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No. SC92382

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

MICHAEL WADE,

Appellant.

Appeal from St. Louis County Circuit Court
Twenty-First Judicial Circuit
The Honorable Carolyn C. Whittington, Judge

RESPONDENT'S AMENDED BRIEF

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STATEMENT OF FACTS

Michael Wade is appealing his conviction and sentence for being a sex offender present within a public park, section 566.150, RSMo Cum. Supp. 2009. (L.F. 73-75). Appellant claims that the trial court erred in overruling his motion to dismiss because section 566.150, RSMo is retrospective as applied to him.

The original indictment, filed on December 8, 2010,[1] charged Appellant with being present within Castlewood State Park, a public park with playground equipment, on or about August 22, 2010. (L.F. 1, 8). The indictment further charged that Appellant pled guilty in Jefferson County Circuit Court on November 25, 1996, to a charge of statutory sodomy in the first degree. (L.F. 8).

Appellant filed a motion to dismiss and supporting suggestions on March 28, 2011. (L.F. 4). The motion alleged that section 566.150, RSMo was retrospective as applied to Appellant because it was enacted after the date of his previous sex offense conviction and it required him to do something, with a criminal penalty for not doing what the law required, and

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[1] The State filed a superseding indictment on June 8, 2011, that added the allegation that Appellant was "knowingly" present in the park. (L.F. 12). The superseding indictment is otherwise identical to the original indictment.

because it imposed a new duty or obligation solely as the result of Appellant's pre-statute conviction. (L.F. 15). Appellant argued in the suggestions that the new duty or obligation was that he must ensure, before entering any real property that is within 500 feet of a public park, that there is no playground or swimming pool anywhere on that public park property. (L.F. 21). The State filed suggestions in opposition to the motion. (L.F. 4, 27-61).

The trial court issued an order on June 15, 2011, denying the motion to dismiss. (L.F. 5, 62). Appellant waived his right to a jury trial and was tried by Judge Carolyn C. Whittington on November 22, 2011. (L.F. 5-6, 63; Tr. 4-10). Appellant renewed the motion to dismiss prior to opening statements. (Tr. 11). The prosecutor argued that, in addition to the reasons presented in the written suggestions, the ban on retrospective laws had traditionally been applied to civil cases and not to criminal cases. (Tr. 12). Defense counsel added an argument that the statute imposed a disability on Appellant because he faced time in prison for being in a public park. (Tr. 13). The trial court denied the renewed motion. (Tr. 15).

Missouri State Park Ranger Joshua Henroid testified as the sole witness at trial. (Tr. 17). Henroid said that he was on duty in Castlewood State Park on August 22, 2010, when he saw Appellant near a sand bar on the Meramec River. (Tr. 17-18). Henroid noticed that Appellant had a can cooler, or "koozie cup," containing an aluminum can in it. (Tr. 18). Because

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alcohol was not allowed in the park, Henroid approached Appellant and asked him what was in the can. (Tr. 19). After determining that the can contained soda, Henroid asked Appellant if he had any alcohol in his possession. (Tr. 19). Appellant replied that he did, but he was not drinking it. (Tr. 19). He then opened his cooler to show Henroid that it contained two wine coolers. (Tr. 19). Henroid gave Appellant the choice of dumping the alcohol or taking it out of the park. (Tr. 19). Appellant dumped the alcohol. (Tr. 19).

Henroid then asked Appellant and his female companion for identification, which they provided. (Tr. 20). Henroid ran a check of their information through the Highway Patrol and found that Appellant was a convicted sex offender. (Tr. 20). Henroid testified that Castlewood State Park contains a playground that sits in plain view, and that anyone driving to the sandbar area where Appellant was at would have to pass that playground. (Tr. 22-23). Henroid told Appellant that he was in violation of a law prohibiting sex offenders from being in the park and arrested him. (Tr. 21). Appellant replied that he had been coming to the park since he was a child, that he was unaware of the law, and that he was unaware that the park had a playground. (Tr. 22).

The State also submitted certified copies of records showing that Appellant pled guilty in the Circuit Court of Jefferson County on November

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25, 1996, to charges of sexual abuse in the first degree, child molestation in the second degree, and statutory sodomy in the first degree. (Tr. 30, 32). Appellant did not testify or present any evidence. (Tr. 34-36). The court found Appellant guilty of the sole count of the indictment, and sentenced him on January 13, 2012 to three years imprisonment in the Department of Corrections. (Tr. 43, 44, 47-48).

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ARGUMENT

The charges against Appellant are not barred by the constitutional prohibition against laws retrospective in their operation.

Appellant claims that the trial court erred in overruling his motion to dismiss because that ruling violated his rights to due process and to be free from prosecution for retrospective crimes. But the trial court properly overruled the motion because the Missouri Constitition's ban on laws retrospective in their operation does not apply to crimes or criminal procedure. Even if the constitutional prohibition does encompass criminal laws, the statute under which Appellant was charged and convicted merely established his status in relation to actions taken after the statute's effective date, which does not run afoul of the ban on retrospective laws.

A. Standard of Review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed to be valid and will not be found unconstitutional unless it clearly contravenes a constitutional provision. *Id.* The person challenging the statute's validity bears the burden of proving that the act clearly and undoubtedly violates the constitution. *Id.* 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). When a motion is denied without findings or conclusions, the trial court's findings are presumed to be in accordance with the judgment entered, and the judgment will be affirmed under any reasonable theory. *State v. Guyer*, 353 S.W.3d 458, 460 (Mo. App. W.D. 2011).

B. Analysis.

The prohibition against retrospective laws is contained in article I, section 13 of the Missouri Constitution, which states:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grants of special privileges or immunities, can be enacted.

Mo. Const. art. I, § 13 (1945). A similar provision has been a part of Missouri law since this State adopted its first constitution in 1820.[2] *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

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[2] *See* Mo. Const. art. XIII, § 17 (1820); Mo. Const. art. I, § 28 (1865); Mo. Const. art. II, § 15 (1875).

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1. This Court has construed the ban on retrospective laws as being limited to civil rights and remedies.

The term "retrospective" that appears in each of Missouri's constitutions, including article I, section 13 of the present constitution, had acquired a definite, legal meaning long before the adoption of Missouri's first constitution. *Ex parte Bethurum*, 66 Mo. at 548. When a constitution employs words that have long had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense, unless there is something to show that they were employed in a different sense. *Am. Fed'n of Teachers v. Ledbetter*, 387 S.W.3d 360, 364 (Mo. banc 2012) (citing *Ex parte Bethurum*, 66 Mo. at 548). That rule of construction is consistent with the codified rule for statutory interpretation, which states that "[w]ords and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." § 1.090, RSMo 2000 *see Spradlin v. City of Fulton*, 924 S.W.2d 259, 262 (Mo. banc 1996) ("Rules for the interpretation of statutes apply with equal force to the constitution.").

The Court noted in *Ex parte Bethurum* that the prohibition against *ex post facto* laws served to prevent the retrospective application of criminal laws, while the phrase "law retrospective in its operation" related to civil

rights and proceedings in civil causes. *Id.* at 550. Applying the technical meaning of retrospective that existed when the constitution was adopted, this Court stated, "A retrospective law, as the phrase is employed in our constitution, is one which relates exclusively to civil rights and remedies." *Id.* at 550. And the Court found that the phrase retained that same meaning in both the 1865 and 1875 constitutions. *Id.* at 552. The Court went on to conclude, "[W]e think there can be no doubt that the phrase 'law retrospective in its operation,' as used in the bill of rights, has no application to crimes and punishments, or criminal procedure . . . ." *Id.* at 552-53.

The Court reaffirmed that position in a pair of cases decided in the following years. In *State v. Johnson*, the defendant was indicted for felonious assault but convicted of the lesser offense of assault and battery. *State v. Johnson*, 81 Mo. 60, 61 (1883). At the time of the charged crime, a defendant indicted for felonious assault could not be convicted of a lesser offense, but a statute passed between the date of the offense and the trial authorized such a conviction. *Id.* The defendant claimed that the conviction violated the constitutional prohibition against *ex post facto* laws, laws impairing the obligation of contracts, and laws retrospective in their operation. *Id.* at 62. The Court rejected the argument, stating that the principle involved was covered by the decision in *Ex parte Bethurum*, which required that the objection be overruled. *Id.* While the Court did not further explain its

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holding, it appears to conclude that the statute in question did not fit within the limited definition given to *ex post facto* laws, and that the ban on retrospective laws did not apply because the statute related to criminal law and procedure.

In *State v. Kyle*, the question before the Court was whether a constitutional amendment authorizing the prosecution of felonies by information was an *ex post facto* law as applied to a defendant who committed the crime before the amendment's effective date. *State v. Kyle*, 166 Mo. 287, 303, 65 S.W. 763, 768 (1901). The Court cited *Ex parte Bethurum* for the proposition that the expression "*ex post facto* laws" is technical and was to be given that meaning. *Id.* 166 Mo. at 305, 65 S.W. at 768. In discussing the meaning of *ex post facto* law, the Court stated, "Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law. **The former only are prohibited**." *Id.* 166 Mo. at 304, 65 S.W. at 768 (emphasis added). Consistent with that statement, the Court found that the constitutional amendment in question was not an *ex post facto* law, and did not consider whether the amendment could be invalidated as a law retrospective in its operation. *Id.*

Despite that limitation, this Court has recently declared criminal statutes unconstitutional as violating the constitutional ban on retrospective laws. In *R.L. v. Department of Corrections*, the Court applied the ban on

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retrospective laws to section 566.147, RSMo Cum. Supp. 2006, a statute making it a felony for certain sex offenders to reside within one-thousand feet of a school or a child care facility. *R.L. v. Department of Corrections*, 245 S.W.3d 236, 237, 238 (Mo. banc 2008). As best as undersigned counsel can determine, that is the first case to invalidate a criminal statute on the basis of it being a law retrospective in its operation. In *F.R. v. St. Charles County Sheriff's Dept.*, the Court again declared that section 566.147, RSMo was retrospective. *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56, 65-66 (Mo. banc 2010). The Court also applied the ban on retrospective laws to uphold the dismissal of misdmeanor charges filed for a violation of section 589.426, RSMo Cum. Supp. 2008, a statute that required registered sex offenders to comply with certain requirements on Halloween. *Id.*

Appellant respectfully suggests that *R.L.* and *F.R.* are contrary to this Court's precedents, to the understanding of the drafters of the constitution and the voters who approved it, and to the standards that this Court uses to construe the constitution. Those decisions should thus no longer be followed.

2. The construction adopted in *Ex parte Bethurum* gives effect to each clause of article I, section 13.

Courts should not adopt a construction of the constitution which renders any of its provisions meaningless. *State ex rel. Moore v. Toberman*, 363 Mo. 245, 257, 250 S.W.2d 701, 705 (1952). If a literal interpretation of

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the language used in a constitutional provision would give it an effect in contravention of the real purpose and intent of the instrument as deduced from a consideration of all its parts, then the intended meaning must prevail over the literal meaning. *Id.*

The present article I, section 13, and its predecessors specifically ban three types of laws: (1) *ex post facto* laws, (2) laws impairing the obligation of contracts; and (3) laws retrospective in their operation. Mo. Const. art. I, § 13 (1945), *see also* Mo. Const. art. XIII, § 17 (1820); Mo. Const. art. I, § 28 (1865); Mo. Const. art. II, § 15 (1875). The United States Constitution already prohibited states from passing *ex post facto* laws, or laws impairing the obligation of contracts, but contains no prohibition against the passage of laws retrospective in their operation. U.S. Const. art. I, § 10. In limiting the ban on retrospective laws to civil rights and remedies, the Court in *Ex parte Bethurum* construed that section of the constitution in a way that gave effect to each of its provisions, by recognizing that the prohibitions against *ex post facto* laws, laws impairing the obligation of contracts, and laws retrospective in their operation each serves a distinct purpose.

The Court noted that all *ex post facto* laws and laws impairing the obligation of contracts are literally retrospective. *Ex parte Bethurum*, 66 Mo. at 549. But the Court noted that the term *ex post facto* had acquired a definite, technical meaning, long before the adoption of Missouri's

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Constitution. *Id.* at 548. That technical definition was set forth by the United States Supreme Court in *Calder v. Bull*, in which Justice Chase wrote that "[t]he prohibition, 'that no state shall pass any ex post facto law,' necessarily requires some explanation, for, naked and without explanation, it is unintelligible, and means nothing." *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798). Justice Chase concluded that a literal interpretation of the phrase would prevent any laws referencing past events, and that enforcing such an interpretation would be unreasonable. *Id.* He thus looked to the construction given to the term prior to the Revolution and adopted the meaning articulated by Sir William Blackstone, which was that *ex post facto* referred to laws that: (1) make an action, done before the passing of the law, and which was innocent when done, criminal and punishes such action; (2) aggravates a crime or makes it greater than it was when committed; (3) inflicts a greater punishment than was annexed to the crime when committed; and (4) alters the rules of evidence to require less or different testimony to convict the offender than was required at the time of the commission of the offense. *Id.* at 390-91.

In *Ex parte Bethurum*, this Court adopted the same definition of *ex post facto* articulated in *Calder* and similarly limited its application to criminal

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cases.[3] *Id.* at 548-50. The Court also looked to decisions of the Supreme Courts of Texas and New Hampshire that relied on *Calder* in construing the scope of their own constitutional prohibitions against retrospective laws. *Id.* at 550-51. Both courts noted that a literal interpretation of the term retrospective would encompass criminal laws as well as civil. *DeCordova v. City of Galveston*, 4 Tex. 470, 1849 WL 4050 at *4 (1849); *Rich v. Flanders*, 39 N.H. 304, 1859 WL 3799 at *8 (1859), *overruled, in part, on other grounds by Caswell v. Maplewood Garage*, 149 A. 746 (N.H. 1930). They also noted the technical construction given to *ex post facto* as applying only to criminal laws, and that *ex post facto* would not be so limited under a literal reading of the term. *DeCordova*, 1849 WL 4050 at *4; *Rich*, 1859 WL 3799 at *8. Both courts concluded that the term retrospective was, like the term *ex post facto*, intended to apply to a particular class of cases. *Id.* The New Hampshire court specifically stated in *Rich* that "retrospective laws are technically held to relate to civil causes only . . . ." *Rich*, 1859 WL 3799 at *8.

In light of that history, this Court found that the ban on retrospective laws was intended to apply to laws that were not already covered by the bans on *ex post facto* laws and laws impairing the obligation of contracts that are

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[3] That interpretation remains in effect to this today. *See*, *e.g.*, *In re R.W.*, 168 S.W.3d 65, 68 (Mo. banc 2005); *Phillips*, 194 S.W.3d at 842.

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contained in both the Missouri and United States Constitutions. *Ex parte Bethurum*, 66 Mo. at 552. The Court stated that a broader interpretation of the ban would "attribute to the members of the convention ignorance of the meaning of the words employed by them, which we are not inclined to credit." *Id.* The Court concluded that when the ban on retrospective laws was taken in connection with the ban on *ex post facto* laws and laws impairing the obligation of contracts, there could be "no doubt" that the phrase "law retrospective in its operation" had no application to crimes and punishment, or criminal procedure. *Id.* at 552-53.

The Court thus recognized that a literal application of retrospective would render meaningless the bans on *ex post facto* laws and laws impairing the obligation of contracts, because a broad application of retrospective would swallow those other provisions. Such an application would also create the anomalous situation where one clause of the section, the ban on retrospective laws, would be given a literal meaning while another clause in the same section, the ban on *ex post facto* laws, would be given a technical meaning. By limiting the ban on retrospective laws to civil laws that do not concern the impairment of contracts, the Court interpreted the phrase in a way that gives meaning to each clause of what is now article I, section 13 of the present constitution.

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The Court reaffirmed that understanding a few years after *Ex parte Bethurum* was handed down. The Court, citing *Ex parte Bethurum* and other authorities, stated that "there is a marked distinction between a law which impairs the obligation of contracts, and one which is retrospective in its operation." *Leete v. State Bank of St. Louis*, 115 Mo. 184, 199, 21 S.W. 788, 791 (1893). The Court went on to state, "If the former class included the latter, then the addition of the latter to section 28 of article I of the constitution would have been a vain and meaningless addition." *Id.*, 115 Mo. at 199-200, 21 S.W. at 791.

3. The construction adopted in *Ex parte Bethurum* is consistent with the understanding of the drafters.

Adopted by a vote of the people, the Missouri Constitution is a direct expression of the public will. Accordingly, "[i]t is the duty of this Court to be faithful to the constitution. '[I]t 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.'" *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)). Indeed, this Court has stated that the "fundamental purpose" in construing a constitutional provision is to ascertain and give effect to the intent of the

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framers and the people who adopted it. *Rathjen v. Reorganized Sch. Dist. R-II*, 365 Mo. 518, 529, 284 S.W.2d 516, 524 (1955). The actions taken at several constitutional conventions demonstrate that the Court's construction of the ban on retrospective laws in *Bethurum* was consistent with the understanding of the drafters of those constitutions and of the voters who adopted them.

a. 1865 Constitutional Convention.

As evidence that the ban on retrospective laws was understood as being limited to civil rights and remedies, the Court in *Bethurum* looked to a provision inserted into the 1865 Constitution. Article II contained several provisions that required the taking of a loyalty oath as a condition of holding certain public offices, or practicing as an attorney at law or minister. Mo. Const. art. II, §§ 7, 9 (1865). Any person who engaged in those activities without first taking the oath was subject to fines or imprisonment. Mo. Const. art. II, § 14. The prescribed oath required the taker to disclaim ever having served in the Confederate military or having been a Confederate supporter or sympathizer. Mo. Const. art. II, §§ 3, 6 (1865).

The Court noted in *Bethurum* that the oath provisions imposed disabilities for acts previously committed and would therefore have been "most flagrantly in conflict with" the ban on retrospective laws were that ban understood as applying to criminal laws. *Bethurum*, 66 Mo. at 552. The

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Court stated that the delegates would not have placed a provision in the constitution that violated another constitutional provision. *Id.* The Court therefore concluded that the ban on retrospective laws had to have been understood to embrace only civil rights and remedies. *Id.* at 552-53.

b. 1875 Constitutional Convention.

Further support for that conclusion can be found in the records of the 1875 Constitutional Convention. 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 obligation of 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 article II, section 15 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

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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, retrospective laws, and laws impairing the obligation of contracts. *Id.* at 95. The full context of the debate 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.

It further bears noting that the opinion in *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

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constitutional convention and almost certainly voted on the adoption of that constitution when it was presented to the public. The Court in *Bethurum* would have been well-attuned to the thinking of its fellow citizens who drafted and adopted the constitution. And as noted above, 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.

c. 1943-1944 Constitutional Convention.

The present article I, section 13 was adopted at the constitutional convention of 1943-1944. Debates of the 1943-1944 Constitutional Convention of Missouri, Vol. 6, p. 1512, *at* http://digital.library.umsystem.edu. The only discussion prior to the vote approving the amendment was to note that the new amendment was identical to article II, section 15 of the 1875 Constitution. *Id.* Both the delegates to the 1943-1944 convention and the voters who adopted the constitution in 1945 are presumed to have known of the construction that this Court had placed on the term "retrospective" when they approved the present article I, section 13. *Moore v. Brown*, 350 Mo. 256, 266-67, 165 S.W.2d 657, 662 (1942). And because the term "retrospective" has been retained in the same context in every version of the Missouri Constitution since *Bethurum* was issued, it is presumed to

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retain the original meaning ascribed by the Court. *State ex rel. Ashcroft v. Blunt*, 813 S.W.2d 849, 854 (Mo. banc 1991).

When the rules that this Court has established for construing constitutional provisions are applied to article I, section 13, the term "retrospective" must be construed as applying exclusively to civil rights and remedies because that is how the term was understood by the convention that adopted that provision and by the voters who approved it. (*See* pp. 12-13 *supra*). And since the passage of the present constitution, both this Court and the Court of Appeals have continued to expressly recognize the distinction that *ex post facto* laws as described in article I, section 13 are limited to crimes and punishment and criminal procedure, while retrospective laws as described in that same provision are limited to civil rights and remedies. *See, e.g.*, *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 34-35 (Mo. banc 1982); *Missouri Real Estate Comm'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010); *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 289 (Mo. App. W.D. 1989); *State v. Thomaston*, 726 S.W.2d 448, 459, 460 (Mo. App. W.D. 1987).

Even in *R.L.*, the Court noted that, "The constitutional bar on retrospective **civil** laws has been a part of Missouri law since this State adopted its first constitution in 1820." *R.L.*, 245 S.W.3d at 237 (emphasis added). But despite that acknowledgement of the limited scope of the ban on

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retrospective laws, the Court applied that ban to invalidate a felony statute barring certain sex offenders from residing within one-thousand feet of a school or a child care facility. *Id.* at 237, 238. That holding relied on the Court's previous opinion in *Doe v. Phillips*, where the Court held that a statute requiring registration as a sex offender for crimes committed before the effective date of the registration law imposed new obligations on the offender, and was thus retrospective as applied to those offenders. *Id.* at 237 (citing *Phillips*, 194 S.W.3d at 850). But the Court stated in *Phillips* that "'the thrust of the registration and notification requirements are civil and regulatory in nature.'" *Phillips*, 194 S.W.3d at 842 (quoting *In re R.W.*, 168 S.W.3d at 70).[4]

4. Recent decisions extending the ban on retrospective laws to criminal statutes are inconsistent with the understanding of the drafters and this Court's precedent in *Ex parte Bethurum*.

The Court correctly applied the ban on retrospective laws to the sex offender registration statute in *Phillips* since the statute was one that

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[4] The Court also rejected a claim that the registration requirement was an *ex post facto* law on the basis that the bar on *ex post facto* laws applied only to criminal laws. *Phillips*, 194 S.W.3d at 842.

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involved civil rights and remedies.[5] In *R.L.*, the Court appears to have extended *Phillips* to the school residency statute simply because both laws involved restrictions placed on persons convicted of sexual offenses. *See R.L.*, 245 S.W.3d at 237. In *F.R.* the Court in turn relied on *R.L.* and *Phillips* to again declare as retrospective the criminal statute prohibiting convicted sex offenders from living within one-thousand feet of a school or child care facility, and to also invalidate as retrospective criminal charges filed under the statute creating a misdemeanor offense when registered sex offenders fail to comply with certain requirements on Halloween. *F.R.*, 301 S.W.3d at 65-66.

Undersigned counsel has reviewed the briefs filed in *R.L.* and *F.R.*, and none of them address whether article I, section 13 can be applied to criminal statutes. Instead, the parties seemed to assume that since the ban on retrospective laws was applied in *Phillips* to the statute requiring sex offender registration, it would equally apply to any statute restricting the activities of sex offenders. The Court thus was not asked to consider the long-standing construction of article I, section 13, and the majority extended

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[5] While the registration statute at issue in *Phillips* authorized criminal penalties for failure to comply, the Court found that provision was unimportant to the retrospective law analysis. *Phillips*, 194 S.W.3d at 852.

Phillips to the statutes being challenged in *R.L.* and *F.R.*[6] But in doing so, the Court construed article I, section 13 in a manner that was contrary to the meaning of "retrospective" as understood when that provision was adopted.

Rather than continue down that path, Appellant respectfully suggests that this Court should, consistent with the understanding of the drafters of the constitution and the voters who approved it, reaffirm that article I, section 13's ban on retrospective laws is limited to civil rights and remedies, and that it does not apply to criminal statutes like section 566.150, RSMo.

5. Excluding criminal statutes from the ban on retrospective laws advances the purposes behind the criminal laws.

In addition to honoring the understanding of the Constitution's drafters, there are other sound reasons why the ban on retrospective laws should not extend to criminal laws and punishments. The concern

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[6] The dissent did discuss the 1875 Constitutional Convention and noted that the chief concern expressed in the debates over the prohibition against retrospective laws was to prevent the legislature from passing a retrospective law that would tread on citizens' financial or property interests. *F.R.*, 301 S.W.3d at 68-69 (Russell, J., dissenting). But the dissent did not discuss this Court's previous construction limiting the application of that prohibition to civil rights and remedies.

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motivating the ban on retrospective laws is to prevent situations where a person cannot avoid liability because all of the events necessary to impose liability have already occurred before the law's passage. Terra A. Lord, Comment, *Closing Loopholes or Creating More? Why a Narrow Application of SORNA Threatens to Defeat the Statutory Purpose*, 62 Okla. L. Rev. 273, 305 (2010). Applying the ban on retrospective laws to a civil obligation like sex offender registration comports with the purpose behind the ban because once a person is convicted of a qualifying offense there is no way to avoid the civil registration requirement.

But the same is not true of criminal statutes like section 566.150, RSMo. The concern that motivates the ban on retrospective laws is already addressed in the criminal law through the ban on *ex post facto* laws, which operates to prevent the legislature from retrospectively criminalizing conduct that was not criminal at the time it was committed. *In re R.W.*, 168 S.W.3d at 68. Unlike the civil registration requirement that was found to be retrospective in *Phillips*, a prior felony offender can avoid criminal liability under section 566.150, RSMo simply by refraining from the activities prohibited under the statute.

But this Court has broadly applied the ban on retrospective laws to invalidate statutes that impose criminal liability for activity that occurs after the statute's effective date. *R.L.*, 245 S.W.3d at 236, 237; *F.R.*, 301 S.W.3d at

65-66. Applying the ban on retrospective laws in that manner unduly restricts the legislature's ability to enact legislation that furthers the purpose of the criminal laws, which is "to protect and vindicate the interests of the public as a whole, to punish the offender and deter others." *Kansas City v. Keene Corp.*, 855 S.W.2d 360, 378 (Mo. banc 1993). In enacting laws to fulfill that purpose, the legislature is free to recognize degrees of harm. *State ex rel. Sweezer v. Green*, 360 Mo. 1249, 1255, 232 S.W.2d 897, 901 (1950), *overruled on other grounds by*, *State ex rel. North v. Kirtley*, 327 S.W.2d 166, 167 ((Mo. banc 1959). The legislature is entitled to determine that sexual crimes against children are so serious that any level of recidivism is unacceptable and that affirmative steps aimed at deterring reoffending are necessary. *See id.* (legislature is entitled to exercise its police power by extending statutes to cases where it deems the need to be greatest and the evil most apparent). The wisdom of that determination is not subject to judicial second-guessing. *Id.* Section 566.150, RSMo seeks to prevent future harm by providing a deterrent that will keep offenders with a history of preying on children away from areas that are frequented by large numbers of children and that have been targeted in the past by pedophiles seeking victims, in this case public parks and public swimming pools.[7]

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[7] *See, e.g., State v. Parker*, 890 S.W.2d 312, 314 (Mo. App. S.D.

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The legislature's duty to promote public safety requires it to do more than just punish people who commit crimes. It also requires the enactment of laws designed to prevent crimes from happening in the first place. That duty is thwarted if the legislature cannot use a person's prior criminal history

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1994) (defendant abducted 13, 11, and 10 year old girls in public park and molested two of the girls in park bathroom); *State v. Young*, 801 S.W.2d 378, 379 (Mo. App. E.D. 1990) (defendant attempted to sodomize nine-year-old girl in restroom of public park); *State v. Grady*, 649 S.W.2d 240, 242 (Mo. App. E.D. 1983) (defendant forced nine-year-old boy into nearby park and sodomized him); *State v. Mathews*, 328 S.W.2d 642, 643 (Mo. 1959) (defendant approached eleven-year-old girl at public swimming pool and molested her). *See also State v. Pribble*, 285 S.W.3d 310, 312-13 (Mo. banc 2009) *and State v. Wadsworth*, 203 S.W.3d 825, 830 (Mo. App. S.D. 2006). In both cases the defendant drove to a public park for an arranged meeting to engage in sexual acts with a person who he thought was a young teenage girl that he had corresponded with over the internet, but who was actually an undercover police officer. The cases cited in this footnote by no means represent a comprehensive listing of cases involving actual or intended sexual assaults against children in public parks or swimming pools, but are merely illustrative.

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to fix that person's status under a statute prohibiting activity that is reasonably seen as increasing the risk of that person committing future crimes. Extending the ban on retrospective laws to criminal statutes cripples the legislature's ability to assess degrees of harm and take reasonable steps to decrease those risks. The concern over retrospective application of criminal statutes is adequately addressed by the prohibition against *ex post facto* laws. This Court should therefore reaffirm the long-standing construction placed on article I, section 13 and uphold the judgment entered against Appellant.

6. Section 566.150, RSMo is not retrospective even if article I, section 13 applies to criminal laws.

Even if the Court determines that the ban on laws retrospective in their operation extends to criminal laws, section 566.150, RSMo, does not violate that restriction. The statute does not attempt to punish or adjudicate behavior that occurred prior to its effective date. *Jerry-Russell Bliss, Inc. v. Hazardous Waste Mgmt. Comm'n*, 702 S.W.2d 77, 81 (Mo. banc 1986). It instead uses a person's prior convictions for felony offenses to fix that person's status as one who is subject to the statutory restrictions and is liable for knowingly violating those restrictions. *Sweezer*, 360 Mo. at 1255, 232 S.W.2d at 901. That is something that the ban on retrospective laws permits. *Id.*; *Phillips*, 194 S.W.3d at 851. In *Phillips* this Court suggested that prior

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criminal convictions could be used to bar certain future conduct by the offender. *Id.* at 852. That is precisely what section 566.150, RSMo does. The statute should thus be upheld as constitutional as applied to Appellant.

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CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

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 6,898 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 4th day of April, 2013, to:

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