floor managers to construe scope of the Endangered Species Act).

Michigan, 501 U.S. 957, 979-80 (1991) (reference to state ratifying conventions for contemporary understanding of "cruel and unusual punishments"), *see also*, Antonin Scalia, *A Matter of Interpretation* 38 (1997).[3] This Court has likewise stated that its duty is to "'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)). Use of the Constitutional Convention debates to ascertain that meaning is entirely appropriate.

Indeed, while Honeycutt claims in one breath that the use of legislative history should be irrelevant, in the next breath he supports his arguments by citing to cases where this Court has referenced the 1875 Constitutional Convention debates to construe article I, section 13. Honeycutt firsts cites to *Phillips* for the proposition that the prohibition on retrospective laws contained in article I, section 13 is "of a more comprehensive nature than is found in any of the constitutions of but three other states in the Union."

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[3] Nor is Justice Scalia the only justice to cite to the Constitutional Convention and ratification debates to construe a Constitutional provision. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806-15, 833 (1995) (Stevens, J.); *I.N.S. v. Chadha*, 462 U.S. 919, 958-59 (1983) (Burger, C.J.).

(Resp.'s Brf., p. 7). That phrase appears in *Phillips* as part of a quotation from an argument presented during the 1875 Constitutional Convention debates. *Phillips*, 194 S.W.3d at 850. Honeycutt goes on to argue that the use of the above-quoted phrase in *Phillips*, and later in *R.L.*, supports the conclusion that the ban on retrospective laws applies to all statutes, criminal and civil. But as noted in the State's opening brief, and conceded by Honeycutt, the debate remarks quoted in *Phillips* were made in support of an unsuccessful attempt to remove the ban on *ex post facto* laws from the Constitution, on the theory that a ban on retrospective laws was broad enough to cover *ex post facto* criminal statutes.

Honeycutt contends that the argument quoted in *Phillips* shows that the ban on retrospective laws was understood to encompass criminal statutes. But the meaning of a constitutional provision is not derived by looking to provisions that were not passed or to the views held by opponents of the provision that was adopted. *District of Columbia v. Heller*, 554 U.S. 570, 590 and n.12 (2008). Honeycutt's further argument that the delegate's unsuccessful argument foreshadowed the opinions in *Phillips*, *R.L.*, and *F.R.* amounts to an assertion that the Court is free to substitute its own understanding of the meaning of a term for the meaning that it was understood to have at the time of adoption. That position is contrary to the

Court's established rules for construing constitutional provisions. *Jefferson County Fire Prot. Dists. Ass'n*, 205 S.W.3d at 872; *Farmer*, 89 S.W.3d at 452.

When this Court quoted that portion of the 1875 Convention debate in *Phillips*, it did not do so for the proposition that the ban on retrospective laws covered criminal statutes. To the contrary, the entirety of the *Phillips* opinion was that because the sex offender registration statute at issue was civil in nature and not criminal it was not subject to the prohibition against *ex post facto* laws, but was subject to the prohibition against retrospective laws. *Phillips*, 194 S.W.3d at 842, 852. And while the Court summarized that portion of *Phillips* in applying the ban on retrospective laws to a criminal statute in *R.L.*, it did so without any discussion about whether the ban on retrospective laws was understood to apply to criminal statutes at the time it was adopted, and without any acknowledgement that the ban had previously been construed as being limited to civil rights and remedies.

The actions of the delegates who adopted the predecessor to the current article I, section 13, and the contemporaneous interpretation of that provision by this Court in *Ex Parte Bethurum* make clear that the phrase "laws retrospective in their operation," was understood to mean civil laws and did not encompass criminal statutes, which were instead subject only to the prohibition against *ex post facto* laws. The trial court erroneously declared the law in granting Honeycutt's motion to dismiss and should be reversed.

CONCLUSION

In view of the foregoing, Appellant State of Missouri submits that the judgment dismissing Count III of the felony complaint filed against Respondent Joey D. Honeycutt should be reversed and the case should be remanded to the trial court for reinstatement of Count III and for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 1,556 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 3rd day of August, 2012, to:

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