SC89130

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex relatione* JOHN DOE,
Relator,

v.

THE HONORABLE STANLEY MOORE,
Respondent.

On Original Petition for Writ of Prohibition

BRIEF OF THE RELATOR

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Jurisdictional Statement

This case is an original action in prohibition before this Honorable Court. Relator challenges the constitutionality of two non-appealable orders which Respondent entered in the underlying case. The Honorable Stanley Moore, in his official capacity as Circuit Judge of the Circuit Court of Moniteau County, is the Respondent.

Because a circuit court is the Respondent, adequate relief in prohibition cannot be afforded by application to any other circuit court. Supreme Court Rule 84.22(a).

Relator previously filed a Petition for Writ of Prohibition before the Missouri Court of Appeals, Western District, as under § 477.060, R.S.Mo., venue lay therein. The Court of Appeals denied Relator's Petition without opinion on February 22, 2008. A denial of a writ petition without opinion is not appealable. Instead, to seek further review, the Relator must file a new petition in a higher court. Accordingly, Relator filed a Petition for Writ of Prohibition in this Court. This Court entered its Preliminary Writ of Prohibition on February 29, 2008. Relator seeks this Court to make permanent its Preliminary Writ.

Therefore, pursuant to Article V, § 4, of the Constitution of Missouri, Chapter 530, R.S.Mo., and Supreme Court Rules 97 and 84.22, *et seq.*, jurisdiction lies in this Court.

Statement of Facts

On March 6, 2006, before the Circuit Court of Moniteau County, Relator John Doe pleaded guilty to the crime of endangering the welfare of a child in the first degree, a class C felony under § 568.045, R.S.Mo. (Appendix, p. A3). Relator's plea was pursuant to a specific plea agreement with the Moniteau County Prosecutor (Appx. A15, A18). On July 3, 2006, the circuit court accepted the plea agreement and, pursuant to it, granted Relator a suspended imposition of sentence contingent upon five years probation with the Missouri Division of Probation & Parole (Appx. A3, A10-A11).

Along with its Judgment, the circuit court, presided over by the Honorable Peggy Richardson, ordered a variety of "special conditions of probation" (Appx. A12-A13). Paragraph fourteen of the "special conditions" originally read "Defendant shall successfully complete the Missouri Sex Offender Program (Appx. A13). Judge Richardson drew a thick line with a pen through the words "Missouri Sex Offender Program," handwrote in its place "Over-the-Walls Program," and signed her initials in the left margin (Appx. A13). Relator interpreted this as *specifically* excluding him from being supervised as a sex offender (Appx. A15, A18). Had Relator been told that he would be supervised as a sex offender, he would not have pleaded guilty, but instead would have proceeded to trial (Appx. A15-A16, A18-A19).

Missouri's Sex Offender Registration Act (SORA), § 589.400, R.S.Mo., *et seq.*, which was enacted in 1994, requires persons who pleaded guilty to or were convicted of one of the offenses listed in § 589.400 to register with their local county sheriff's office as a sex offender (Appx. A30-A32). Under § 589.415, R.S.Mo., these persons are deemed "sex offenders" for the purposes of probation and parole (Appx. A34). They are supervised according to the Division of Probation & Parole's (the "Division's") ORANGE BOOK, *Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional release for Sex Offenders* (Appx. A81-A97), rather than its WHITE BOOK, *Rules and Regulations Governing the Conditions of Probation, Parole and Conditional Release* (Appx. A98-A107).

Unlike other probationers, as a condition of their probation and parole, persons covered under SORA face the potential of their home computer being seized by their probation officer at any time under § 589.042, R.S.Mo. (Appx. A33). These persons also face a variety of other restrictions on where they may live, as detailed in §§ 566.147 and 566.149, R.S.Mo. (Appx. A37-A38). As well, like persons convicted of an offense in Chapter 566, R.S.Mo., "Sexual Offenses," they face a specialized and rigorous psychological treatment scheme under §§ 566.140 and 566.141, R.S.Mo. (Appx. A35-A36).

At the time Relator pleaded guilty in March of 2006, neither SORA nor any of the other special probation conditions or registration provisions which are particular to "sex offenders" under the law of Missouri applied to the crime of endangering the welfare of a child in the first degree (Appx. A39-A80). That crime is contained in Chapter 568, "Offenses Against the Family," rather than Chapter 566, "Sexual Offenses." Effective June 5, 2006, however, the 93rd Missouri General Assembly passed H.B. 1698, which broadened SORA's definition of a sex offender in § 589.400, R.S.Mo., to include "[a]ny person who, since July 1, 1979, has been or is hereafter convicted of, been found guilty of, or pled guilty or *nolo contendere* to committing, or attempting to commit … endangering the welfare of a child under Section 568.045, R.S.Mo., when the endangerment is sexual in nature" (Appx. A61).

In so doing, H.B. 1698 also added Relator's offense to the other provisions detailing the other restrictions on "sex offenders" contained in §§ 589.042, 589.415, 566.140, 566.141, 566.147, and 566.149, (Appx. A33-A38), and made persons convicted of this crime applicable for probation under the Division's ORANGE BOOK, rather than its WHITE BOOK (Appx. A83). Before this change in the law, the offense of endangering the welfare of a child in the first degree was not a "sex offense," and persons convicted of this offense were not "sex offenders" and could not have been treated as such (Appx. A61, A92-A93).

In August of 2006, in a letter and an "investigation report," the Division asked the circuit court to approve a change of Relator's probation status to that of sex offender (Appx. A4, A15, A18). Relator's counsel never was given any copy of the letter or the report, never had notice of them prior to their submission to the circuit court, and never had the opportunity to challenge them (Appx. A16, A19).

On September 7, 2006, the circuit court, then presided over by the Honorable Jack Bennett, ordered that Relator's probation be modified to add two special conditions: "(1) Defendant shall be evaluated by Doctor chosen by P&P to determine his need for treatment and shall successfully complete all treatment as recommended. (2) Defendant shall be supervised as a sex offender" (Appx. A15-A16, A18-A19). Twenty days later, Relator filed an objection to the court's order, as well as an alternative Motion to Rescind Guilty Plea and Request for Jury Trial (Appx. A5, A16, A-18).

On December 4, 2006, with the Honorable Greg Kays presiding, the circuit court heard Relator's motions and removed the added condition requiring a doctor's evaluation without any ruling on the motions (Appx. A5). On March 15, 2007, with Respondent, the Honorable Stanley Moore, presiding, the circuit court again took up Relator's motions challenging the change in his probation status, sustained Relator's objection to supervision as a sex offender and removed the

condition of being supervised as a sex offender, returning Relator to his original probation conditions (Appx. A6).

The Division, however, continued to request approval that Relator be supervised as a sex offender and undergo evaluation by one of the Division's doctors (Appx. A7). After a hearing on May 7, 2007, because "it appears Probation & Parole require that Defendant be supervised as a sex offender and evaluated as such by a physician of their choice," Respondent acceded to the Division's request and entered an Order "that Defendant be supervised as a sex offender and evaluated by a physician at the direction of Probation and Parole" Appx. A7). Finally, on December 13, 2007, after receiving another request from the Division, the circuit court ordered that as an *additional* probation condition, Relator attend and successfully complete "sex offender treatment" with a treatment provider approved by the Division (Appx. A7-A8).

The new sex offender requirements placed on Relator are detailed in the "Sex Offender Supervision Agreement," the "Sex Offender Supervision Directives," and the Order of Probation Amended, which the Division initially made Relator sign on May 15, 2007, before Respondent's final order of December 13, 2007 (Appx. A21-A24). Among other things, the new requirements, which he did not face before the change in his probation status, demand that Relator:

- Register as a sex offender (Appx. A21);

- Receive approval of his residence and employment (Appx. A21);
- Advise all adult members of his household of his conviction (Appx. A21);
- Report the names, dates of birth, and gender of all persons residing with him (Appx. A21);
- Submit, at his own expense, to treatment procedures required by his supervising officer, including polygraphs or penile plethysmographs (Appx. A21);
- Not have any unsupervised contact with any person age 16 or under, or any incapacitated person (Appx. A21);
- Avoid parks, schools, daycare centers, toy stores, pools, carnivals, or other places where children are known to frequent; not possess or access any pornographic material (Appx. A21);
- Allow his supervising officer to have access to his home and all the occupants (Appx. A22);
- Inform his employer of his offense (Appx. A22);
- Not travel for employment purposes (Appx. A22);
- Not leave Jackson or Cass County without prior permission (Appx. A22);
- Abide by a curfew of 11:00 p.m. Sunday through Thursday, and midnight on Friday and Saturday (Appx. A22);

- Not view any sexually-oriented videotapes, television shows, films, or pictures (Appx. A21, A22);
- Not miss any sex offender treatment sessions (Appx. A22); and
- Not use the internet without prior permission by his supervising officer (Appx. A22).

Relator's probation officer has explained that as a result of these conditions, Relator may not watch subscription cable television networks like HBO and Showtime (Relator's Petition for Writ of Prohibition, p. 12). He may not pick up his fiancée from her place of employment, a school where she is employed as a teacher (Petition 12). He may not use the internet (Appx. A22). He cannot travel freely within Missouri (Appx. A22). He cannot possess any pornography (Appx. A21). He can be forced, at his own expense, to undergo testing on a polygraph or penile plethysmograph (Appx. A21). A penile plethysmograph is a device which measures changes in penile volume in response to the subject viewing sexually-stimulated photographs while the subject's penis is strapped to the machine. *See* Deborah H. Rulo, *Can We Identify the Sexual Predator by Use of Penile Plethysmography?*, located at http://www.forensic-evidence.com/site/Behv_Evid/BeE00005_2.html (1999) (retrieved April 6, 2008)). At a cost to him of $40.00 per week, he must attend both weekly solo counseling and group counseling with other "sex offenders" (Petition 12-13). He will face

these new duties, obligations, and disabilities for the next three-and-a-half years, the duration of his probation (Appx. A3).

In June of 2006, in *Doe v. Phillips*, this Court held that the retrospective application of SORA's registration provisions to persons who pleaded guilty or were convicted of a registrable offense before SORA was enacted violates the bar on laws retrospective in operation contained in Article I, § 13, of the Constitution of Missouri. 194 S.W.3d 833, 852 (Mo. banc 2006). The Court held that SORA's registration provisions were constitutionally inapplicable to persons convicted of covered crimes in the original Act after January 1, 1995, "based solely on their pre-act criminal conduct." *Id.* at 852. The Court noted that the registration provisions could not be applied to most of the Relators in that case, who were convicted before SORA originally was enacted in 1995, because applying the Act to them "specifically requires the Does to fulfill a new obligation and imposes a new duty to register and to maintain and update the registration regularly, based solely on their offenses prior to its enactment. This … violates our constitutional bar on laws retrospective in operation." *Id.*

Less than a year later, in *Doe v. Blunt*, this Court applied *Phillips* to persons who pleaded guilty to or were convicted of an offense before § 589.400, R.S.Mo., was amended to include that offense. 225 S.W.3d 421, 422 (Mo. banc 2007). In a concise opinion, the Court held that

> a retrospective law is one that 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. *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006). The obligation to register by its nature imposes a new duty or obligation. *Id*. at 852.
>
> The same is true in this case. When he pleaded guilty, Doe had no obligation to register; his duty to register arose from a change in the law. Because the new law imposed a new duty, it is a retrospective law prohibited by Mo. Const. article I, § 13.

Id.

With *Phillips* and *Blunt* as precedent, on July 31, 2007, Relator obtained a declaratory judgment from the Circuit Court of Jackson County relieving him of any requirement to register as a sex offender and ordering the Sheriff of Jackson County and the Missouri State Highway Patrol to remove Relator's entries from their respective sex offender registries (Appx. A25). The Highway Patrol has appealed the portion of that judgment requiring its deletion of Relator's registration information to the Missouri Court of Appeals, Western District. *Doe v. Keathley*, Case No. WD68910 (Mo. App. filed Oct. 10, 2007). The portion relieving Relator

of any requirement to register as a sex offender – one of the new probation conditions – was and is unchallenged.

On February 4, 2008, Relator moved the circuit court to set aside its orders of May 7, 2007, and December 13, 2007, and return him to his original probation conditions (Appx. A8). Several days before the Motion was filed, Relator informed his counsel that he would be meeting with his probation officer on February 5, 2008, who would demand that Relator sign forms consenting to the new probation status (Petition 15). Counsel advised Relator not to sign any consent to the new status, as it could prejudice his pending motion because his consent might be construed as a waiver of his rights (Petition 15). At the meeting with his probation officer, Relator thus declined to signify his consent (Petition 15). On February 7, 2008, the probation officer informed Relator that she was in the process of reporting to Respondent that Relator had violated his probation by failing to consent to supervision and treatment as a sex offender (Petition 15).

With the probation officer's threat pending, on February 14, 2008, Relator filed a Petition for Writ of Prohibition in the Missouri Court of Appeals, Western District, seeking the same relief which Relator seeks from this Court (Appx. A26). *State ex rel. Doe v. Moore*, Case No. WD69349. In the meantime, on February 20, the probation officer filed her probation violation report (Appx. A8). The Court of Appeals denied Relator's petition on February 22, 2008 (Appx. A26). Because of

Relator's alleged violation of his probation, a probation review hearing was scheduled for March 3, 2008 (Appx. A8).

Relator immediately sought this Court's writ of prohibition (Petition 15-16). On February 29, 2008, this Court granted its Preliminary Writ of Prohibition (Appx. A108). The Court commanded Respondent not to enforce his orders of May 7, 2007, and December 13, 2007, and not to do anything other than either file a return to the Preliminary Writ or vacate those orders and return Relator to his original probation status, until further order of the Court (Appx. A108).

Relator now seeks this Court to make permanent the Preliminary Writ which it issued on February 29, 2008.

Points Relied On

I. Relator is entitled to an order prohibiting Respondent from enforcing Respondent's orders of May 7, 2007, and December 13, 2007, and doing anything other than vacating said orders, thereby returning Relator to his original probation conditions entered on July 3, 2006, *because* the orders violate the prohibition on retrospective applications of law contained in Article I, § 13, of the Constitution of Missouri, *in that* the orders apply the probation provisions of Missouri House Bill 1698 retrospectively to Relator, creating new obligations, imposing new duties, and attaching new disabilities to Relator with respect to the past transaction of Relator's plea of guilty months before H.B. 1698 became law.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006).

Doe v. Blunt, 225 S.W.3d 421 (Mo. banc 2007).

R.L. v. Mo. Dept. of Corrections, 245 S.W.3d 236 (Mo. banc 2008).

State ex rel. St. Louis County v. Stussie, 556 S.W.2d 186 (Mo. banc 1977).

Constitution of Missouri, Article I, § 13.

§ 589.400, R.S.Mo., *et seq*. (2005).

§ 589.400, R.S.Mo., *et seq*. (Cum. Supp. 2006).

II. Relator is entitled to an order prohibiting Respondent from enforcing Respondent's orders of May 7, 2007, and December 13, 2007, and doing anything other than vacating said orders, thereby returning Relator to his original probation conditions entered on July 3, 2006, *because* the orders violate the prohibitions on *ex post facto* applications of law contained in the Constitution of Missouri, Article I, § 13, and the Constitution of the United States, Article I, § 10, *in that* the orders retrospectively apply provisions of Missouri House Bill 1698 retrospectively to Relator so as to increase the punishment for Relator's criminal acts already committed, applying these provisions to Relator's crime and guilty plea – events before the enactment of H.B. 1698, and disadvantaging Relator.

State ex rel. Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995).

Weaver v. Graham, 450 U.S. 24 (1981).

State v. Lawhon, 762 S.W.2d 820 (Mo. banc 1988).

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)

Constitution of Missouri, Article I, § 13.

Constitution of the United States, Article I, § 10.

§ 589.400, R.S.Mo., *et seq*. (2005).

§ 589.400, R.S.Mo., *et seq*. (Cum. Supp. 2006).

Argument

I. Relator is entitled to an order prohibiting Respondent from enforcing Respondent's orders of May 7, 2007, and December 13, 2007, and doing anything other than vacating said orders, thereby returning Relator to his original probation conditions entered on July 3, 2006, *because* the orders violate the prohibition on retrospective applications of law contained in Article I, § 13, of the Constitution of Missouri, *in that* the orders apply the probation provisions of Missouri House Bill 1698 retrospectively to Relator, creating new obligations, imposing new duties, and attaching new disabilities to Relator with respect to the past transaction of Relator's plea of guilty months before H.B. 1698 became law.

Standard of Review

The writ of prohibition is a fundamental part of our common law which allows this Court to prevent the usurpation of judicial power and prevent an absolute irreparable harm to a party. *See* § 530.010, R.S.Mo; *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000); *Thomas v. Mead*, 36 Mo. 232, 246-247 (1864) (citing 3 BLACKSTONE'S COMMENTARIES 41; Constitution of Missouri, Article VI, § 3 (1865)). In Missouri, a writ of prohibition is appropriate against a circuit court

> in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003).

For the writ to lie, the Relator must have no adequate remedy at law. Trial courts have discretion to determine the conditions of a defendant's probation. §§ 559.100.2 and 559.021.1, R.S.Mo. Orders setting conditions of probation are not appealable, and instead only may be challenged by means of a petition for writ of prohibition in an appellate court. *State v. Williams*, 871 S.W.2d 450, 452 and 452 n.2 (Mo. banc 1994); *State ex rel. St. Louis County v. Stussie*, 556 S.W.2d 186, 187-188 (Mo. banc 1977).

* * *

Since 1820, the Constitution of Missouri has prohibited the retrospective application of laws. Relator pleaded guilty to endangering the welfare of a child in the first degree in March of 2006. Before June 5, 2006, that crime was not a "sex offense" and the law of Missouri did not consider defendants who were convicted of or pleaded guilty to it to be "sex offenders." The law did not place upon them

any duties, obligations, or disabilities which anyone else convicted of any class C felony in Missouri would not face. On June 5, 2006, however, H.B. 1698 became law, and transformed the crime into a "sex offense" and anyone who was convicted of or pleaded guilty to it into a "sex offender." Thereafter, on request of the Division of Probation & Parole, Respondent ordered that Relator be supervised as a sex offender. He later additionally ordered that Relator undergo sex offender treatment. Do Respondent's orders violate the Constitution of Missouri's bar on applying laws retrospectively? Should Respondent be permanently prohibited from enforcing them and taking any other action except to vacate those orders and return Relator to his original probation status?

Article I, § 13, of the Constitution of Missouri provides that "no … law … retrospective in its operation … can be enacted." "The 1875 constitutional debates note the constitutional bar on retrospective laws is broader than the ex post facto bars in other states." *R.L. v. Mo. Dept. of Corrections*, 245 S.W.3d 236, 239 (Mo. banc 2008). This guarantee "has no analogue in the United States Constitution and is contained in the constitutions of only a handful of other states." *Phillips*, 194 S.W.3d at 849 (Mo. banc 2006) (comparing Tenn. Const. Art. I, § 20; Ohio Const. Art. II, § 28; Colo. Const. Art. II, § 11; N.H. Const. Part I, Art. 23). This provision prohibits enacting any statute with retrospective application or applying any statute retrospectively. *Id.* at 852.

Accordingly, this Court consistently has held, "A retrospective law is one which [1] creates a new obligation, [2] imposes a new duty, or [3] 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." *Id.* at 850 (quoting *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (Mo. 1911)).

Over the past two years, this Court has heard several cases concerning the retrospective application of "sex offender" requirements to persons who pleaded guilty to or were convicted of offenses before their offense was covered by Missouri's sex offender laws, particularly SORA, §§ 589.400 through §589.425, R.S.Mo. In *Phillips*, the Court held that it violated Article I, § 13 to require persons convicted of "sex offenses" before the Sex Offender Registration Act was passed in 1995 to register as "sex offenders." 194 S.W.3d 833 at 852.

One year later, in *Doe v. Blunt*, the Court applied its holding from *Phillips* to persons who pleaded guilty to or were convicted of a registrable offense before the offense was added to SORA through an amendment. 225 S.W.3d 421, 422 (Mo. banc 2007). In *Blunt*, the Appellant pleaded guilty to a crime before the duty of registering as a sex offender applied to his offense. *Id*. The individual in *Blunt* was given probation for his offense, and was on probation at the time of this Court's decision. *Id.*; *see Doe v. Blunt*, Case No. SC87786, Brief of the Appellant,

pp. 10-11, *available at* http://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/ff4a3840e0e7d7df8625728e005eb4d9/$FILE/SC87786_John_Doe_Brief.pdf (retrieved April 6, 2008). Subsequently, the law changed so that those convicted of the Appellant's crime were required to register as a sex offender. *Id*. The requirement to register as a sex offender became a condition of the Appellant's probation. *Id.* Because the Appellant failed to register, a probation violation report was filed against him. *Blunt*, 225 S.W.3d at 422. This Court held that "When he pleaded guilty, Doe had no obligation to register; his duty to register arose from a change in the law. Because the new law imposed a new duty, it is a retrospective law prohibited by" Article I, § 13, of the Constitution of Missouri. *Id.*

Most recently, in February of 2008, in *R.L. v. Mo. Dept. of Corrections*, the Court held that it violates Article I, § 13, to require the Respondent, a probationer convicted of a registrable offense, not to live within 1000 feet of a school when he pleaded guilty before the statute promulgating that requirement applied to his offense. 245 S.W.3d 236, 240. The Respondent had "received a three-year suspended execution of sentence, was placed on probation for five years, and was required to register as a sex offender." *Id.* at 237. The Respondent's guilty plea was in December 2005, and thus he still was on probation at the time of this Court's decision in the case on February 19, 2008. *Id.* When he refused to move

after the statute concerning living near a school was amended, the Department of Corrections, of which the Division of Probation & Parole is a component, "informed R.L. that pursuant to the new residency restrictions in 566.147, he was committing a felony by residing within 1,000 feet of a school and that he needed to establish a plan to relocate. The department further informed R.L. that he could be subject to prosecution if he did not move." *Id.* at 238. The Court held that, as with

> the registration requirements in *Phillips*, the residency restrictions at issue in this case impose a new obligation upon R.L. and those similarly situated by requiring them to change their place of residence based solely upon offenses committed prior to enactment of the statute. Attaching new obligations to past conduct in this manner violates the bar on retrospective laws set forth in article I, section 13.

Id. at 240.

Through its decisions in *Phillips*, *Blunt*, and *R.L.*, this Court has made it abundantly clear that none of the duties, obligations, or disabilities particular to the status of sex offender constitutionally can be applied to a person who was convicted of an offense before the law of Missouri considered that offense a "sex offense." This case is no different. In his orders of May 7, 2007, and December 13, 2007, Respondent ordered that Relator obey an abundance of new, severe duties, obligations, and disabilities as a sex offender which Relator could not have

faced before the law was amended to make his offense a sex offense and him a sex offender. Applying these requirements to Relator violates the prohibition on retrospective laws contained in Article I, § 13, of the Constitution of Missouri.

In Missouri, trial courts have discretion to determine probation conditions. §§ 559.100.2 and 559.021.1, R.S.Mo. As well, probation officers have discretion to recommend that the conditions of a Defendant's probation be changed. § 217.705.3, R.S.Mo. This discretion, however, does not mean that a judge or a probation officer has discretion to fashion whatever he or she wishes as a probation condition. In Missouri, probation only may be ordered as authorized by statute. *State ex rel. St. Louis County v. Stussie,* 556 S.W.2d 186, 187 (Mo. banc 1977). Where an imposed probation condition is outside the probation statutes, this Court will issue its writ of prohibition to enjoin the imposition of that condition. *Id.*

In *Stussie,* St. Louis County challenged the decision of a circuit judge to order probationers to undergo "shock" incarceration in the County's custody. *Id.* at 188. The circuit court's orders had not yet been executed. *Id.* This Court held that probation is governed by statute, and that a trial court cannot impose conditions of probation which are not authorized by statute. *Id.* At the time, the Revised Statutes did not provide for temporary incarceration as a condition of probation. *Id.* Accordingly, the trial court's Order exceeded its jurisdiction and

this Court issued its Writ of Prohibition, vacating the trial court's Order. *Id.* at 189-190.

This Court has held similarly in cases concerning the retrospective application of sex offender probation conditions. Where a probationer's probation conditions are changed retrospectively so as to create a new obligation, impose a new duty, or attach a new disability with respect to the probationer's guilty plea or conviction before the law authorized that condition, that condition violates Article I, § 13, and the party creating that condition must be enjoined from enforcing it. *Blunt*, 225 S.W.3d at 422; *R.L.*, 245 S.W.3d at 240.

In 1994, the General Assembly passed SORA, §§ 589.400 to 589.425, R.S.Mo., identifying certain offenses as "sex offenses," identifying certain convicted defendants as "sex offenders," and placing certain disabilities and duties on those persons. Relator was convicted of endangering the welfare of a child in the first degree in March of 2006. At the time of his guilty plea, SORA had no provision that it applied to persons convicted of endangering the welfare of a child in the first degree. At the time of his guilty plea, Relator's offense was not a "sex offense" and Relator could not have been considered a "sex offender." The probation requirements for supervision as a sex offender simply could not have applied to him.

In June of 2006, however, three months after Relator's guilty plea, the General Assembly passed H.B. 1698, which amended SORA to apply it to persons convicted of endangering the welfare of a child in the first degree, thereby opening all the additional obligations, duties, and disabilities of sex offender supervision and treatment to persons so convicted (Appx. A61). When, applying this amendment, Respondent changed Relator's status to that of sex offender and approved all the additional probation directives and stipulations detailed *ante*, Respondent plainly created new obligations, imposed new duties, and attached new disabilities to Relator, all based on the past transaction of Relator's pre-amendment guilty plea.

In so doing, Respondent's application to Relator of H.B. 1698's amendments specifically requires Relator to follow a variety of new obligations, fulfill new duties, and submit to new disabilities, based solely his guilty plea prior to enactment of the amendment. This retrospective application to Relator of H.B. 1698's new obligations, duties, and disabilities violates Article I, § 13, of the Constitution of Missouri. Thus, Respondent's orders of May 7, 2007, and December 13, 2007, designating Relator as a sex offender and requiring supervision and treatment as such, are unconstitutional.

It is notable that Respondent's orders of May 7 and December 13 were not of Respondent's own desire. Indeed, the circuit court initially had precluded

Relator from being supervised as a sex offender (Appx. A13). In March of 2007, Respondent sustained Relator's objections and vacated two 2006 orders requiring Relator to be supervised and treated as a sex offender (Appx. A6). Respondent only entered the May 7 order requiring sex offender supervision because "It appears Probation & Parole require that Defendant be supervised as a sex offender and evaluated as such by a physician of their choice" (Appx. A7). But Article I, § 13, of the Constitution of Missouri precludes the Division from so requiring or Respondent from so acceding. *Blunt*, 225 S.W.3d at 422; *R.L.*, 245 S.W.3d at 240.

From its inception, the sex offender designation has included a very specific list of persons to whom it applies. § 589.400, R.S.Mo. At the time Relator pleaded guilty to endangering the welfare of a child in the first degree in March of 2006, his offense was not covered in this list. Three months later, however, H.B. 1698 suddenly amended SORA and many other Missouri laws to include his offense.

H.B. 1698 added Relator's offense to SORA's registration provisions in § 589.400, the prior and persistent sex offender provisions of §§ 217.735 and 559.106, the residency restrictions of § 566.147, and the school restrictions of § 566.149. Because H.B. 1698 made Relator's offense registrable under § 589.400, it also subjected persons convicted of Relator's offense to the probation mandates of §§ 589.415 and 589.042, which expressly apply only to persons required to

register under § 589.400. H.B. 1698 thoroughly transformed Relator's offense into a "sex offense" and anyone who pleaded guilty to it into a "sex offender," whereas the offense and anyone who pleaded guilty to it were not so designated before H.B. 1698's passage.

The Division of Probation & Parole promulgates two guides for the supervision of defendants in its custody. One is the WHITE BOOK, *Rules and Regulations Governing the Conditions of Probation, Parole and Conditional Release* (Appx. A98-A107), which governs the probation conditions for most offenses. The other is the ORANGE BOOK, *Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional release for Sex Offenders* (Appx. A81-A97), which governs probation conditions for persons supervised as a sex offender.

Relator's Sex Offender Supervision Agreement (Appx. A21), his Sex Offender Supervision Directives (Appx. A22), and the ORANGE BOOK detail all the requirements which Respondent's orders of May 7 and December 13 placed on Relator. The Division of Probation & Parole considers any person whose offense is registrable under § 589.400, R.S.Mo., to be a "sex offender" and subject to sex offender supervision (Appx. A92-A93). Only persons whose offenses are listed in § 589.400, R.S.Mo., are so subject (Appx. A92-A93). Relator must notify and receive approval of any change in residence, pursuant to § 589.415, R.S.Mo. That

statute applies its requirements to "a sex offender who is required to register pursuant to sections 589.400 to 589.425." *Id.* That statute only is being applied to Relator because H.B. 1698 retrospectively added his offense to SORA.

Relator must provide his probation officer with access to his personal home computer, pursuant to § 589.042, R.S.Mo. That statute applies its requirements to "a person who is required to register as a sex offender under sections 589.400 to 589.425." That statute also only is being applied to Relator because H.B. 1698 retrospectively added his offense to SORA.

Because H.B. 1698 retrospectively added the offense to § 566.147, Relator's probation mandates that he "not reside within one thousand feet of any public school … or any private school giving instruction in a grade or grades not higher than the twelfth grade, or child-care facility." The retrospective application of this condition is what this Court declared unconstitutional in *R.L.* 245 S.W.3d at 240. H.B. 1698 also promulgated an entirely new requirement that, as a "sex offender," Relator "shall not be present in or loiter within five hundred feet of any school building, on real property comprising any school, or in any conveyance owned, leased, or contracted by a school to transport students." § 566.149, R.S.Mo. None of these requirements could have been forced upon Relator without H.B. 1698's retrospective application of sex offender status to Relator.

These unconstitutionally retrospective applications of law are compounded by the fact that the crime of endangering the welfare of a child in the first degree is not located in Chapter 566, R.S.Mo., titled "sexual offenses," but rather is in Chapter 568, "offenses against the family." Respondent's order of December 13, 2007, approved Relator's treatment as a sex offender under §§ 566.140 and 566.141, R.S.Mo. § 566.140 provides that its treatment provisions apply to any "person who has pleaded guilty to or been found guilty of violating the provisions of *this chapter* and is granted a suspended imposition or execution of sentence or placed under the supervision of the board of probation and parole" (emphasis added). Relator's offense never has been listed in *that chapter*, but rather is contained in Chapter 568. § 566.141 applies its similar provisions to any "person who is convicted of or pleads guilty or nolo contendere to any *sexual offense* involving a child" (emphasis added).

The title of Chapter 566, where the sex offender treatment provision is located, is titled "sexual offenses." Relator's offense is an "offense against the family." If the term "sexual offense" appears in a chapter titled "sexual offenses" and follows after a statute applying "sexual offenses" to "the provisions of this chapter," then the canons of statutory interpretation mandate that the term "sexual offenses" in the latter statute be interpreted to mean a violation of the chapter titled "sexual offenses." This is the essence of the doctrine of *ejusdem generis*, which

holds that "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed." BLACK'S LAW DICTIONARY 535 (7th ed. 1999). Endangering the welfare of a child is not a "sexual offense" under Chapter 566. Rather, any and all application of the status of sex offender to someone convicted of endangering the welfare of a child in the first degree is only by virtue of H.B. 1698's changes to the law of Missouri detailed *ante*, making that crime a "sexual offense."

There can be no doubt that the change from ordinary probation status to sex offender status has imposed a plethora of new duties, obligations, and disabilities on Relator. Relator's liberties severely have been curtailed in a manner not contemplated for someone convicted of his offense before the passage of H.B. 1698. He is prohibited from watching subscription cable television, whereas his pre-H.B. 1698 probation had no such disability. He is prohibited from picking his fiancée up from her work because she works at a school, whereas his pre-H.B. 1698 probation had no such disability. He is prohibited from using the internet, whereas his pre-H.B. 1698 probation had no such disability. He is prohibited from traveling outside Jackson or Cass Counties, whereas his pre-H.B. 1698 probation prohibited him only from leaving Missouri. He cannot possess any pornographic material, whereas his pre-H.B. 1698 probation had no such disability. If requested,

he must submit at his own expense to polygraph or penile plethysmograph testing, whereas his pre-H.B. 1698 probation had no such duty. Relator must fulfill the obligation of attending both weekly solo counseling and group counseling with sex offenders, whereas his pre-H.B. 1698 probation had no such obligation.

If Relator does not follow these new requirements, he risks revocation of his probation and a potential sentence of imprisonment, as his crime is a class C felony. § 568.045, R.S.Mo. Indeed, without this Court's February 29 Preliminary Writ of Prohibition commanding Respondent not to take further action in this case, a probation review hearing already would have been held, because Relator declined to sign his consent to sex offender treatment on the advice of counsel.

Concisely, the new duties, obligations, and disabilities created by H.B. 1698 for persons convicted of the crime of endangering the welfare of a child in the first degree and retrospectively applied to Relator in Respondent's orders of March 7 and December 13 are as follows:

- Under the new § 589.400, Relator must register with his county sheriff as a sex offender (Appx. A21, A30, A61, A92-A93). This requirement was deemed unconstitutional and unenforceable as to Relator by the Circuit Court of Jackson County in *Doe v. Phillips*, Case No. 0716-CV05959 (July 31, 2007) (Appx. A25).

- Because H.B. 1698 made Relator's offense registrable, under § 589.415 Relator now must notify his probation officer and receive her approval of any change in residence (Appx. A21, A34).
- Because H.B. 1698 made Relator's offense registrable, under § 589.042 Relator must provide his probation officer with access to his personal home computer, subject to seizure at any time at the probation officer's pleasure (Appx. A33, A83).
- Under the new § 566.149, R.S.Mo., Relator is prohibited from being present within five hundred feet of any school property (Appx. A38, A54-A55, A83). This prevents Relator from picking his fiancée up from the school where she is employed as a teacher.
- Because H.B. 1698 made Relator's offense a "sexual offense," even though it is not contained in Chapter 566, R.S.Mo., under §§ 566.140 and/or 566.141, R.S.Mo., Relator must submit to sex offender evaluation and treatment by a physician of the Department of Probation & Parole's own choosing (Appx. A35, A36, A95).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must advise all adult members of his household of his conviction (Appx. A21, A85).

- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must report the names, dates of birth, and gender of all persons residing with him (Appx. A21, A85).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must submit, at his own expense, and at any time when so requested, to any treatment procedures required by his probation officer, including polygraph testing or penile plethysmograph testing (Appx. A21, A89-A90).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from having any unsupervised contact with any person age 16 or under, or any incapacitated person (Appx. A21, A87).
- Under the new § 566.149, R.S.Mo., Relator must avoid parks, schools, daycare centers, toy stores, pools, carnivals, or other places where children are known to frequent (Appx. A21, A38, A87).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from possessing or accessing any pornographic material (Appx. A21, A22, A88).

- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must allow his probation officer to have access to his home and all the occupants (Appx. A22, A85).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must inform his employer of his offense (Appx. A22, A86).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from traveling for employment purposes (Appx. A22, A83-A84).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from leaving Jackson or Cass County without prior permission from his probation officer (Appx. A22, A83-A84), whereas his original probation conditions allowed free travel within Missouri (Appx. A13).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator must abide by a curfew of 11:00 p.m. Sunday through Thursday, and midnight on Friday and Saturday (Appx. A22, A90).
- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from viewing any sexually-oriented videotapes, television shows, films, or pictures (Appx. A22, A88).

- Because H.B. 1698 made Relator's offense a "sexual offense," as part of sex offender supervision Relator is prohibited from using the internet without the prior written permission of his probation officer (Appx. A22).

Many of these requirements are conspicuously similar to the conditions authorized upon conditional release from civil commitment as a "sexually violent predator" contained in § 632.505, R.S.Mo., and also first promulgated in H.B. 1698 (Appx. A74-A76).

These new duties, obligations, and disabilities all are a result of a retrospective application of law, either by means of adding Relator's crime to the list of registrable offenses in § 589.400 – which is what defines a "sex offender" in the eyes of the Division of Probation & Parole (Appx. A92-A93) – or by adding the crime to other statutes as detailed *ante*. Existing statutes which previously did not apply to Relator were made to apply to him by virtue of his guilty plea, a past transaction. Like the Relators in *Phillips*, *Blunt*, and *R.L.*, H.B. 1698, as applied to Relator in Respondent's orders of May 7, 2007, and December 13, 2007, specifically requires Relator to fulfill the new, stringent obligations and duties imposed on "sex offenders," as well as to submit to the new, strict disabilities forced upon him under this designation, based solely his guilty plea prior to enactment of the amendment. Applying these new obligations and new duties to Relator, based solely on his prior guilty plea, violates Missouri's Constitutional bar

on retrospective laws. The designation of sex offender unconstitutionally is being applied to the Relator.

This Court should make permanent the Preliminary Writ which it issued on February 29, 2008. The Court should prohibit Respondent from doing anything other than vacating his orders of May 7, 2007, and December 13, 2007, revising Relator's status and probation conditions, and in lieu thereof return Relator to his original probation conditions entered on July 3, 2006.

II. Relator is entitled to an order prohibiting Respondent from enforcing Respondent's orders of May 7, 2007, and December 13, 2007, and doing anything other than vacating said orders, thereby returning Relator to his original probation conditions entered on July 3, 2006, *because* the orders violate the prohibitions on *Ex Post Facto* applications of law contained in the Constitution of Missouri, Article I, § 13, and the Constitution of the United States, Article I, § 10, *in that* the orders retrospectively apply provisions of Missouri House Bill 1698 retrospectively to Relator so as to increase the punishment for Relator's criminal acts already committed, applying these provisions to Relator's crime and guilty plea – events before the enactment of H.B. 1698, and disadvantaging Relator.

Standard of Review

The writ of prohibition is a fundamental part of our common law which allows this Court to prevent the usurpation of judicial power and prevent an absolute irreparable harm to a party. *See* § 530.010, R.S.Mo; *State ex rel. Dir. of Revenue v. Gaertner*, 32 S.W.3d 564, 566 (Mo. banc 2000); *Thomas v. Mead*, 36 Mo. 232, 246-247 (1864) (citing 3 BLACKSTONE'S COMMENTARIES 41; Constitution of Missouri, Article VI, § 3 (1865)). In Missouri, a writ of prohibition is appropriate against a circuit court

> in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy an excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. banc 2003).

For the writ to lie, the Relator must have no adequate remedy at law. Trial courts have discretion to determine the conditions of a defendant's probation. §§ 559.100.2 and 559.021.1, R.S.Mo. Orders setting conditions of probation are not appealable, and instead only may be challenged by means of a petition for writ of prohibition in an appellate court. *State v. Williams*, 871 S.W.2d 450, 452 and 452 n.2 (Mo. banc 1994); *State ex rel. St. Louis County v. Stussie*, 556 S.W.2d 186, 187-188 (Mo. banc 1977).

* * *

The Constitution of Missouri and the Constitution of the United States prohibit *ex post facto* laws. *Ex post facto* laws are those which are retrospective and that either alter the definition of crimes or increase the punishment for criminal acts already committed. Relator pleaded guilty to endangering the welfare of a child in the first degree in March of 2006. Before June 5, 2006, that crime was not

a "sex offense" and the law of Missouri did not consider defendants who were convicted of or pleaded guilty to it to be "sex offenders." The law did not place upon them any increased punishment beyond that which anyone else convicted of any class C felony in Missouri would face. On June 5, 2006, however, H.B. 1698 became law, and transformed the crime into a "sex offense" and anyone who was convicted of or pleaded guilty to it into a "sex offender," greatly decreasing the liberty of persons who pleaded guilty to the crime vis-à-vis other, ordinary class C felonies. Thereafter, on request of the Division of Probation & Parole, Respondent ordered that Relator be supervised as a sex offender. He later additionally ordered that Relator undergo sex offender treatment. Are Respondent's orders an unconstitutional *ex post facto* application of law? Should Respondent be permanently prohibited from enforcing them and taking any other action except to vacate those orders and return Relator to his original probation status?

In addition to its bar on retrospective laws, Article I, § 13, of the Constitution of Missouri also guarantees that "no *ex post facto* law … can be enacted," echoing Article I, § 10, of the Constitution of the United States, which provides, "No state shall … pass any … *ex post facto* law." *Ex post facto* laws are those which "are retrospective and that either alter the definition of crimes or increase the punishment for criminal acts already committed." *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 136 (Mo. banc 1995).

"Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). In order to fall within the *ex post facto* prohibition, a law "must be retroactive, that is, it must apply to events occurring before its enactment" and "it must disadvantage the offender affected by it." *Id.* at 29.

Although some Missouri courts have held that probation is not punishment *per se*, *State v. Welsh*, 853 S.W.2d 466, 470 (Mo. App. 1993), for constitutional purposes the Supreme Court of the United States views probation differently: "Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'" *United States v. Knights*, 534 U.S. 112, 119 (2001) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987)). As such, while "custodial sentences are qualitatively more severe than probationary sentences of equivalent terms," still, probationers

> are nonetheless subject to several standard conditions that substantially restrict their liberty. Probationers may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit

> unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking. Most probationers are also subject to individual "special conditions" imposed by the court.

Gall v. United States, 128 S. Ct. 586, 595-596 (2007).

That the requirements placed upon Relator were applied retrospectively is undeniable. Beyond that element, a "two-stage inquiry determines whether a retrospective statute constitutes an invalid *ex post facto* punishment or a valid, non-punitive civil regulation." *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc. 2005). If the complained-of retrospective application of law is "intended to establish a punishment, the inquiry ends and an ex post facto violation is established." *Id.* Otherwise, if the application of law is a civil regulatory measure, it must be analyzed to determine whether it is "sufficiently punitive in effect" so as still to warrant protection under the *Ex Post Facto* Clauses of the Federal and State Constitutions. *Id.*

To determine whether a civil regulatory measure has a punitive effect for the purposes of the constitutional prohibition on *ex post facto* laws, the Supreme Court of the United States has prescribed a seven-factor test:

1) whether the sanction involves an affirmative disability or restraint;

2) whether it has historically been regarded as a punishment;

3) whether it comes into play only on a finding of scienter;

4) whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5) whether the behavior to which it applies is already a crime;

6) whether an alternative purpose to which it may rationally be connected is assignable to it; and

7) whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963).

In this case, the new probation requirements plainly are punishment, and the inquiry should end. This is because probation "is part of the punishment meted out through a defendant's criminal sentence." *Doe v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001) (citing *United States v. Soto-Olivas*, 44 F.3d 788, 790 (9th Cir. 1995)), *rev'd on other grounds sub nom. Smith v. Doe*, 538 U.S. 84, 106 (2003).

But even if the new requirements which Respondent's orders of May 7 and December 13 effected upon Relator somehow absurdly are a "non-punitive civil regulatory measure," they unquestionably fit the seven-factor *Kennedy* test. As noted *ante*, they include a profusion of new affirmative disabilities and restraints. As the Supreme Court noted in *Knights*, *Griffin*, and *Gall*, *supra*, probation historically has been regarded as punitive. The requirements only come by virtue

of Relator's guilty plea, at which he provided the necessary finding of scienter. As Respondent stated in his Return to this Court's Preliminary Writ, the new probation requirements are designed to promote the traditional aims of punishment for Relator's offense (Return to Preliminary Writ of Prohibition, pp. 3-4, 5-6). The behaviors to which the new probation requirements apply already are crimes (Appx. A92-A93). The new requirements placed on relator through Respondent's retrospective application of H.B. 1698 unequivocally have a punitive effect.

In *Smith v. Doe*, the Supreme Court of the United States held that retroactively requiring persons previously convicted to register as sex offenders does not constitute a violation of the *Ex Post Facto* Clause, because the mere act of *registering* as a sex offender is not punitive. 538 U.S. at 106. In *R.W.*, this Court agreed. 168 S.W.3d at 69. At issue in both *Smith* and *R.W.*, however, was the mere requirement of registering as a sex offender, which the Courts held to be a civil regulatory measure, not the plethora of disadvantages which Respondent applied retroactively to Relator in this case – disadvantages which, as shown *ante*, are not only punishment, but undeniably constitute an "affirmative disability or restraint." *Kennedy*, 372 U.S. at 168.

Instead, the clearer analogue in the law of Missouri is that of a "class X offender" designation under § 558.019, R.S.Mo., which was a new punishment twenty years ago. Like the "sex offender" classification at issue in this case,

designation as a "class X offender" increases the punishment for a defendant's offense. § 558.019, R.S.Mo. In *State v. Lawhon*, the defendant argued that the trial court erred in finding him a "class X offender," because doing so was an *ex post facto* application of law. 762 S.W.2d 820, 824 (Mo. banc 1988). The defendant's offenses were committed in November of 1986, and the "class X" statute became effective on January 1, 1987. *Id.* This Court held that applying the "class X" designation to the defendant was an unconstitutional *ex post facto* law, and remanded the case for resentencing. *Id.* at 826. The Missouri Court of Appeals held the same in *State v. Pollard*, 746 S.W.2d 632 (Mo. App. 1988), *State v. Hillis*, 748 S.W.2d 694 (Mo. App. 1988), *State v. McCoy*, 748 S.W.2d 809 (Mo. App. 1988), and *State v. Wiley*, 766 S.W.2d 700 (Mo. App. 1989).

This case is no different. The acts for which Relator was charged occurred in 2005. He pleaded guilty in March of 2006. H.B. 1698's changes to the law did not become effective until June 5, 2006. Respondent's application of its new laws requiring sex offender status for Relator's offense was retrospective: Respondent clearly applied H.B. 1698's provisions to events in this case occurring before their enactment. It served only to disadvantage Relator's liberty in ways not contemplated for his offense before the amendment's enactment, enacting affirmative disabilities.

Respondent's orders of May 7, 2007, and December 13, 2007, curtail Relator's liberties to travel, to reside where he wishes, not to have his personal property open to unwarranted search and seizure by the State, to view television programming freely, to use the internet freely, and not to be forced to submit to having his genitals hooked to a machine by the State. Without Respondent's orders retrospectively applying H.B. 1698, Relator would not face these particular losses of liberty.

Had Relator known that he retrospectively would be designated a sex offender and had his liberties restrained in this manner, there is no question that he would not have pleaded guilty, but instead would have proceeded to trial. Applying H.B. 1698's sex offender designation retrospectively to Relator, with all the severe disadvantages involved, is an *ex post facto* application of law, in violation of the Constitution of Missouri, Article I, § 13, and the Constitution of the United States, Article I, § 10.

This Court should make permanent the Preliminary Writ which it issued on February 29, 2008. The Court should prohibit Respondent from doing anything other than vacating his orders of May 7, 2007, and December 13, 2007, revising Relator's status and probation conditions, and in lieu thereof return Relator to his original probation conditions entered on July 3, 2006.

Conclusion

Respondent's orders of May 15, 2007, and December 13, 2007, violate Article I, §13, of the Constitution of Missouri. They also violate Article I, § 10, of the Constitution of the United States.

This Court should make permanent the Preliminary Writ of Prohibition which it entered on February 29, 2008. The Court should prohibit Respondent from doing anything other than vacating his orders of May 7, 2007, and December 13, 2007, revising Relator's status and probation conditions, and in lieu thereof return Relator to his original probation conditions entered on July 3, 2006.

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Certificate of Compliance

I hereby certify that the enclosed CD-ROM has been scanned for viruses using Norton AntiVirus 2008 and is virus free. I also certify that I used Microsoft Word 2003 for word processing. I further certify that this Brief of the Relator complies with the word limitations contained in Supreme Court Rule 84.06(b) and that this brief contains 9,490 words.

_____

Jonathan Sternberg, Attorney

Certificate of Service

I hereby certify that on April 7, 2008, I mailed a true and accurate copy and CD-ROM of this Brief of the Relator, as well as a copy of its Appendix, to the following:

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I further certify that on April 7, 2008, as a courtesy, I mailed a copy and CD-ROM of this Brief of the Relator, as well as a copy of its Appendix, to the following:

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