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 REPLY 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 AUTHORITIES

Cases

Statutes and Constitution

Other Authority

ARGUMENT

I.

The State is not estopped from defending the constitutionality of section 566.150, RSMo on a theory not presented to the trial court because statutes passed by the legislature and approved by the governor carry a heavy presumption of constitutionality and will be upheld as constitutional under any reasonable theory.

In its opening brief, the State argued that the trial court erred in finding that section 566.150, RSMo violates the ban on retrospective laws contained in article II, section 13 of the Missouri Constitution, because that provision does not apply to criminal statutes. Respondent Davis argues that the State should be estopped from making that argument because it was not made in the trial court and was thereby waived. That argument is wrong.

A claim that a statute is constitutional cannot be waived. Laws enacted by the legislature and approved by the governor carry with them a strong presumption of constitutionality. *Strup v. Director of Revenue*, 311 S.W.3d 793, 796 (Mo. banc 2010). Accordingly, the burden of proof rests on a statute's challenger to demonstrate otherwise. *Id.* This Court will not invalidate a statute unless it clearly and undoubtedly contravenes the constitution, will resolve all doubt in favor of the act's validity, and may make every reasonable intendment to sustain the constitutionality of the statute. *Reproductive Health Srvcs. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006). Accordingly, a statute attacked

as unconstitutional will be sustained if there is any reasonable theory upon which it may be upheld. *Brown v. Morris*, 365 Mo. 946, 956, 290 S.W.2d 160, 167 (1956).

Davis relies on case law that found claimed constitutional **violations** were waived because they were not presented to the trial court. *State ex rel. York v. Daugherty*, 969 S.W.2d 223, 224 (Mo. banc 1998). Because of the presumption that statutes are constitutional and the burden of proof placed on the party challenging the statute to overcome that presumption, it is appropriate to require challenging parties to raise specific constitutional challenges at the earliest opportunity. But the party defending the constitutionality of a statute bears no such burden and is under no obligation to raise any argument in defense of the statute. Even in the absence of an opposing argument, a trial court can uphold the validity of the statute simply upon a finding that the party challenging the statute has not met its burden.

Davis's claim that the State should be estopped from raising the theory put forth in its opening brief is not well taken. It should be rejected by this Court.

II.

Missouri's constitutional ban on laws retrospective in their operation does not apply to crimes and punishments.

Davis attacks as wrongly decided this Court's precedents stating that the constitutional ban on laws retrospective in their operations does not apply to crimes and punishments. The Court first reached that conclusion in *Ex Parte Bethurum*, 66 Mo. 545, 552-53 (1877). Davis criticizes *Ex Parte Bethurum* for failing to follow the appropriate standards for constitutional interpretation. But it is Davis who ignores the "fundamental purpose of constitutional construction," which is to give effect to the intent of the voters who adopted the constitutional provision. *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991). "While a court will read a constitutional provision broadly, it 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. The meaning conveyed to the voters is presumptively the ordinary and usual meaning given the words of the provision." *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002) (internal citations omitted).

As noted in the State's opening brief, the present article I, section 13 is identical to article II, section 15 of the 1875 Constitution. Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, *at* http://digital.library.umsystem.edu. In approving the 1945 Constitution, the voters were presumed to know of the construction

placed on provisions carried over from the previous constitution and to have intended to retain the original meaning of those provisions. *Moore v. Brown*, 350 Mo. 256, 266-67, 165 S.W.2d 657, 662 (1942); *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991). The construction placed on the 1875 Constitution is thus persuasive as to the construction to be placed on the identical provision in the 1945 Constitution.

Ex Parte Bethurum was issued just two years after the adoption of the 1875 Constitution, and the judges who joined in the unanimous opinion were contemporaries of the delegates to the constitutional convention and almost certainly voted on the adoption of that constitution when it was presented to the public. The Court in *Ex Parte Bethurum* would have been well-attuned to the thinking of its fellow citizens who drafted and adopted the constitution. And the debates of the 1875 Constitutional Convention demonstrate that the Court accurately captured the intended scope of the prohibition on laws retrospective in their operation.

As originally introduced at the convention, the proposed article II, section 15 prohibited retrospective legislation but did not expressly include *ex post facto* laws and those impairing the obligationof contracts, both of which had been incorporated into the constitutions of 1820 and 1865. Debates of the Missouri Constitutional Convention, 1875, Vol. II, p. 10 (Isidor Loeb & Floyd C. Shoemaker eds., State Historical Soc'y of Mo. 1938). A substitute was introduced that added those provisions and also prohibited any irrevocable grants of special privileges or immunities. *Id.* During debate on the substitute provision, a delegate named Gantt argued for the original proposal, which simply read, "no law retrospective in its operation shall be passed by the General

Assembly." *Id.* at 405. Delegate Gantt argued that adding a ban on *ex post facto* laws was unnecessary because an *ex post facto* law is a retrospective criminal law and would necessarily be included in a ban on laws retrospective in their operation. *Id.* at 405-10. That argument was challenged by another delegate, who questioned why the 1820 Constitution would have banned both retrospective laws and *ex post facto* laws if the two terms really meant the same thing. *Id.* at 410. Despite Delegate Gantt's arguments, the convention adopted the substitute provision that banned both *ex post facto* laws and laws retrospective in their operation. *Id.* at 447-48.

During debate on the final adoption of section II, article 15, Delegate Gantt repeated his argument that the ban on retrospective laws was broad enough to encompass *ex post facto* laws and laws impairing obligations of contracts. *Id.* at Vol. IV, pp. 94-95. He offered an amendment so that the section would read: "That no law retrospective in its operation or making any irrevocable grants of special privileges or immunities can be passed by the General Assembly." *Id.* at 95. That amendment was defeated and the convention adopted article II, section 15 with the prohibitions on *ex post facto* laws and laws impairing the obligation of contracts. *Id.* at 95.

Davis supports his argument that the delegates to the 1875 convention did not intend the prohibition against retrospective laws to be limited to civil cases by quoting out of context a portion of Delegate Gantt's speech urging the adoption of his amendment. (Davis Brf., p. 19). But the above discussion shows that Gantt's opinion was the minority view, and that the majority of the delegates believed that analysis of the

retrospective effect of new criminal statutes should be confined to the boundaries of the *Ex Post Facto* Clause.

Davis also argues that the development of jurisprudence surrounding the ban on retrospective laws shows that it was intended to apply to criminal laws. That argument fails to withstand scrutiny. The ban on laws retrospective in their operation appears in every version of the Missouri Constitution. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237 (Mo. banc 2008). Yet undersigned counsel has been unable to locate any decision prior to that 2008 opinion in *R.L.* where this Court invalidated a criminal statute on the basis that it was retrospective in its operation. *Id.* at 237-38. And only one other opinion has been issued by this Court where a criminal statute was invalidated for violating the ban on retrospective laws.[1] *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 65-66 (Mo. banc 2010). While Davis argues that *F.R.* overruled *Ex Parte Bethurum*, that can hardly be said to be the case where there is no indication that the Court considered *Ex Parte Bethurum* in reaching its decision. *See Ferrellgas, L.P. v. Williamson*, 24 S.W.3d 171, 179 (Mo. App. W.D. 2000) (declining to find that important Supreme Court precedent had been overruled by implication).

Davis offers no convincing argument as to why the rule in *Ex Parte Bethurum* should not be followed. His first assertion is that this Court defined the meaning of

---

[1] In both *R.L.* and *F.R.*, the Court found it unnecessary to consider whether the challenged laws violated the ban on *ex post facto* laws. *R.L.*, 245 S.W.3d at 237 n.1; *F.R.*, 301 S.W.3d at 61 n.9.

retrospective laws in *Squaw Creek Drainage Dist. No. 1 v. Tunney*, 235 Mo. 80, 138 S.W. 12 (1911), without specifically limiting its application to civil rights and remedies. But *Squaw Creek* involved a civil matter, setting the boundaries of a drainage district, so that there was no need for the Court to make a specific declaration that the constitutional prohibition against retrospective laws was limited to civil matters. *Id.* Secondly, the opinion in *Squaw Creek* was issued only thirty-four years after the opinion in *Ex Parte Bethurum*[2] and the holding of the latter case was in all likelihood still familiar enough that it did not have to be repeated.

Davis next notes that the ban on retrospective laws was applied to restrictions on sex offenders in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006). But as noted in the State's opening brief, the Court in *Phillips* specifically found that the sex offender registration statute under challenge was civil and regulatory in nature. *Phillips*, 194 S.W.3d at 842. Davis then goes on to make the same extrapolation that was apparently made in the *R.L.* and *F.R.* cases, which is to assume that since the ban on retrospective laws applies to civil sex offender registration laws, it must also apply to criminal statutes restricting the activities of sex offenders. The State has previously argued why that

---

[2] Which Davis implicitly argues is too old to be of any value. (Davis Brf., p. 18). But this Court has found that the application of the ban on retrospective laws for over 100 years, beginning with *Squaw Creek*, is entitled to judicial deference. *F.R.*, 301 S.W.3d at 62 n.11. The same deference should be given to the more than 100 years of cases limiting the application of that ban to civil cases, beginning with *Ex Parte Bethurum*.

extrapolation was incorrect, and incorporates that argument from the opening brief into this brief.

And Davis's citation of recent cases that have applied the retrospective ban is likewise unconvincing. (Davis Brf., pp. 15-16 n.4). Two of the cases involved non-criminal regulations. *Rentschler v. Nixon*, 311 S.W.3d 783, 788 (Mo. banc 2010) (conditional release eligibility); *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 689 (Mo. App. W.D. 2010) (real estate agent licensing).[3] Two other cases, *State v. Molsbee* and *Brand v. State*, were cases where the Court of Appeals had to invalidate convictions for violations of section 566.147, RSMo,[4] in the wake of this Court's invalidation of the statute in *F.R. State v. Molsbee*, 316 S.W.3d 549, 551 (Mo. App. W.D. 2010); *Brand v. State*, 313 S.W.3d 226, 228 (Mo. App. E.D. 2010). Those courts were, of course, constitutionally obligated to follow this Court's decision in *F.R. Smith v. St. Louis Pub. Srvc. Co.*, 364 Mo. 104, 107, 259 S.W.2d 692, 694 (1953). Similarly, *Doe v. Crane* and *Doe v. Nixon* were both cases in which federal courts cited *F.R.* in disposing of challenges to the law restricting sex offender activities on Halloween.[5] *Doe*

---

[3] In *Rayford*, the Western District did, however, repeat the precedent that "the term *retrospective* refers exclusively to laws related to civil rights and remedies." *Rayford*, 307 S.W.3d at 690 (emphasis in original).

[4] The statute making it a felony for certain sex offenders to reside within one-thousand feet of a school or child care facility.

[5] § 589.426, RSMo Cum. Supp. 2008.

v. Crane, 2010 WL 2218624 at *2 (W.D. Mo., May 28, 2010); *Doe v. Nixon*, 2010 WL 4363413 at *3 (E.D. Mo, Oct. 27, 2010). Neither the United States Supreme Court nor any other federal tribunal has the authority to place a different construction on a state statute than has the highest court of that state. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Those courts were thus bound to follow this Court's construction of the Halloween statute in *F.R.*

Davis also cites to a case from the Tennessee Supreme Court. *Estate of Bell v. Shelby County Health Care Corp.*, 318 S.W.3d 823 (Tenn. 2010). That case involved a tort action and thus did not require any analysis of whether the ban on retrospective laws extended to criminal matters. *Id.* at 825. Davis's reliance on the case is apparently based on its citation to this Court's opinion in *Phillips*. *Id.* at 829 n.12. But a closer examination of the Tennessee case shows that it actually supports the conclusion that the ban on retrospective laws is limited to civil rights and remedies.

The citation by the Tennessee court to *Phillips* follows a passage where the court noted that other states with constitutional bans on retrospective laws "have observed that their own constititutional provision provides greater protections **to parties in civil matters** than those provided by the United States Constitution." *Id.* at 829 (emphasis added). That's exactly what this Court said in *Ex Parte Bethurum*. The Court noted that the United States Constitution prohibited retrospective criminal laws through the bar on *ex post facto* laws, but that nothing in the federal constitution prevented the legislature from enacting retrospective civil laws. *Ex Parte Bethurum*, 66 Mo. at 548, 549. The Court concluded that the ban on retrospective laws was added to the Missouri

Constitution to eliminate any uncertainty as to the legislature's ability to enact restrospective civil laws. *Id.* at 549.

The Tennessee court also traced that State's constitutional ban on retrospective laws to a similar article in the New Hampshire Constitution. *Estate of Bell*, 318 S.W.3d at 828. Davis criticizes *Ex Parte Bethurum* for looking to that same provision in the New Hampshire Constitution in construing Missouri's Constitution, and suggests that the Court in *Ex Parte Bethurum* misinterpreted the New Hampshire provision since it bans retrospective laws for the decision of civil causes or the punishment of offenses. *See id.* at 828 n.11; *Ex Parte Bethurum*, 66 Mo. at 550. But as noted in *Ex Parte Bethurum*, the New Hampshire Supreme Court had held that the ban on retrospective laws for the punishment of offenses was synonymous with the ban on *ex post facto* criminal laws in the United States Constitution. *Ex Parte Bethurum*, 66 Mo. at 550. And the Tennessee Supreme Court noted that New Hampshire's constitutional provision "has been characterized as the 'ancestor' of the state constitutional provisions safeguarding against the application of retrospective laws in civil cases." *Estate of Bell*, 318 S.W.3d at 828 n.11 (citing Richard B. Collins, *Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity*, 86 Denv. L. Rev. 1433, 1452 (2009)). *Estate of Bell* thus does not aid Davis's argument that the ban on retrospective laws should be extended to crimes and punishments. And to the extent that decisions of state supreme courts interpreting their state constitutions are helpful to this Court in interpreting the Missouri Constitution, it bears noting that at least two other states with constitutional provisions nearly identical to Missouri's limit the application of their ban on retrospective laws to civil statutes while

analyzing criminal statutes for e*x post facto* violations. *People v. District Court*, 834 P.2d 181, 193 (Colo. 1992); *Evans v. State*, 314 S.E.2d 421, 428 (Ga. 1984).

For the reasons cited above and in the State's opening brief, this Court should interpret the ban on retrospective laws in article I, section 13 of the Missouri Constitution consistently with this Court's precedents and with the intent of voters who adopted the provision, and find that it is inapplicable to crimes and punishments.

III.

Section 566.150, RSMo is a criminal statute, not a civil regulatory law.

Davis argues that even if the ban on retrospective laws is limited to civil actions it still applies to section 566.150, RSMo because legislative intent is unclear as to whether it is a criminal or a civil statute. This Court follows the approach used by the United States Supreme Court in determining whether a statute is criminal or civil. *In re R.W.*, 168 S.W.3d 65, 68-69 (Mo. banc 2005).

The categorization of a particular proceeding as civil or criminal is a matter of statutory construction that requires an appellate court to initially determine whether the legislature meant to establish criminal or civil proceedings. *Hendricks v. Kansas*, 521 U.S. 346, 361 (1997). The court ordinarily defers to the legislature's stated intent. *Id.* The legislature's objective to create a criminal proceeding is evidenced by the statute's placement in the Criminal Code. *Id.* The statute barring sex offenders from parks contemplates only criminal prosecutions and makes no allowance for civil proceedings or remedies. § 566.150, RSMo Cum. Supp. 2009. Nothing on the face of the statute suggests that the legislature sought to create anything other than a criminal statute. *See Hendricks*, 521 U.S. at 361.

Although the label of a statute as civil or criminal is not always dispositive, a court will reject the legislature's manifest intent only upon the clearest proof that the statutory scheme is in fact contrary to its stated purpose. *Id.* Davis has failed to satisfy that burden. The two primary objects of criminal punishment are retribution and deterrence.

Id. at 361-62, *see also Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993) (noting that the purpose of the criminal law includes punishing the offender and deterring others). Section 566.150, RSMo fulfills those functions by using the threat of imprisonment to deter certain convicted sex offenders from frequenting areas where children are known to gather, and by punishing those who are not deterred through the imposition of a felony sentence upon conviction. *Hendricks*, 521 U.S. at 362-63; § 566.150, RSMo Cum. Supp. 2009.

Another important element in distinguishing criminal from civil statutes is that criminal statutes require the element of scienter. *Hendricks*, 521 U.S. at 362. Section 566.150, RSMo contains that scienter element, making it a felony for persons subject to the statute to "knowingly" be present in or loiter within 500 feet of a public park or swimming pool. § 566.150.1(2), RSMo Cum. Supp. 2009. The existence of that scienter element further demonstrates the legislature's intent to create a criminal statute.

Far from being ambiguous, the legislature's intent is clear. Section 566.150, RSMo has the classic characteristics of a criminal statute. It proscribes certain conduct and imposes a penalty on persons who knowingly engage in that conduct. The statute does nothing more than that. Section 566.150, RSMo is a criminal statute and thus is not subject to the ban on laws retrospective in their operation that is contained in article I, section 13 of the Missouri Constitution. The trial court thus erred in relying on that constitutional provision to dismiss the felony complaint filed against Davis.

IV.

Section 566.150, RSMo is not an *ex post facto* law.

Davis argues that if section 566.150, RSMo is a purely criminal statute, it violates the constitutional prohibition against *ex post facto* laws. In making this argument, Davis does the same thing that he criticized the State for doing – raising a constitutional claim for the first time on appeal. (L.F. 8-10). The difference, of course, is that Davis is advancing a new theory of a constitutional violation. Because of the presumption of constitutionality and the heavy burden of showing unconstitutionality discussed in the first portion of this brief, such claims are to be raised at the earliest opportunity. *See Strup*, 311 S.W.3d at 796; *Daugherty*, 969 S.W.2d at 224. But even if the *ex post facto* claim had been raised at the proper time, it fails.

This Court interprets the Missouri Constitution's ban on *ex post facto* laws consistently with the interpretation given the same provision in the United States Constitution. *Phillips*, 194 S.W.3d at 831. The United States Supreme Court has held that the *Ex Post Facto* Clause is limited to four situations: (1) a law that punishes as a crime an act previously committed that was innocent when done; (2) a law that aggravates a crime or makes it greater than it was when committed; (3) a law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed; and (4) a law that alters the legal rules of evidence so as to require less or different evidence to convict than what was required when the offense was

committed.[6] *Collins v. Youngblood*, 497 U.S. 37, 42-43, 52 (1990); *Carmell v. Texas*, 529 U.S. 513, 538, 539 (2000); *Stogner v. California*, 539 U.S. 607, 611-12 (2003). The Court summarized the purpose of the *Ex Post Facto* Clause as prohibiting legislatures from retroactively altering the definition of crimes or increasing the punishment for criminal acts. *Collins*, 497 U.S. at 43. Section 566.150, RSMo does not implicate any of those situations.

The criminal act prohibited under section 566.150, RSMo is the defendant's knowing presence or loitering within 500 feet of a public park or swimming pool. § 566.150.1, RSMo Cum. Supp. 2009. The statute became effective in 2009. *Id.* Davis was charged with violating the statute by entering a public park on June 17, 2010. (L.F. 5). He therefore was charged with committing a criminal act after the effective date of the statute and is not subject to punishment for committing an act that was innocent at the time it was committed. Davis's argument that the statute punishes solely for his prior criminal conviction is simply wrong. The prior conviction merely establishes his status as a person who is subject to the statute. What the statute punishes him for are the actions he took after it was enacted, namely entering a public park that he was prohibited from entering.

---

[6] Davis relies on a definition of *ex post facto* that is contained in *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The definition set forth in *Weaver* no longer appears to be valid to the extent that it exceeds the carefully articulated scope of the *Ex Post Facto* Clause that is set forth in *Collins* and *Carmell*, and reaffirmed in *Stogner*.

The second category of *ex post facto* laws, those that aggravate a crime or make it greater than when committed, applies where a new law inflicts a punishment upon a person not then subject to that punishment to any degree. *Stogner*, 539 U.S. at 613-14. An example of that type of law is one that revives a cause of action after the statute of limitations has expired. *Id.* at 612-13. Again, that category does not apply to Davis because the offense at issue is his prospective act of illegally entering a park, and that offense has not been aggravated since he committed it.

The final two *ex post facto* scenarios also do not apply to the statute. The statute has never been amended, so the punishment for the crime of being within 500 feet of a public park or swimming pool has not increased since Davis committed the offense, and the quantum of evidence required to convict Davis has not been reduced or altered since he committed the offense. Section 566.150, RSMo does not violate the *ex post facto* clauses of the Missouri or United States Constitutions. Davis's argument fails.

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 4,408 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 26th day of April, 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