

IN THE SUPREME COURT OF MISSOURI

APPEAL NUMBER SC99714

GARY NELSON FORD

Appellant

v.

**COL. JON BELMAR, CHIEF OF POLICE,
AS CHIEF LAW ENFORCEMENT OFFICER
OF ST. LOUIS COUNTY, PURSUANT TO
COUNTY CHARTER,**

AND,

MISSOURI STATE HIGHWAY PATROL,

AND,

**JIM BUCKLES, SHERIFF OF ST. LOUIS
COUNTY, AS "CHIEF LAW ENFORCEMENT
OFFICIAL" AS DEFINED BY RSMO 589.404(3),**

Respondents

**APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, MISSOURI
DIVISION NUMBER 19
THE HONORABLE VIRGINIA LAY**

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal of a circuit court judgment entered by the Honorable Virginia Lay, Division 19, St. Louis County Circuit Court. The judgment denied Appellant's Petition for Removal from the Sexual Offender Registry pursuant to Section 589.401 RSMo .

This appeal does not involve the validity of a treaty or a statute of the United States, a statute or provision of the Constitution of this state or title to any state office, nor is it a case in which the punishment of death has been imposed. As provided in Article V, Section 3 and 15 of the Missouri Constitution, as amended, the Missouri Court of Appeals, Eastern District, had jurisdiction to hear the direct appeal in this matter from trial court's judgment.

After the Eastern District Court of Appeals issued its opinion reversing the trial court's judgment, the Respondents filed a timely Motion for Rehearing and Application for Transfer in the Eastern District Court of Appeals, both of which were denied. The Respondents then filed a timely Application for Transfer in this Court under Rule 83.04. The Court sustained that application and transferred this case.

Therefore, under Mo. Const. Art V, §10, which authorizes this Court to transfer a case from the court of appeals "before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining the existing law, or pursuant to Supreme Court Rule," this Court has jurisdiction.

STATEMENT OF FACTS

Appellant appeals the denial of his Petition for Removal from the Sexual Offender Registry Pursuant to Section 589.401 RSMo.

On January 30, 2004, Appellant received a Suspended Execution of Sentence (SES) on three Class A misdemeanor counts of Child Molestation in the Second Degree, in St. Louis County (Tr p 4, L 12-13; Tr p6, L 9-10). Appellant then successfully completed his period of probation (Tr p 9, L 12-3).

On 12/23/2018, Petitioner filed his Petition for Removal from the Sexual Offender Registry, thereby requesting that his name be removed from the Sex Offender Registry and that he be released from his statutory obligation from future registration, pursuant to Section 589.401 RSMo (Tr P 4, L 22-25) (LF Doc No. 2) (App A 11-15).

Appellant's Petition was set for hearing and, at trial, the trial court heard evidence that Petitioner was required to register as a sexual offender due to the conviction and that Petitioner did, in fact, timely register (Tr P4, L 17-21). Appellant always maintained his registration (Tr P 8, L 5-10). Petitioner was never subsequently charged with any crime. Appellant successfully completed his term of probation and his required Sexual Offender Program (Tr P 8 L25-P9, L21). The court received un-controverted evidence that Appellant is not a potential threat to public safety (Tr P 9, L 22-24).

Respondent's evidence at trial was limited to confirmation that, on the date of the offense, the victim was a minor (Tr P 12, L 21-22).

Child Molestation in the Second Degree is a "Tier 1 Offense", as defined by Section 589.414 RSMo. (Tr P 6, L 4-8) (Section 589.414.5(n) RSMo) (App A 16-23) . There is no dispute by the parties that Appellant presented the statutorily required evidence to the court as set forth in Section 589.401 RSMo. Rather, Respondent's contention is that Section 589.401 RSMo does not authorize the court to grant Appellant's Petition since Respondent asserts, and the trial court determined, that RSMo 589.400 et. seq. mandates that Appellant has a lifetime registration requirement. (See, Trial Court Order and Judgment, LF Doc No. 11, p 2; App A 3; and see TR p 15, L2-8 and Respondents Response to Petitioner's Motion for New Trial - LF doc 19, p1).

On May 20, 2021, the trial court entered its judgment denying Appellant's Petition for Removal from the Sexual Offender Registry, ruling that, "the way the statute is drafted dictates that 'an offender is subject to a lifetime registration obligation under State law, if he or she was ever required to register under federal law' ... Petitioner's requirement to register under SORNA results in a required lifetime registration in the State of Missouri. Thus, Petitioner is prohibited from seeking relief under 589.401." (see Trial Court Order and Judgment, LF Doc No. 11, p 2; App A-3 - internal citations omitted).

Appellant subsequently timely filed his Motion for New Trial and Motion to Re-Consider Judgment. The trial court issued its Order in favor of Respondent

and denying Petitioner's post-trial motion on September 2, 2021 (LF Doc No. 21; App A-4).

The appeal to the Eastern District Court of Appeals followed, whereupon, the Eastern District entered its Opinion reversing the trial court's judgment, with orders that the case be "remanded to the trial court with directions to grant Petitioner's Petition for Removal and order his name removed from the registry without further delay.) (See, Eastern District Opinion, ED109958, entered June 7, 2022).

The appeal in this Court follows, pursuant to this Court's Order accepting transfer.

POINTS RELIED ON

- I. **THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT’S PETITION FOR REMOVAL FROM THE SEXUAL OFFENDER REGISTRY DUE TO ITS DETERMINATION AND SPECIFIC FINDING THAT “AN OFFENDER IS SUBJECT TO A LIFETIME REGISTRATION UNDER STATE LAW, IF HE OR SHE WAS EVER REQUIRED TO REGISTER UNDER FEDERAL LAW”, THEREBY DENYING APPELLANT’S PETITION, BECAUSE THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW AS SET FORTH IN RSMO §589.400 AND §589.401, ET. SEQ., IN THAT THE 2018 AMENDMENTS TO §589.400, ET SEQ AND, SPECIFICALLY, NEWLY ENACTED §589.401, RSMO, PROVIDES THE LEGISLATIVE RIGHT OF A TIER I OFFENDER TO PETITION THE CIRCUIT COURT FOR REMOVAL FROM THE SEXUAL OFFENDER REGISTRY**

Danny Joe Dixon v. MSHP, et al., 583 S.W.3d 521 (Mo. App. WD 2019)

Wilkerson v. State, 533 S.W.3d 755 (Mo. App. W.D. 2017)

Selig v. Russel, 604 S.W.3d 817 (Mo. App. W.D. 2020)

Hixson v. MSHP, et al., 611 S.W. 3d 923 (Mo. App. 2020)

Section 589.400 RSMo

Section 589.401 RSMo

Section 589.414 RSMo

Section 589.400-589.425

II. THE TRIAL COURT ERRED IN ITS RELIANCE ON THE SPECIFIC AUTHORITY REFERENCED IN ITS JUDGMENT BECAUSE SUCH AUTHORITY IS INAPPLICABLE TO THE CASE AT BAR IN THAT THE CASE LAW CITED WAS EITHER OUTDATED AND INAPPLICABLE DUE TO THE STATUTORY AMENDMENT OF SECTION 589.400 ET SEQ., RSMO, OR INVOLVED ISSUES SEPARATE AND INAPPLICABLE TO THE ISSUES IN THIS CASE

Wilkerson v. State, 533 S.W.3d 755 (Mo. App. W.D. 2017)

Selig v. Russel, 604 S.W.3d 817 (Mo. App. W.D. 2020)

Hixson v. MSHP, et al., 611 S.W. 3d 923 (Mo. App. 2020)

Edward Bacon v. MSHP, et al, No ED107919 (MoApp ED 2020).

Section 589.400 RSMo

Section 589.401 RSMo

Section 589.414 RSMo

Section 589.400-589.425

III. **EVEN ASSUMING, ARGUENDO, THAT THIS COURT INTERPRETS THE WESTERN DISTRICT’S SELIG OPINION AS HOLDING THAT A TIER I OFFENDER IS INELIGIBLE FOR REMOVAL FROM THE SEX OFFENDER REGISTRY DURING HIS LIFETIME, THE TRIAL COURT ERRED BY ADHERING TO THE STATUTORY CONSTRUCTION OFFERED BY THE WESTERN DISTRICT, AS OPPOSED TO THE EASTERN DISTRICT, BECAUSE NEITHER THE TRIAL COURT NOR THE EASTERN DISTRICT COURT OF APPEALS NOR THIS COURT IS BOUND BY FIRST IMPRESSION STATUTORY CONSTRUCTION OFFERED BY THE WESTERN DISTRICT IN THAT EACH APPELLATE DISTRICT DETERMINES ISSUES OF STATUTORY CONSTRUCTION NOT YET ADDRESSED BY THE MISSOURI SUPREME COURT DENOVO, WITH THIS COURT THE FINAL ARBITER OF ANY SUCH CONFLICT.**

Danny Joe Dixon v. MSHP, et al., 583 S.W.3d 521 (Mo. App. WD 2019)

Selig v. Russel, 604 S.W.3d 817 (Mo. App. W.D. 2020)

Hixson v. MSHP, et al., 611 S.W. 3d 923 (Mo. App. 2020)

Doe v. Toelke, 389 S.W. 3d 165 (2012)

Section 589.400 RSMo

Section 589.401 RSMo

Section 589.414 RSMo

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ITS DENIAL OF APPELLANT’S PETITION FOR REMOVAL FROM THE SEXUAL OFFENDER REGISTRY BECAUSE THE TRIAL COURT ERRONEOUSLY DECLARED AND APPLIED THE LAW IN ITS DETERMINATION THAT “AN OFFENDER IS SUBJECT TO A LIFETIME REGISTRATION UNDER STATE LAW, IF HE OR SHE WAS EVER REQUIRED TO REGISTER UNDER FEDERAL LAW”, THEREBY DENYING APPELLANT’S PETITION, IN THAT THE 2018 AMENDMENTS TO SECTION 589.400, ET SEQ AND, SPECIFICALLY, NEWLY ENACTED SECTION 589.401, RSMO, PROVIDES THE LEGISLATIVE RIGHT OF A TIER I OFFENDER TO PETITION THE CIRCUIT COURT FOR REMOVAL FROM THE SEXUAL OFFENDER REGISTRY

STANDARD OF REVIEW

“An appellate court will reverse a judgment of a trial court when it is not supported by substantial evidence, is against the weight of evidence, or erroneously declares or applies the law.

Questions of statutory interpretation are reviewed de novo. Any time a court is called upon to apply a statute, the primary obligation is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider the words in their plain and ordinary meaning. This court interprets statutes in a way that is not hypertechnical but instead is reasonable and logical and gives meaning to the statute and the legislature's intent as reflected in the plain language of the statute at issue." *Danny Joe Dixon v. MSHP, et al.*, 583 S.W.3d 521, 523-524 (MoAppWD 2019). (Internal citations and internal quotation marks omitted).

ARGUMENT

Appellant appeals the trial court's judgment denying his Petition for Removal from the Sexual Offender Registry, filed pursuant to Section 589.401 RSMo. Section 589.401 is entitled: "Removal from Registry, Petition, Procedure." There is no dispute that Appellant was required to register with the Sexual Offender Registry as a result of his adjudication, on January 30, 2004, involving charges of Child Molestation in the Second Degree, a misdemeanor (Tr p 6, L 9-10). There is also no dispute that, as a result of the statutory classification of the offense, Appellant is statutorily identified as a Tier I offender (Section 589.414.5(1) (n) RSMo).

Section 589.401.4 RSMo provides that Petitioner's Petition was to have been dismissed in the event ten years had not yet elapsed from the date of his conviction. There is no dispute that that was not the case. Similarly, there is no dispute that Petitioner's Petition contained the statutorily required elements, as spelled out in Section 589.401(5) RSMo. There is no dispute that the appropriate parties were named as Respondent, as required by Section 589.401.6 RSMo or that appropriate notice was provided as required by Section 589.401.8 RSMo. Furthermore, there is no dispute that Appellant presented un-controverted evidence in satisfaction of the required elements set forth in Section 589.401(11) RSMo and that fingerprints were submitted to and examined by the Highway Patrol, as required by Section 589.401(12) RSMo.

Provided that Petitioner did not fail "to comply with the provisions of Sections 589.400-589.425", Section 589.401.18 RSMo removes discretion from the trial court judge and requires that the court "shall not deny the Petition" unless "the prosecuting attorney provided evidence demonstrating the petition should be denied." Here, there is no dispute that no such evidence was presented. To the contrary, the extent of the prosecuting attorney's case for the Respondents was to simply verify that the victim of this sexual offense was a minor at the time of the occurrence (a fact not in dispute). (TR p 12, L 19-23).

Apparently in deference to the prosecuting attorney's legal argument to deny the Petition on legal grounds (Tr P15, L 2-8), the trial court determined in its judgment that:

the way the statute is drafted dictates that, 'an offender is subject to a *lifetime* registration obligation under state law, if he or she was ever required to register under federal law'(citing *Wilkerson v. State*, 533 S.W.3d 755,761 (Mo. App. W.D. 2017) ... Petitioner's requirement to register under SORNA results in a required lifetime registration in the State of Missouri. Thus, Petitioner is prohibited from seeking relief under 589.401." (See, Trial Court's Judgment dated September 2, 2021 (LF Doc # 11, p2) (App A-3). (The Trial Court's other internal citations are referenced immediately below).

The trial court, in its judgment, cited as its authority: *Wilkerson v. State*, 533 S.W.3d 755, 761 (Mo. App. W.D. 2017). The trial Court's judgment also referenced *Selig v. Russel*, 604 S.W.3d 817 (Mo. App. W.D. 2020) and *Hixson v. MSHP, et. al.*, 611 S.W.3d 923 (Mo. App. 2020) in support of its legal conclusion to deny Appellant's Petition.

With due respect to the Trial Court, the trial court's reliance on *Wilkerson*, *Selig* and *Hixson* for the proposition that Missouri law requires a lifetime registration requirement for Appellant's tier I offense without the statutory right of Appellant to petition to be removed from the obligation pursuant to Section 589.401 RSMo is misplaced, as shown below.

Since *Wilkerson* was decided by the Western District prior to the enactment of the statutory amendment to Section 589.400 RSMo, et seq. in 2018, some review of the statutory history of Missouri's Sex Offender registration act (MO-SORA or SORA) and its interrelationship with the federal Sexual Offenders Registration and Notification Act (SORNA) may be of benefit in order to understand the statutory purpose behind the enactment of the 2018 amended legislation. At the time *Wilkerson* was decided, in 2017, the version of Section 589.400 RSMo then in effect provided for a much more lenient two-year time-frame after which a defendant could then petition the court to be removed from the registration requirement. (See SB 655, p 9, App A-32). As the time frame then provided by the Missouri statute (SORA) was more lenient than that of the federal statute (SORNA), the State statute actually conflicted with the federal statute since the federal statute would have required continued registration (either 10 or 15 years). Such a conflict represented not only a policy differentiation, but also served as an economic dis-incentive to Missouri since "SORNA maintains compliance of states with SORNA's registration requirements by tying federal funds with substantial compliance with the federal act." See, *Selig v. Russel*, 604 SW3d 817, 821 (MoApp WD 2020), citing 34 USC Sec. 20927(a). For a more detailed analysis of the legislative history behind the amendments to Section 589.400 RSMo and the creation of Section 589.401 RSMo, the reader is referred to *Selig*, supra, at pp 820-822 and/or *Hixson*, supra, at pp 2-5. Suffice it to say, for the purposes of this appeal, it is clear that the Missouri legislature had both a

policy and an economic incentive to legislatively align the provisions of SORA with SORNA, regarding those defendants required to register with the Sexual Offender Registry as well as the time during which they must maintain such registration prior to petitioning to be removed.

As an aid for purposes of reference, Senate Bill No. 655 is included in the Appendix at A-24. As stated in the Bill, Senate Bill 655, passed in 2018, repealed the prior Sections 589.400, 402, 403, 405, 407 and 414, and enacted in their place the new statutes: 589.400, 589.401, 589.402, 403, 404, 405, 407 and 414. As always, newly added language is bolded and omitted language is bracketed [–]. For purposes of this case, it is very important to note that Section 401 (Section 589.401 RSMo), entitled “Removal from Registry, Petition, Procedure,” is not an amended section, but rather a completely new section that did not exist prior to the 2018 adoption of SB 655.

Taking the newly adopted and/or amended sections one by one:

The Respondent’s argument, and the language of the Trial Court’s Judgment, would have this court believe that the language of Section 589.400.7 RSMo either requires or states that a lifetime registration requirement is imposed on any individual who at any time registered pursuant to federal law (SORNA). The statute does not provide that language, nor does it provide any language to even

remotely suggest such an intent. To the contrary, Section 589.400 states that “Sections 589.400-589.425 shall apply to ... “any person who is a resident of this state who ... has been or is required to register under ... federal ... law.” (See, Section 589.400.1.6 RSMo and SB 655, Section 589.400.1 and 500.400.1[(7)] **(6)** (App A 26-28).

Appellant introduced un-controverted evidence at trial that he had previously been required to register under SORNA (federal law) - there is no dispute between the parties as to that fact (Tr p10 L 18-P11 L 15). Therefore, since there is no dispute between the parties that Appellant had previously been subject to a federal registration requirement under SORNA, pursuant to the statutory language in the paragraph above, we know, from the citation referenced in the paragraph above, that RSMo Sections 589.400-589.425 are applicable to Appellant.

It is important to note at this point that within the trial court’s judgment, on the last line of page 1 of the judgment, the trial court states that “Petitioner also admitted at hearing that he is currently required to register under both state and federal law.” (LF Doc No. 11, p 1) (App A-2). That statement by the trial court is incorrect and no such admission appears at any point in the transcript. To the contrary, the oft repeated assertion by Appellant was that his federal requirement to register under SORNA had long since expired and, since he was now statutorily entitled to petition for release of his State obligation under SORA, that was the

purpose of Appellant’s Petition (see, eg, the following statement to the trial court from Petitioner’s counsel: “The point being that he is not required under federal law to be registered after 10 years. Even if it were still 15, he’s already completed his 15 also.” (Tr p 11 L 8-11). See also, the following separate transcript references that Appellant is no longer required to register under federal law: (Tr p 11 L 11-19, Tr p p 16, L 22-23, Tr p 17, L 13-16, Tr p 14, L 4-8).

Since we know from Section 589.400.7 RSMo that Sections 589.400-589.425 are applicable to Appellant, we now review those statutory sections, as enacted in 2018, to provide us the guidance as to when and how Appellant is statutorily authorized to petition the circuit court for removal of his registration requirement under SORA.

Section 589.401 RSMo which, again, was a newly enacted section not previously in existence prior to 2018, provides the statutory vehicle by which Appellant is authorized to petition for removal.

Prior to 2018, Section 589.400.3 RSMo provided that the registration requirements of Sections 589.400-589.425 were “lifetime registration requirements” (excepting circumstances set forth in subsections 1-3 of that section). That now deleted language is why case law existing prior to 2018 referenced registration requirements as “lifetime registration requirements” –

because, pursuant to the then-existing statute, that's what they were. See, e.g., *Doe v. Toelke*, 389 S.W.3d 165 (2012), the Missouri Supreme Court case serving as the authority on which *Wilkerson* relied, interpreting the then-existing statutes, and stating that Section 589.400 (as it then existed) provides that “the lifetime registration requirements of sections 589.400 to 589.425 shall apply to any person who meets certain conditions.” *Doe v. Toelke*, at 167. But, again, effective 2018, the “lifetime registration” language in 589.400.3 was abrogated. As the removed and amended language of 589.400.3 is critical to this appeal, the language of SB No. 655 showing the bracketed deleted language and the bolded added language, effective 2018, is set forth below:

The registration requirements of sections 589.400 through 589.425 [are lifetime registration requirements] **shall be as provided under subsection 4 of this section...** See, SB 655 amending Section 589.400.3 RSMo, (Appendix A-29)

The newly enacted Subsection 4 of Section 589.400.1 RSMo states:

4. The registration requirements shall be as follows:
 - (1) Fifteen years if the offender is a tier I sex offender as provided under section 589.414;
 - (2) Twenty-Five years if the offender is a tier II sex offender as provided under section 589.414; or,
 - (3) The life of the offender if the offender is a tier III sex offender.
- Section 489.400.4 (1)-(3) RSMo.

As previously noted, there is no dispute in this case that the Appellant is a type I sex offender and, therefore, his registration requirement under Section 489.400.4(1) RSMo is fifteen years – not the lifetime registration requirement as suggested by the circuit court in its judgment.

Although not particularly germane to this appeal since more than fifteen years had expired since Appellant filed his Petition, it might be noted that Section 589.400.5 RSMo is also a completely new subsection, effective 2018, and provides for the means by which the registration requirement referenced in subsection (4) shall be reduced (in the case of a Tier I offender, such as Appellant, the reduction is five years), thereby authorizing removal at ten years from adjudication, rather than 15 years. (Section 589.400.5.(3)(a) RSMo). Again, the language and terms of the statutorily allowed reduction of the time necessary to remain on the registration after the period of “good behavior” was intended to mirror the language and provisions of the federal statute, thereby bringing Missouri directly in line with the federal provisions (*Selig*, P 821-822, L3). See also, 34 U.S.C. Section 20915 (App A-51). Additionally, for reference in order to avoid confusion from earlier federal SORNA case cites, see also included in the Appendix the chart/notice of the reclassification of SORNA from Title 42 to Title 34, effective September 21, 2017. The language of the statute was not changed. (See, App A-53).

In sum, therefore, pursuant to Sections 589.400 and 589.401 RSMo, Appellant was statutorily authorized to file his Petition requesting removal from the sexual offender registry when he filed it and, upon pleading and proving all statutory elements, without either objection or contradiction by Respondents, the trial court was obligated to grant Petitioner the relief as prayed, pursuant to the mandatory language of Section 589.401.18 RSMo, removing any discretion from the Trial Court once the statutory elements are satisfied.

POINT II

THE TRIAL COURT ERRED IN ITS RELIANCE ON THE SPECIFIC AUTHORITY REFERENCED IN ITS JUDGMENT BECAUSE SUCH AUTHORITY IS INAPPLICABLE TO THE CASE AT BAR IN THAT THE CASE LAW CITED WAS EITHER OUT-DATED AND INAPPLICABLE DUE TO THE 2018 STATUTORY AMENDMENT OF SECTION 589.400 ET SEQ., RSMO, OR INVOLVED ISSUES SEPARATE AND INAPPLICABLE TO THE ISSUES IN THIS CASE

STANDARD OF REVIEW

“An appellate court will reverse a judgment of a trial court when it is not supported by substantial evidence, is against the weight of evidence, or erroneously declares or applies the law.

Questions of statutory interpretation are reviewed de novo. Any time a court is called upon to apply a statute, the primary obligation is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider the words in their plain and ordinary meaning. This court interprets statutes in a way that is not hypertechnical but instead is reasonable and logical and gives meaning to the statute and the legislature’s intent as reflected in the plain language of the statute at issue.” *Danny Joe Dixon v. MSHP, et al.*, 583

S.W.3d 521, 523-524 (MoAppWD 2019). (Internal citations and internal quotation marks omitted).

ARGUMENT

The trial court relies on and cites directly to *Wilkerson v. State* in its judgment (*Wilkerson v. State*, 533 S.W.3d 755 (Mo. App. W.D. 2017) . Specifically, the court, in its judgment, states, “The way the statute is drafted dictates that ‘an offender is subject to a *lifetime* registration obligation under state law, if he or she was ever required to register under federal law,’” citing *Wilkerson*, at 761. (See, LF Doc. No. 11, p 2). Indeed, *Wilkerson* used that language in its opinion. But, as stated in detail in Point I above, the statutory language of 589.400.3 referencing “lifetime registration requirements”, in existence when *Wilkerson* was decided in 2017, was abrogated the following year by the Missouri legislature, with new statutory language that, instead, specifically provided for a fifteen year registration requirement for tier I offenders such as Appellant, rather than the previously existing lifetime registration requirement. The new statutory section, instead of a lifetime registration requirement, specifically provided for a registration requirement of only 15 years (or 10 if the qualifying reduction factors are satisfied). See, argument in Point I above; see also, Sections 589.400 and 589.401 RSMo.

As noted in Point I above, the trial court's judgment, in the second sentence of the third paragraph, states the following incorrect factual conclusion: After correctly stating that "Petitioner testified that he is a Tier 1 offender under both state and federal law", the trial court went further to incorrectly state, "Petitioner also admitted at hearing that he is *currently* required to register under both state and federal law." (emphasis added). (LF Doc No. 11, P 2) (App A-2). There is absolutely no support in the record for that conclusion made by the trial court. To the contrary, Petitioner went to great lengths to point out, through counsel, that Petitioner's obligation to register under federal law (SORNA), had long since expired. In Petitioner's case, due to his clean record, SORNA required he register under federal law for a period of only 10 years. (See, 34 USC Sec. 20915 (a) and (b), App A-51). That fact was asserted on the record at numerous instances: eg, the following statement to the trial court from Petitioner's counsel: "The point being that he is not required under federal law to be registered after 10 years. Even if it were still 15, he's already completed his 15 also." (Tr p 11 L 8-11). See also, Tr P 11 L 11-19, Tr P 16, L 22-23, Tr P 17, L 13-16, Tr 14, L 4-8). Additionally, the trial court was specifically directed to and acknowledged 34 USC 20915 (Tr P 10, L 16-24) (App A-51).

After incorrectly stating the factual assertion referenced above, the trial court, in its judgment, set forth the following paragraph that serves as the substance of the trial court's denial of Petitioner's Petition for Removal:

Therefore, due to his federal registration requirement, Petitioner is ineligible from removal from the sex offender registry. The way the statute is drafted dictates that “an offender is subject to a *lifetime* registration obligation under State law, if he or she was ever required to register under federal law.” Wilkerson at 761 (MoApp WD 2017) (emphasis in original). This is true even under the current “tiered” system enacted by the legislature in 2018. Selig v. Russel, 604 SW3d 817, 824-25 (MoApp WD 2020), transfer denied (May 28, 2020). *See also* Hixson v. MSHP et al., 611 SW3d 923 (MoApp 2020). Petitioner’s requirement to register under SORNA results in required lifetime registration in the State of Missouri. Thus. Petitioner is prohibited from seeking relief under 589.401.” (Trial Court Judgment entered May 20, 2021, LF Doc #11, p 2).

With due respect to the trial court, nothing in the above referenced quotation from the trial court’s judgment is supported by either the facts of this case nor by current law.

Focus first on the second sentence quoted above, “The way the statute is drafted dictates that “an offender is subject to a *lifetime* registration obligation under State law, if he or she was ever required to register under federal law.” As noted in the trial court’s judgment, the trial court was quoting from language contained in Wilkerson (*Wilkerson* at 761 (MoAppWD2017)).

Wilkerson, however, in its 2017 opinion, in support of its ruling, recognized the then existing law that provided that, “Subject to certain exceptions, the registration

requirements imposed by Missouri's sex-offender registration statute 'are lifetime registration requirements' 589.400.3".

That quotation from 589.400.3 was correct as the statutory law existed in 2017 (see, see SB 655, P 6, L 86-88 at App A-29).

But, as referenced in Point I above, the statutory scheme and language of SORA was altered, effective 2018, to bring the state in line with the federal provisions of SORNA. Specifically, instead of providing for a *lifetime* registration requirement, as was the case under the prior statutory language of 589.400.3, the statute now states that the registration requirements "shall be as provided under subsection 4 of this section..."(see App A-29 (SB 655 p6 L 86-88)) Again, to be perfectly clear, prior to 2018, the statutory law relied upon by *Wilkerson* (and by *Toelke*, supra), stated, "The registration requirements of Sections 589.400-589.425 are lifetime registration requirements." That language was abrogated in the 2018 amendment to Section 589.400 RSMo. Instead of a lifetime registration requirement, since 2018, subsection 4 of 589.400 now provides, in applicable part, "The registration requirements shall be as follows: Fifteen years if the offender is a Tier I offender as provided under section 589.414." As referenced above, there is no dispute in this case that Appellant is a tier I offender. In fact, the only defendants now statutorily obligated to a lifetime registration are tier III sex offenders (see SB 655, p 6, L 97-103 - App A-29).

After incorrectly stating that “the way the statute is drafted dictates that offender is subject to a *lifetime* registration obligation under state law”, the trial court, in its judgment, follows with a second incorrect legal conclusion , asserting that, “this is true even under the current “tiered system enacted by the legislature in 2018.” As legal authority for this bold statement, the trial court, without further explanation, simply cites to: Selig v. Russel, 604 SW3d 817, 824-825 (MoApp WD 2020), transfer denied (May 28, 2020), and Hixson v. MSHP et al., 611 SW3d 923 (Mo App 2020).

While true that the quoted language in the paragraph above was lifted from *Selig v. Russell*, the context in which the language was used in *Selig* and the facts of that case are totally inapplicable to the case at bar. *Selig v. Russell* was not a case that dealt with a Petition for Removal from the Sexual Offender Registry, but rather a case wherein the Petitioner, who never registered, was seeking an *exemption* from registration, under Section 589.400.9(2)(c) RSMo. (see, *Selig v. Russell*, 604 SW3d 817,819 (MoAppWD 2020). “Selig asserts that pursuant to section 589.400.9(2)(c) he was exempt from registering under the Missouri Sex Offender Registry.” (*Id*, at 819).

As stated above, the trial court’s reliance on *Selig* for its position that Appellant remains subject to a statutory lifetime ban on registration even after the 2018 statutory amendments is mis-placed, since *Selig* dealt not with release from

registration after the appropriate period of registration served, under Section 589.401 RSMo, but rather with a request for an exemption from registration, having never served any period of registration, under Section 589.400 RSMo. As stated more fully in Point I, the legislature, in 2018, devoted an entirely to new statutory section to *removal* rights and procedure (Section 589.401, RSMo). Conversely, statutory rights as to *exemption* are set out in Section 589.400 RSMo. Any reading of *Selig* that suggests that the reasoning of *Selig* should be applied to a lifetime registration requirement rather than be limited to the exemption issue then before the court should be treated, at best, as inapplicable and unsupported dicta. In the case at bar, unlike *Selig*, Appellant was required to register, both under SORNA and SORA, for a period of 10 years (shortened from the 15 year period that would otherwise be applicable because of his “good record”). Unlike *Selig*, Appellant acknowledges his pre-existing duty to register, as provided in Section 589.400 RSMo, did register, and now has petitioned for his statutory right to removal from the registry pursuant to Section 589.401 RSMo. Apples and oranges. The Trial Court erred in extrapolating language from the Western District’s *Selig* opinion, dealing with a separate question involving exemption from registration, in support of its judgment denying appellant his statutory right to petition for removal from the registry once the mandated time under both SORA and SORNA had expired (34 USC 20915(a) and(b), and Section 589.401 RSMo).

The Trial Court's reliance on *Hixson v. MSHP et al.*, is similarly misplaced. *Hixson* was a 2020 Eastern District case that correctly provided that:

“On August 28, 2018, the Missouri General Assembly amended SORA to distinguish between offenses based on their severity. The 2018 amendments divide sexual offenders into three tiers based upon the severity of their offenses...The amendments align SORA more closely with the federal Sex Offender Notification Act (SORNA). As noted above, to account for the fact that newly classified tiers I and II offenders no longer are required to remain on the registry for their lifetimes, SORA allows those offenders to seek removal...” *Hixson v. MSHP et al.*, 611 S.W.3d 923, 925-926 (Mo. App. ED 2020) Also, see Sections 589.400.10 and 589.401.

The above quoted language from *Hixson*, a case relied on by the trial court in its judgment, is dispositive of the issue in this case and is in favor of Appellant. The above quoted language directly refutes the proposition that the trial court's judgment attempts to assert.

After correctly recounting the current state of Missouri's statutory amendments (above), the *Hixson* opinion then addressed the issue in *that* case: “The question on appeal is whether a *tier III offender*, whose offense had been adjudicated in another state and who has been removed from that state's registry, may petition under SORA for removal from Missouri's registry.” *Hixson v. MSHP, et. al.*, 611 S.W.3d 923, 924 (Mo. App. 2020) (emphasis added).

Predictably, the Eastern District, in *Hixson*, then went on to point out that

Missouri's statute still requires the more serious tier III offenders to register for a lifetime and that this statutory provision is not altered by the fact that the Petitioner may have initially been adjudicated in Illinois and his Illinois obligation to register previously removed due to Illinois' more lenient statutory obligations on such offenders. The Eastern District, in *Hixson*, correctly pointed out that, "the plain language of subsections 589.400.10 and 589.401.3 expressly prohibit an adult tier III offender from petitioning for removal under Section 589.401. There is no dispute that Appellant is an adult Tier III offender under SORA..." *Hixson*, at 927. The opinion goes on to correctly state that,

Section 589.400.10 plainly states that only tier I, tier II and adjudicated delinquent tier III offenders can petition for removal under Section 589.401. Subsection 589.401.3 plainly prohibits adult tier III offenders from petitioning from removal..." See *Hixson*, at 927.

Without intending to beat the proverbial dead horse, there is supporting caselaw out of the Eastern District, after the 2018 legislative changes, in addition to *Hixson*, granting removal from the Sexual Offender registry and, thereby, supporting the very clear statutory observation that tier I offenders are now statutorily authorized to petition for removal from the registry under Section 589.401 RSMo. See, eg, ...*Eric Bacon v. MSHP et al.*, 602 S.W.3d 245 at 247,251 (MoApp ED 2020):

Until recently, SORA treated all sexual offenses the same and imposed on all offenders a lifetime registration requirement , with limited exceptions. Effective August 28, 2018, the legislature restructured SORA. Sexual offenders are now divided into three tiers based on the severity of the offense, and each tier has different registration periods ranging from fifteen years to the offender's lifetime... those adjudicated for a Tier I offense are required to register for fifteen years...the registration period can be reduced to ten years if the offender maintains a clean record...

Petitioner is a Tier I offender, it has been at least ten years since the date he was required to register for his most recent offense and it is undisputed that Petitioner has complied with the other requirements for filing the petition and satisfied the other conditions for removal set out in Section 589.401. Thus, the court did not err in granting his petition and removing him from the sex offender registry. *Eric Edward Bacon v. MSHP, et al*, 602 S.W.3d 245 at 247,251 (MoApp ED 2020).

In sum, for the reasons set forth above, the trial court's reliance on the holding in *Wilkerson* is misplaced due to the 2018 statutory amendment that has since taken place; the trial court's reliance on *Selig* is misplaced due to the fact that the issue in *Selig* did not involve *removal* from the Sexual Offender Registry under 589.401 but, rather, the question as to whether Selig was *exempt* from registration under 589.400; and the trial court's reliance on *Hixson* is misplaced since the *Hixson* case dealt with a separate issue (Petitioner's requested removal from registration as a more serious tier III offender) but, nevertheless, in so doing, *Hixson* reviewed Missouri's current statutory amendments and acknowledged that tier I offenders,

such as Appellant, are now allowed to file their Petition for Removal from the registry under Sec 589.401 and are no longer subject to lifetime registration requirements. (See, *Wilkerson*, *Selig* and *Hixson*, supra).

POINT III

EVEN ASSUMING, ARGUENDO, THAT THIS COURT INTERPRETS THE WESTERN DISTRICT'S SELIG OPINION AS HOLDING THAT A TIER I OFFENDER IS INELIGIBLE FOR REMOVAL FROM THE SEX OFFENDER REGISTRY DURING HIS LIFETIME, THE TRIAL COURT ERRED BY ADHERING TO THE STATUTORY CONSTRUCTION OFFERED BY THE WESTERN DISTRICT, AS OPPOSED TO THE EASTERN DISTRICT, BECAUSE NEITHER THE TRIAL COURT NOR THE EASTERN DISTRICT COURT OF APPEALS NOR THIS COURT IS BOUND BY FIRST IMPRESSION STATUTORY CONSTRUCTION OFFERED BY THE WESTERN DISTRICT IN THAT EACH APPELLATE DISTRICT DETERMINES ISSUES OF STATUTORY CONSTRUCTION NOT YET ADDRESSED BY THE MISSOURI SUPREME COURT DENOVO, WITH THIS COURT THE FINAL ARBITER OF ANY SUCH CONFLICT.

STANDARD OF REVIEW

“An appellate court will reverse a judgment of a trial court when it is not supported by substantial evidence, is against the weight of evidence, or erroneously declares or applies the law.

Questions of statutory interpretation are reviewed de novo. Any time a court is called upon to apply a statute, the primary obligation is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider the words in their plain and ordinary meaning. This court interprets statutes in a way that is not hypertechnical but instead is reasonable and logical and gives meaning to the statute and the legislature’s intent as reflected in the plain language of the statute at issue.” *Danny Joe Dixon v. MSHP, et al.*, 583 S.W.3d 521, 523-524 (MoAppWD 2019). (Internal citations and internal quotation marks omitted).

ARGUMENT

As discussed at length in Points I and II above, Appellant submits that the trial court’s reliance on *Selig v. Russell* for the proposition that, even after the 2018 statutory amendments, a Tier I sexual offender is precluded from successfully petitioning for removal from the sex Offender Registry during his lifetime is misplaced since *Selig* dealt with a completely separate issue and statute (the question

of exception from registering under 589.400, rather than removal from the registry under 589.401).

The fact that the Western District, after *Selig*, considered Section 589.401 RSMo and determined that a Tier I sexual offender *was* eligible for removal from the sex offender registry after 10 years certainly appears to put to rest any argument that the Western District interprets 589.400 and 589.401 as requiring a lifetime registration without the opportunity for removal:

Under SORA, Dixon is a tier I sexual offender and was therefore eligible to petition for removal from the sex offender registry once more than ten years had elapsed since registration was imposed. Dixon's 2018 removal petition was timely, given that he was first subject to a registration obligation in 2003. Because the Highway Patrol does not contend that Dixon otherwise failed to satisfy the statutory requirements for removal from the registry, the judgment of the circuit court is affirmed. *Danny Joe Dixon v. MSHP*, WD82346, pp 12-13 (MoApp WD 2019).

Similarly, in a more recent Western District case, the Western District, in *J.B. v. Paul Vescovo, III, et al.*, made clear its recognition that the 2018 legislative change provides that only tier III offenders remain subject to lifetime registration:

Missouri's Sex Offender Registration Act ("SORA"), section 589.400 et seq., effective January 1, 1995, originally imposed

lifetime registration requirements for qualifying offenses with limited exceptions. *Dixon v. Missouri State Highway Patrol*, 583 S.W. 3d 521,525 (Mo. App. W.D. 2019). In 2018, the General Assembly amended SORA and “for the first time divided sexual offenders into three ‘tiers,’ based on the severity of the offenses of which they were convicted.” *Id.*; section 589.414. “The 2018 amendments specified that only offenders in the highest tier - tier III - would be subject to a lifetime registration obligation.” *id.* Sexual offenders in tiers I and II are eligible to petition for removal from the registry after fifteen and twenty-five years, respectively. *J.B. v. Paul C. Vescovo, III, et al.*, WD84010 (August 31, 2021), pp 2-3.

Appellant acknowledges, however, that the *Selig* opinion, while dealing with the separate issue involved in that case, used language that may have confused readers into assuming its rationale included cases not only involving the issue of exemption from registering, but also spilled over into cases involving removal from the sexual offender registry. Despite the fact that *Dixon*, involving removal, had already been decided prior to *Selig*, and *Selig* neither overruled nor criticized *Dixon*, and despite the fact that *J.B. v. Paul Vescovo, III, et al.* more recently followed and cited to *Dixon*, to the extent that this Court reads *Selig* to apply also to cases involving removal and, thereby, interprets *Selig* as holding that, despite Section 589.401 RSMo, a tier 1 offender is never eligible for removal from the Sexual Offender Registry but, rather, must register for his or her lifetime,

Appellant suggests that such an interpretation need not be followed and should not be followed for the following reasons.

First, since the issue involved in *Selig* involved one of exemption from registration, under Section 589.400 RSMo, rather than removal from the registry under Section 589.401 RSMo, such language, even if intended, would constitute mere dicta since the issue of removal would have neither been before the court nor briefed by the parties. That Western District dicta was not binding on the trial court in St. Louis County and, needless to say, dicta is not binding on this court, particularly unsupported dicta from the Western District.

Secondly, even if the issue involved in *Selig* involved the statutory interpretation of 589.401 (which was not the case), each appellate district construes issues of statutory construction not yet addressed by the Missouri Supreme Court, *denovo*, without deference to prior rulings of statutory construction from either of the other two districts.

The interpretation of a statute is a question of law and appellate review is *de novo*. *Barker v. Barker*, 98 SW3d 532, 534 (Mo banc 2003). The primary rule in statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning. *State ex rel. Riordan v. Dierker*, 956 S.W. 2d 258,260 (Mo. banc 1997).
Nelson v. Crane, 187 SW 3d 868, 869-870 (2006).

The Missouri Supreme Court, of course, is the final arbiter of any such dispute of statutory construction actually deemed to exist.

In our case, using the normal rules of statutory construction, both the intent of the legislature and the plain meaning of the words used in the newly created 589.401 are perfectly clear. As referenced in Point I above, even the title of 589.401 (“Removal from Registry, Petition, Procedure”) removes any doubt as to the intended content of the section. Similarly, in creating the three tier designations and reflecting the time period by which an offender may petition to be removed from the registry, consistent with the federal provisions of SORNA, the plain meaning of the verbiage used is both clear and consistent with the intent.

CONCLUSION

WHEREFORE, Appellant respectfully requests that this Court reverse the judgment of the trial court, dated May 20, 2021, and remand to the trial court with instructions to grant Petitioner’s Petition for Removal from the Sexual Offender Registry; that the trial court judgment provide that, “Petitioner’s name, Gary Nelson Ford, is to be ordered removed from the Sexual Offender Registry and that any future obligation of Petitioner to continue to register or abide by the restrictions otherwise applicable to a registrant, is hereby removed.” The trial

court's judgment shall also provide that, "pursuant to Section 589.401.16 RSMo, the Clerk shall provide a copy of this Judgment to all Respondents named herein to place Respondents on notice of this court's directive to have Petitioner removed from the Sexual Offender Registry."

Respectfully submitted,

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IN THE SUPREME COURT OF MISSOURI

GARY NELSON FORD,

Appellant,

v.

COL. JON BELMAR, CHIEF OF POLICE,
AS CHIEF LAW ENFORCEMENT OFFICER
OF ST. LOUIS COUNTY, PURSUANT TO
COUNTY CHARTER,

AND,

MISSOURI STATE HIGHWAY PATROL,

AND,

JIM BUCKLES, SHERIFF OF ST. LOUIS
COUNTY, AS "CHIEF LAW ENFORCEMENT
OFFICIAL" AS DEFINED BY RSMO 589.404(3),

Respondents.

Appeal No. SC99714

CERTIFICATION IN COMPLIANCE WITH RULE 84.06

AND CERTIFICATE OF SERVICE

Stephen R. Fleddermann, attorney for Appellant, hereby certifies that Appellant's Brief was e-filed with the Court with copy of Appellant's Brief submitted to Respondents' attorney(s) of record, as registered users of casenet, in accordance with Rule 103.08(a), this 20th day of September, 2022.

Furthermore, pursuant to Rule 84.06(c), Stephen Fleddermann certifies that Appellant's Brief contains the identification information required by Rule 55.03;

that Appellant's Brief complies with the limitations contained in Rule 84.06(b), and that Appellant's Brief does not exceed 31,000 words (contains 7,943 words).

/s/ Stephen R. Fleddermann

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Certificate of Service: Appellant's Substitute Brief e-filed with the Court with copy of the above Appellant's Substitute Brief submitted to Respondents' attorney(s) of record, as registered users of casenet, in accordance with Rule 103.08(a), this 20th day of September, 2022.

/s/ Stephen R. Fleddermann

STEPHEN R. FLEDDERMANN