No. SC99656

In the
Supreme Court of Missouri

Liana M. MacColl,

Appellant,

v.

Missouri State Highway Patrol and
Boone County, Missouri, Sheriff

Respondents.

Appeal From the Boone County Circuit Court
The Honorable Jeff Harris, Circuit Judge, Division II
Case No. 20BA-CV03298

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment by the Honorable Jeff Harris of Division II of the Circuit Court of Boone County, Missouri, granting summary judgment in favor of Respondents and denying Appellant's motion for summary judgment in her favor. The dispute involves whether the Appellant was ever required to register under federal law as a sex offender and, therefore, required to continually maintain her registration under Missouri law. Appellant submits that the Circuit Court's judgment was erroneous as a matter of law and that the pertinent facts in this case are not in dispute. Pursuant to Article V, Section 3, of the Missouri Constitution, and § 512.020(5) RSMo the Western District rendered an opinion in this case. Thereafter Appellant filed her timely request for transfer to the Supreme Court of Missouri, and on August 30, 2022, the Supreme Court sustained the application. The Supreme Court of Missouri has jurisdiction pursuant to the transfer order.

STATEMENT OF FACTS

On August 21, 1995, Appellant was charged with having "deviate sexual intercourse with an unnamed juvenile female, to whom . . . (Appellant) was not married and who then was under the age of seventeen years" in Case Number CR0195-047472M before the Circuit Court of Boone County. (L.F. Doc. #25, pp. 5-7, ¶¶ 10-11). Appellant pled guilty to the single count of the information filed against her, and was adjudicated by the Circuit Court as having committed the crime described in Section 566.090 RSMo., a Class A Misdemeanor of Sexual Misconduct. (L.F. Doc. #25, p. 7, ¶ 11). As a result of her plea and adjudication, the Circuit Court of Boone County sentenced Appellant to one year in jail but suspended that sentence and imposed upon her a period of two years of supervised probation. (L.F. Doc. #25, pp. 7-8, ¶ 12). On August 20, 1997, Appellant successfully satisfied the terms of her probation, was discharged from it, and her rights were restored. (L.F. Doc. #25, pp. 11-12, ¶ 16).

About five years after her adjudication, Appellant was advised by personnel in the office of Respondent Sheriff of Boone County that she was required to register as a sexual offender under the provisions of "SORA." (L.F. Doc. #25, p. 21). Appellant first registered as such on August 24, 2000, and has maintained this registration since then. (L.F. Doc. #25, pp. 12-14, ¶ 22).

Appellant's adjudication on August 21, 1995, was her first and only criminal offense. (L.F. Doc. #25, pp. 10-11, ¶ 15). More than twenty-seven (27) years has elapsed since the date of Appellant's adjudication. Since the date of Appellant's adjudication, Appellant: (i) has not violated any laws of the type described in Section 589.401 RSMo.;

(ii) has successfully and properly completed her probation; (iii) has complied in all respects with the orders of this Court in connection with its judgment and orders; (iv) has satisfied the judgment of this Court; (v) does not have any pending charges of any kind against her; and (vi) has complied with what she thought were her requirements under Missouri law to register as a sexual offender at all times prior to the date of Appellant's petition in this case. (L.F. Doc. #25, pp. 10-11, ¶ 15). Appellant successfully completed the required sexual offender program specified in the sentence imposed by the Circuit Court of Boone County. (L.F. Doc. #25, pp. 8-10, ¶ 14).

Appellant filed her petition to the Circuit Court of Boone County for relief from any obligation to register as a "sex offender" under both SORA and SORNA. (L.F. Doc. #2). Thereafter, and on October 7, 2020, Appellant sought leave and was allowed to file her First Amended Petition in which she sought: (1) the Trial Court's declaratory judgment that she was a Tier I offender under §589.414.5, that she did not have a prior or current obligation to register as a "sex offender" under either SORA or SORNA, and that she be deemed eligible for removal from the sex offender registry under § 489.401 RSMo.; and (2) a request for relief under §589.401 directing that she be removed from the sex offender registry and no longer be required to so register. (L.F. Doc. #9)

Appellant's first and only attempt to be relieved of any registration requirement was the filing of this case. She did not seek such relief in any earlier proceeding.

After Respondents' Answer to Appellant's Petition, Appellant filed her Motion for Summary Judgment (L.F. Doc. #11). Respondents submitted their reply to that motion by filing "Respondent's Opposition to Appellant's Motion for Summary Judgment and

Countermotion for Summary Judgment in favor of Respondents." (L.F., Doc.#21). Following the filing of affidavits, proposed uncontroverted facts, and argument, the separate motions were submitted by the Parties to the Trial Court for its ruling. (L.F., Doc. #1). Thereafter, the Trial Court entered its judgment in favor of Respondents and against Appellant. (L.F., Doc. # 34).

The Circuit Court based its judgment upon its conclusions that the following constitute the legal principles of law applicable to this case:

- That Appellant was obligated to register under the federal Jacob Wetterling Act at the time of her plea of guilty in 1995 because the offense to which she pleaded guilty was a sex offense against a minor.
- That Appellant was required to register under the Missouri Sex Offender Registration Act ("SORA") beginning with the 2000 amendments to that law that required registration by persons convicted of certain misdemeanor offenses and by any person who "has been or is required to register under federal law."
- That Appellant's obligation under federal law to register as a sex offender continued under the 2006 enactment of the Federal Sex Offender Registration and Notification Act ("SORNA") until the 15-year obligation expired in 2010.
- That Appellant did not previously request a reduction of her registration obligation during the 15-year period and is not entitled as a matter of law to retroactively request a reduction of the 15-year federal obligation to register under SORNA.
- That Appellant was required to register as a sexual offender under Section

589.400.1(7) RSMo. (2006) because she "has been or is required to register under federal law" and is not entitled to be removed from the sex offender registry. (L.F. Doc.#34, Pages 2-3).

Appellant filed a timely appeal from the Circuit Court's judgment to the Court of Appeals for the Western District of Missouri. The Western District of Missouri issued its opinion affirming the Trial Court's decision finding the Appellant had a duty to register under MO-SORA because she "has been or is required to register under…federal…law." WD84739. After Appellant's timely application for transfer or rehearing was denied by the Western District, the Appellant filed a timely application for transfer before this Court. On August 30, 2022, this Court sustained the Appellant's application for transfer.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT ERRONEOUSLY INTERPRETED THE JACOB WETTERLING ACT AS IMPOSING UPON APPELLANT AN INDEPENDENT AND SEPARATE OBLIGATION TO REGISTER AS A SEX OFFENDER IN THAT THE WETTERLING ACT ONLY IMPOSED UPON THE STATES AN OBLIGATION TO ENACT A SEX OFFENDER REGISTRATION LAW SATISFYING THE CRITERIA SPECIFIED IN THAT ACT AND WAS NOT INTENDED TO AND DOES NOT CREATE A FEDERAL OBLIGATION FOR ANY PERSON TO SO REGISTER, BUT SAID STATUTE WAS CITED BY THE TRIAL COURT IN ITS JUDGMENT AS AMONG THE REASONS FOR ITS RULING AGAINST APPELLANT.

U.S. v. Briggs, 50 U.S. 350 (1850)

Fasulo v. U.S., 272 U.S. 620, 42 S.Ct. 200, 71 L. Ed. 443 (1926)

42 U.S.C. § 14071

II. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT'S CONCLUSION THAT APPELLANT WAS REQUIRED TO REGISTER UNDER THE MISSOURI SEX OFFENDER REGISTRATION ACT ("SORA") BEGINNING WITH THE 2000 AMENDMENTS TO THAT LAW WAS ERRONEOUS AS A MATTER OF LAW IN THAT APPLYING SORA TO APPELLANT WOULD VIOLATE ARTICLE I, § 13 OF MISSOURI'S CONSTITUTION, APPELLANT WOULD HAVE BEEN A "TIER I" OFFENDER UNDER SORA, AND THE TRIAL COURT'S JUDGMENT HAS THE EFFECT OF CONVERTING THE MISDEMEANOR TO WHICH APPELLANT PLED GUILTY INTO THE EQUIVALENT OF A FELONY.

Dixon v. Missouri State Highway Patrol, 583 S.W.3d 521 (Mo. App. W.D. 2019)

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

State v. Hendricks, 944 S.W.2d 208 (Mo. banc 1997)

Carr v. Missouri Attorney General Office, 560 S.W.3d 61 (Mo. Ct. App. W.D. 2018)

III. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE OF ITS ERRONEOUS CONCLUSION THAT APPELLANT IS A PERSON WHO "HAS BEEN OR IS REQUIRED TO REGISTER UNDER FEDERAL LAW," I.E., UNDER SORNA, AND WAS REQUIRED TO REGISTER UNDER THE MISSOURI SEX OFFENDER REGISTRATION ACT ("SORA") FOR THAT REASON IN THAT APPELLANT HAD A "CLEAN RECORD" UNDER SORNA FOR MORE THAN 10 YEARS PRIOR TO THE EFFECTIVE DATE OF SORNA AND THUS APPELLANT WAS NOT REQUIRED TO REGISTER UNDER SORNA.

Petrovick v. State, 537 S.W. 3d 388 (W.D. Mo. App. 2018)

Carr v. Missouri Attorney General Office, 560 S.W.3d 61 (Mo. Ct. App. W.D. 2018)

United States v. Bass, 404 U.S. 336 (1971)

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

IV. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT ERRONEOUSLY FOUND THAT BECAUSE APPELLANT FAILED TO SEEK A SEPARATE "ALLOWANCE" OF A REDUCTION IN SORNA'S REQUIRED REGISTRATION PERIOD FROM 15 YEARS DOWN TO 10 YEARS AT SOME TIME IN THE PAST, THAT APPELLANT'S FAILURE TO DO SO FORECLOSES HER FROM SEEKING THAT "ALLOWANCE" IN THIS PROCEEDING, AND IN ITS HOLDING THAT APPELLANT IS "NOT ENTITLED AS A MATTER OF LAW TO RETROACTIVELY REQUEST A REDUCTION OF THE 15-YEAR FEDERAL OBLIGATION TO REGISTER UNDER SORNA" IN THAT SUCH CONSTRUCTION DISREGARDS THE EXPRESS LANGUAGE OF 34 USCA § 20915(b)(1) AND DENIES TO APPELLANT THE RELIEF TO WHICH SHE IS ENTITLED.

Bauer v. Transitional School District of the City of St. Louis, 111 S.W.3d 405 (Mo. banc 2003)

Anderson v. Yungkau, 329 U.S. 482 (1947)

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

State ex rel. Kauble v. Hartenbach, 216 S.W.3d 158 (Mo. banc 2007).

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT ERRONEOUSLY INTERPRETED THE JACOB WETTERLING ACT AS IMPOSING UPON APPELLANT AN INDEPENDENT AND SEPARATE OBLIGATION TO REGISTER AS A SEX OFFENDER IN THAT THE WETTERLING ACT ONLY IMPOSED UPON THE STATES AN OBLIGATION TO ENACT A SEX OFFENDER REGISTRATION LAW SATISFYING THE CRITERIA SPECIFIED IN THAT ACT AND WAS NOT INTENDED TO AND DOES NOT CREATE A FEDERAL OBLIGATION FOR ANY PERSON TO SO REGISTER, BUT SAID STATUTE WAS CITED BY THE TRIAL COURT IN ITS JUDGMENT AS AMONG THE REASONS FOR ITS RULING AGAINST APPELLANT.

The Trial Court erroneously ruled the Appellant was required to register under the Jacob Wetterling Act ("Jacob's Act") at the time her offense was committed. However, Jacob's Act only sought for states to enact their own sex offender registration act, which Missouri did under SORA. SORA did not require any misdemeanor offenders to register until amendments in 2000, which have been clearly held to not be retroactive. Thus, as more fully explained below, the Appellant had no requirement to register under Jacob's Act, or SORA.

a. <u>This Court analyzes the appeal de novo as it is an appeal from summary judgment, and the only issue is a matter of law</u>

This case was decided on Respondent's cross motion for summary judgment motion. When reviewing a case that is on appeal from summary judgment this court analyzes the case *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). Whether to grant summary judgment is purely an issue of law. *Id.* This court does not need to give any deference to the trial court's summary judgment decision. *Id.*

Summary judgment allows for a judgment on the merits of the case. *Id.* It is appropriate when there is no issue of genuine fact and the movant demonstrates it has a right to judgment as a matter of law. *See* Mo. R. Civ. Pro. 74.04. As explained below, the Appellant is entitled to a reversal of the trial court's summary judgment granted in Respondent's favor because there is no genuine issue as to the material fact, and those facts demonstrate that the Appellant is entitled to judgment as a matter of law because the Appellant has never been **required** to register as a sex offender under federal or state law.

b. <u>The Jacob Wetterling Act and the Originally Enacted MO-SORA Statute Did Not Require Appellant to Register.</u>

The Jacob Wetterling Act became a federal law on September 13, 1994. It was repealed by Congress on July 27, 2009. It required each of the states in the U.S. to establish separate state laws commanding sex offenders to register as such under the registration regimes created by these new state laws. This statute also specified the minimum criteria each state's sex offender registration law had to contain in order to comply with the Act.

The Jacob Wetterling Act begins with the words: "The Attorney General shall establish guidelines for State programs that require. . ." 42 USCA § 14071(a)(1). Thereafter, the statute recites that: "(a)n approved State registration program established under this section shall contain the following elements . . ." 42 USCA § 14071(b)(1). The statute allowed each state ". . .not more than 3 years from September 13, 1994, in which to implement this section . . ." 42 USCA § 14071(g)(1). A state which fails ". . .to implement the program described in this section shall not receive 10 percent of the funds that would otherwise be allocated to the State under section 3756 of this title." 42 USCA §14071(g)(2)(A). Nothing in the statute imposes upon Appellant (or any other person) any obligation to register. When that statute became law, only the U.S. Attorney General and each state's legislature were instructed to do anything. Presumably, a state electing <u>not</u> to enact a conforming statute would have been willing to forfeit 10% of the federal funds otherwise payable to that state as prescribed by §14071(g)(2)(A). But the Jacob Wetterling Act clearly and unambiguously left to each state whether to enact a conforming law and, upon enacting such a law, to determine what punishments would be imposed upon persons convicted of violating that state's sex offender registration law. See, e.g., 42 USCA § 14071(c): "A person required to register <u>under a State program established pursuant to this section</u> who knowingly fails to so register and keep such registration current shall be subject to criminal penalties in any State in which the person has so failed." (Emphasis added).

In spite of the clear mandates and language of the Jacob Wetterling Act, the Trial Court based its ruling against Appellant, at least in part, upon the supposed independent obligation imposed by the Jacob Wetterling Act upon Appellant to register as a sex offender even though the Jacob Wetterling Act does not specify with whom or how Appellant or anyone else would comply with this supposed mandate. If that obligation existed as the Trial Court found, then that obligation would have existed on the date of Appellant's conviction. However, no notice to Appellant or requirement of Appellant or any other alleged sex offender similar to Appellant was ever given to so register until SORA was enacted. Appellant can find no statute, precedent, or regulation in which the Jacob Wetterling Act required any person to register as a sex offender prior to 2000 amendments to SORA. Rather, Missouri's registration regime as created by SORA did not begin until after January 1, 1995, when SORA became law, and on that date and until the amendments to SORA became effective on August 28, 2000, persons convicted of misdemeanors such as Appellant's conviction were not required to register under SORA or any other statutory scheme in effect in Missouri.

Finally, this conclusion by the Trial Court is inconsistent with the very next conclusion of law stated by the Trial Court in its judgment, i.e., that Appellant ". . . was required to register under . . . <u>beginning with the 2000 amendments to . . .(SORA</u>). . ." (L.F. Doc. #34, Page 2). (Emphasis added). Indeed, Appellant has searched in vain for any other case in which a court held that the Wetterling Act mandated a separate obligation on the part of individuals to register as sex offenders who were otherwise not subject to SORA's registration requirements.

Accordingly, no authority exists for the Circuit Court's conclusion that the Jacob Wetterling Act created an independent federal obligation for Appellant to register as a sex offender as of the date of her conviction and as recited in the Circuit Court's judgment.

Instead, the Circuit Court's judgment in this regard is erroneous as a matter of law and should be reversed. *U.S. v. Briggs*, 50 U.S. 350 (1850); *Fasulo v. U.S.*, 272 U.S. 620, 42 S.Ct. 200, 71 L. Ed. 443 (1926).

II. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT'S CONCLUSION THAT APPELLANT WAS REQUIRED TO REGISTER UNDER THE MISSOURI SEX OFFENDER REGISTRATION ACT ("SORA") BEGINNING WITH THE 2000 AMENDMENTS TO THAT LAW WAS ERRONEOUS AS A MATTER OF LAW IN THAT APPLYING SORA TO APPELLANT WOULD VIOLATE ARTICLE I, § 13 OF MISSOURI'S CONSTITUTION, APPELLANT WOULD HAVE BEEN A "TIER I" OFFENDER UNDER SORA, AND THE TRIAL COURT'S JUDGMENT HAS THE EFFECT OF CONVERTING THE MISDEMEANOR TO WHICH APPELLANT PLED GUILTY INTO THE EQUIVALENT OF A FELONY.

As explained above in part I, the Jacob Wetterling Act did not impose upon Appellant a separate obligation to register as a sex offender. However, the next error committed by the Trial Court in this case was to conclude that the August 28, 2000, amendments to SORA obligated Appellant to do so. Because of erroneous advice given to her in August 2000 by personnel in the office of Respondent Sheriff of Boone County, Appellant began registering as a sex offender on August 24, 2000, and continued such registration thereafter. This appeal seeks to rectify that mistake.

a. <u>This Court analyzes the appeal de novo as it is an appeal from summary judgment, and the only issue is a matter of law</u>

This case was decided on Respondent's cross motion for summary judgment motion. When reviewing a case that is on appeal from summary judgment this court analyzes the case *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). Whether to grant summary judgment is purely an issue of law. *Id.* This court does not need to give any deference to the trial court's summary judgment decision. *Id.*

Summary judgment allows for a judgment on the merits of the case. *Id.* It is appropriate when there is no issue of genuine fact and the movant demonstrates it has a right to judgment as a matter of law. *See* Mo. R. Civ. Pro. 74.04. As explained below, the Appellant is entitled to a reversal of the trial court's summary judgment granted in Respondent's favor because there is no genuine issue as to the material fact, and those facts demonstrate that the Appellant is entitled to judgment as a matter of law because the Appellant has never been **required** to register as a sex offender under federal or state law.

b. <u>The Amendments to MO-SORA in 2000 Did Not Retro-actively Apply to the Appellant</u>

Article I, § 13 of the Missouri Constitution provides:

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

MO-SORA became effective on January 1, 1995, but did not then require registration by persons convicted of misdemeanors under Chapter 566. On August 28, 2000, "the registration scheme was amended to require registration for misdemeanor offenses under chapter 566." *Doe et al. v. Keathley*, 290 S.W.3d 719, 720 (Mo. banc 2009).

This change in the law by the state of Missouri was determined by Missouri's Supreme Court to be unconstitutional under Article I, § 13 of Missouri's Constitution as it applied to persons found guilty of prior misdemeanors. *Doe et al. v. Phillips,* 194 S.W.3d 383 (Mo. banc 2006). In the case of *Doe v. Blunt*, 225 S.W.3d 421 (Mo. banc 2007), Missouri's Supreme Court stated:

> *"In Phillips, the Court determined that a law requiring registration as a sex offender for an offense that occurred prior to the registration law's effective date was retrospective in operation in violation of Mo. Const. article I, section 13. As the Court explained, 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 (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, section.13."*

See also: *F.R. v. St. Charles County Sheriff's Dept.*, 301 S.W.3d 56 (Mo. Banc 2010).

The foregoing authorities do not discuss application of §589.400.1(7) RSMo., to Appellant, and the issues surrounding proper interpretation of § 489.400.1(7) are addressed below in parts III and IV of this brief. However, for the purposes of determining whether any other provisions of SORA apply to defeat Appellant's claims (i.e., assuming arguendo and for the purposes of the issue discussed in this portion of this brief that § 589.400.1(7) RSMo., is not applicable to Appellant), it must be concluded that she was not required to register as a sex offender under SORA because: (1) she was adjudged guilty of violating the predecessor to § 566.101 RSMo., a Class A misdemeanor; (2) SORA did not require registration by persons adjudged guilty of misdemeanors prior to August 28, 2000; and (3) Missouri's Constitution (Article I, Section 13) prevents SORA (as it was amended and effective on August 28, 2000) from being applied retroactively to Appellant. *Doe*, 225 S.W.3d 421. See also *Selig v. Russell*, 604 S.W.3d 817, 822-823 (Mo. App. W.D. 2020). Even though these authorities should dispose of Respondents' claims and refute the portion of the Trial Court's judgment based upon a supposed obligation imposed by SORA on Appellant to register solely based upon SORA alone, Appellant is concerned that another interpretation of the Trial Court's judgment might be urged by Respondents in this case, i.e., that Appellant is not entitled to her requested relief because she is a "Tier III" offender under SORA.

Although not explicitly set forth in the Trial Court's judgment, it is inferable from the language of the judgment that the Trial Court was persuaded by the Respondents' argument that because ". . .[a]ny offense under Section 566.101 RSMo. that was punishable by *exactly one year* is not named under the Tier structure in Section 589.414 RSMo. . . .it is therefore a Tier III offense pursuant to 589.414.7(5) . . . [which carries] a lifetime registration requirement under Section 589.400.4(3) RSMo." (L.F. Doc.#10, Page 9). Perhaps this interpretation of SORA by Respondents was relied upon by the Trial Court in finding that, as a matter of law, the August 28, 2000, amendments to SORA "required registration of misdemeanor offenses." This argument (and the Trial Court's basis for its judgment in this case) must fail because of well-established rules of statutory construction in force in Missouri.

Missouri places the various crimes punishable under its statutes into several classifications: felonies into five categories (A, B, C, D, and E), and misdemeanors into four categories (A, B, C, and D). §§ 557.016 and 557.021 RSMo. The authorized maximum term of imprisonment for a class A misdemeanor is "a term not to exceed one year." § 558.011 RSMo.

Words used in statutes are supposed to be considered as having their "plain and ordinary meaning." *State ex. rel. Hillman v. Beger*, 566 S.W.3d 600, 604-05 (Mo. banc 2019). § 589.414.5(1)(c) RSMo., places "Sexual abuse in the second degree under section 566.101 if the ***punishment*** is less than a year. . ." into Tier I. § 589.414.7(2)(cc) places "Sexual abuse in the second degree under section 566.101 if the ***penalty*** is a term of imprisonment of more than a year. . ." into Tier III. Neither emphasized term is defined or consistent with other statutory references to a maximum allowable term of imprisonment for a misdemeanor vs. a felony. However, assuming that the commonly accepted definitions of both "penalty" and "punishment" were intended by Missouri's legislature, then, according to the Merriam-Webster dictionary, "punishment" means: "(1) the act of punishing; (2)(a) suffering, pain, or loss that serves as retribution; (b) a penalty inflicted on an offender through judicial procedure; (3) severe, rough, or disastrous treatment." Similarly, the same source defines "penalty" as: "(1) the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense; (2) the suffering or the sum to be forfeited to which a person agrees to be subjected in case of nonfulfillment of stipulations; (3) disadvantage, loss, or hardship due to some action . . ." With respect to both definitions, it is clear the meaning of the words used by the legislature should be construed to refer to an actual imprisonment imposed upon the person, and not a theoretical maximum allowable term of imprisonment. Missouri's legislature was able to specify a range of maximum permissible periods of incarceration as the condition precedent to assignment to a particular tier, but it did not do so. Appellant was not imprisoned. Her sentence to "1 YEAR AGENCY: BOONE COUNTY JAIL" was suspended. (L.F. Doc. #3, Page 4).

Several Missouri cases recite that a suspended imposition of sentence is generally not considered a "conviction" under Missouri law. See, e.g., *Roe v. Replogle*, 408 S.W.3d 759, fn. 2 (Mo. banc 2013); *Hoskins v. State*, 329 S.W.3d 694, 698 (Mo. 1993); *Yale v. City of Independence*, 846 S.W.2d 193, 196 (Mo. 1993). Arguably, not being a "conviction" would equate to no "punishment" within the meaning of the SORA definitions. These cases are not completely dispositive of this issue, however, because §589.400 RSMo., requires only an "adjudication" of a sex offense in order to require registration, and Appellant was adjudicated as having violated § 566.090 RSMo. However, in determining into which Tier that offense should fall, the legislature's deliberate use of the words "punishment" and "penalty" should be construed as requiring more than one year of actual incarceration before moving a particular crime into Tier III. Alternatively, and at a minimum, § 589.414.5(1)(c) should be interpreted as meaning, in effect, that if the authorized range of punishment is one year or less then the offense is a tier I offense under SORA.

"In construing a penal statute, the general rule is that a criminal statute must be construed liberally in favor of the Respondent and strictly against the state." *State v.*

Treadway, 558 S.W.2d 646 (Mo. 1977); *State v. Dowdy*, 774 S.W.2d 504 (Mo. App. 1989).

The proper rejection of Respondents' argument concerning this issue can be found in the case of *Dixon v. Missouri State Highway Patrol*, 583 S.W.3d 521 (Mo. Ct. App. 2019), where the court stated:

> *"Of the thirty*-six *offenses specifically identified in the definition of a tier III offender, all are felonies, with the sole exception of a class B misdemeanor which is included in the definition only if the offense is committed by a recidivist felony offender. It is hard to believe that the General Assembly intended for Dixon's conviction of a class C misdemeanor to render him a tier III offender, when every other person falling within that category must either be convicted of a current felony or have been convicted of two or more prior felonies. . ..*
>
> *It bears emphasis that, for the purposes of statutory construction, the Missouri Supreme Court has characterized SORA as a 'penal statute.' J.S. v. Beaird, 28 S.W.3d 875, 877(Mo. 2000); see also Kersting v. Replogle, 492 S.W.3d 600, 605-07(Mo. App. W.D. 2016). . . .These principles provide additional justification for rejecting the Highway Patrol's proposed interpretation." Id*. at 527-528.

The Respondents' interpretation (and thus the Trial Court's judgment) not only is inconsistent with the *Dixon* holding, but it also violates the rule of lenity. The rule of lenity dictates that ambiguity in a criminal statute must be resolved against the government. *Goings v. Missouri Department of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999); *State v. Harper*, 855 S.W.2d 474, 479 (Mo. App. 1993); *Fainter v. State*, 174 S.W.3d 718, 721 (Mo. App. 2005). This rule applies to statutes defining criminal behavior and providing for sentencing. *State v. Jones*, 899 S.W.2d 126, 127 (Mo. App. 1995); *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc 2002); *Woods v. State*, 176 S.W.3d 711, 712–713 (Mo. banc 2005). The rule also is applicable where violation of a civil statute has penal consequences. *J.S. v. Beaird*, 28 S.W.3d 875, 877 (Mo. banc 2000); *See also*, *City of Kansas City v. Tyson*, 169 S.W.3d 927 (Mo. App. 2005).

SORA defines tier I offenses as those involving punishments of <u>less</u> than a year's imprisonment. It defines tier II and tier III offenses as those involving punishments of <u>more</u> than a year's imprisonment. It is silent about into which tier offenses involving punishments "not to exceed one year" (as stated in § 558.011 RSMo.) should fall. Respondents (and perhaps the Trial Court) say it should be tier III. The above rules of statutory construction say tier I.

In effect, the Respondents' argument (and thus the Trial Court's judgment) concerning this issue equates a suspended sentence in a Class A misdemeanor case as equivalent to incarceration for more than one year and thus as a felony. That interpretation violates the principles and authorities cited above and applies the relevant rules of construction exactly backwards. Accordingly, Appellant must be considered for all purposes in this case as being a "Tier I offender" and as having committed a "Tier I offense."

Finally, the Trial Court's judgment (as well as the arguments of Respondents to the Trial Court) seek to reopen the original case against Appellant and to recharacterize the offense to which Appellant pled guilty as a more serious offense sufficient to have required Appellant to register under SORA. That is impermissible under Missouri law. The nature of the charge to which Appellant pled guilty cannot be revisited and revised at a later date to convert it, in effect, into a felony. *State v. Hendricks*, 944 S.W.2d 208, 211(Mo. banc 1997); *Keeney v. Fitch*, 458 S.W.3d 838 (Mo. Ct. App. 2015). See also *Carr v. Missouri Attorney General Office*, 560 S.W.3d 61 (Mo. Ct. App. W.D. 2018), to wit:

> "*When determining a sex offender's tier under SORNA, courts generally employ the 'categorical approach,' which compares 'the elements of the prior offense of conviction with the elements of the pertinent federal offense, also referred to as the 'generic' offense.' U.S. v. Berry, 814 F.3d 192, 195 (4th Cir. 2016);* see also, *U.S. v. Cabrera-Gutierrez, 756 F.3d 1125, 1133-34 (9th Cir. 2014); U.S. v. White, 782 F.3d 1118, 1133 (10th Cir. 2015). 'Because the categorical approach looks squarely at the elements of the offense of conviction, a reviewing court is precluded from examining the circumstances underlying the prior conviction.' Peters v. Jackson County Sheriff, 543 S.W.3d 85, 88 (Mo. App. 2018) (quoting U.S. v. Price, 777 F.3d 700, 704-05 (4th Cir. 2015) (internal quotation marks omitted))." Id. at 65.*

The Western District also stated, "The parties agree that, for purposes of SORNA, MacColl is considered a Tier 1 (the least severe category) sex offender." WD 84739 As mentioned *supra*, the Western District did not reach this issue because it found Point Relied On III dispositive.

Accordingly, except for the issues described below in Points Relied On III and IV, the applicable case and statutory law conflicts with the Trial Court's judgment and requires its reversal.

III. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE OF ITS ERRONEOUS CONCLUSION THAT APPELLANT IS A PERSON WHO "HAS BEEN OR IS REQUIRED TO REGISTER UNDER FEDERAL LAW," I.E., UNDER SORNA, AND WAS REQUIRED TO REGISTER UNDER THE MISSOURI SEX OFFENDER REGISTRATION ACT ("SORA") FOR THAT REASON IN THAT APPELLANT HAD A "CLEAN RECORD" UNDER SORNA FOR MORE THAN 10 YEARS PRIOR TO THE EFFECTIVE DATE OF SORNA AND THUS APPELLANT WAS NOT REQUIRED TO REGISTER UNDER SORNA.

The trial court erroneously held the Appellant was required to register under the federal SORNA statute. As more fully explained below, the Appellant's requirement to register was reduced by the plain language of the statute to 10 years due to her maintaining a clean record thus having her requirements to register cease in 2005, which elapsed prior to SORNA being enacted.

a. <u>This Court analyzes the appeal de novo as it is an appeal from summary judgment, and the only issue is a matter of law</u>

This case was decided on Respondent's cross motion for summary judgment motion. When reviewing a case that is on appeal from summary judgment this court analyzes the case *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). Whether to grant summary judgment is purely an issue of law. *Id.*

This court does not need to give any deference to the trial court's summary judgment decision. *Id.*

Summary judgment allows for a judgment on the merits of the case. *Id.* It is appropriate when there is no issue of genuine fact and the movant demonstrates it has a right to judgment as a matter of law. *See* Mo. R. Civ. Pro. 74.04. As explained below, the Appellant is entitled to a reversal of the trial court's summary judgment granted in Respondent's favor because there is no genuine issue as to the material fact, and those facts demonstrate that the Appellant is entitled to judgment as a matter of law because the Appellant has never been **required** to register as a sex offender under federal or state law.

b. SORNA's Plain Language Reduced Appellant's Registration Length From Fifteen (15) to Ten (10) Years

The 90th General Assembly (in Senate Bills Nos. 757 and 602 which became effective on August 28, 2000) made a substantial change to SORA when it added §589.400.1(5) RSMo., the language which is now codified as § 589.400(7) RSMo. In essence, and according to prior precedent established by the Court of Appeals for the Western District of Missouri, that change to SORA had the effect of requiring any person who has ever had an obligation to register as a sex offender under federal law (SORNA) to register under SORA for life and regardless of the amendments to SORA added by Missouri's Legislature in 2018. *Selig v. Russell,* 604 S.W.3d 817 (Mo. App. 2020).

At the time of Appellant's adjudication on August 21, 1995, "SORNA" had not been enacted. It was enacted by the U.S. Congress on July 27, 2006 (Pub. L. 109-248, Title I, Section 111), more than ten years after Appellant's adjudication. At the time of SORNA's enactment, Appellant had completed her involvement in Missouri's criminal justice system.

At the time of its enactment, SORNA required sex offenders to register and specified that the duration of a sex offender's registration period would depend upon into which "tier" their offense and conviction falls, to wit:

> *"34 USCA § 20911. Relevant definitions. . .*
>
> *(1) The term "sex offender" means an individual who was convicted of a sex offense.*
>
> *(2) The term "tier I sex offender" means a sex offender other than a tier II or tier III offender.*
>
> *(3) The term "tier II sex offender" means a sex offender other than a tier III offender whose offense is punishable by imprisonment for more than 1 year and . . .*
>
> *(4) The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and . . ."* [emphasis added]."

Accordingly, for the purposes of SORNA, Appellant would be a "tier I sex offender" because her offense was not punishable by imprisonment for more than 1 year. The rules of statutory construction and the rule of lenity discussed in Part I of this brief explain why Appellant must be considered as such under Missouri law and under federal law. The rules for the construction of a federal penal statute are substantially the same as Missouri's, i.e., ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Rewis v. United States*, 401 U.S. 808, 812, 91 S.Ct. 1056, 1059, 28 L.Ed.2d 493 (1971). *See also Ladner v. United States*, 358 U.S. 169, 177, 79 S.Ct. 209, 213, 3 L.Ed.2d 199 (1958); *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *United States* *v. Five Gambling Devices*, 346 U.S. 441, 74 S.Ct. 190, 98 L.Ed. 179 (1953) *(plurality opinion for affirmance); United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522, 30 L. Ed. 2d 488 (1971).

34 U.S.C.A. § 20913, as in effect on the date of SORNA's enactment, required each sex offender to register in the pertinent state registry and required each state to impose a "*criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply. . . [with his or her registration requirements].*" That same statute gave to the U.S. Attorney General "the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter. . ."

34 USCA § 20915(a)(1), as in effect on the date of SORNA's enactment, specified the duration of a tier I sex offender's registration requirement under SORNA to be 15 years. Alone, that statutory requirement would have meant that Appellant would have had to register under SORNA until August 21, 2010, and thus for a period which would not have expired until <u>after</u> the effective date of SORNA. However, 34 USCA § 20915(b)(1) states:

> *"The full registration period <u>shall be reduced as described in paragraph (3)</u> for a sex offender who maintains a clean record for the period described in paragraph (2) by—*
>
> *(A) Not being convicted of any offense for which imprisonment for more than 1 year may be imposed;*
>
> *(B) Not being convicted of any sex offense;*
>
> *(C) Successfully completing any periods of supervised release, probation, and parole; and*
>
> *(D) Successfully completing of an appropriate sex offender treatment*

program certified by a jurisdiction or by the Attorney General.

(2) In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years. . .

(3) In the case of—

(A) a tier I sex offender, the reduction is 5 years . . ." (emphasis added).

Pursuant to the authority granted to the U.S. Attorney General, a regulation expanding upon the language of SORNA was promulgated at 73 FR 38030-01, 2008 WL 2594934 (July 2, 2008). That regulation, in pertinent part, prescribes as follows:

"Subsection (b) of section 115 allows the registration period to be reduced by 5 years for a tier I sex offender who has maintained a "clean record" for 10 years . . . The specific *requirements under section 115(b) to satisfy the "clean record" precondition for reduction of the registration period are as follows:*

The sex offender must not be convicted of any offense for which imprisonment for more than one year may be imposed (§ 115(b)(1)(A)).

The sex offender must not be convicted of any sex offense (§ 115(b)(1)(B)). In contrast to section 115(b)(1)(A), section 115(b)(1)(B) is not limited to cases in which the offense is one potentially punishable by imprisonment for more than a year. Hence, conviction for a sex offense prevents satisfaction of the "clean record" requirement, even if the maximum penalty for the offense is less than a year.

The sex offender must successfully complete any periods of supervised release, probation, and parole (§ 115(b)(1)(C)). The requirement of "successfully" completing periods of supervision means completing these periods without revocation.

The sex offender must successfully complete an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General (§ 115(b)(1)(D)). Jurisdictions may make their own decisions concerning the design of such treatment programs, and jurisdictions may choose the criteria

> *to be applied in determining whether a sex offender has "successfully" completed a treatment program, which may involve relying on the professional judgment of the persons who conduct or oversee the treatment program."*

Accordingly, Appellant's "10-year clean record period" entitling her to a reduction of the 15-year registration period under SORNA became a matter of fact on August 21, 2005, a full 11 months before SORNA became law. Furthermore, SORNA was not deemed effective upon enactment so as to apply to persons such as Appellant until—at the earliest—<u>February 28, 2007</u>. See, e.g., *Petrovick v. State*, 537 S.W. 3d 388, 392 (W.D. Mo. App. 2018). That means that when SORNA became law, Appellant was automatically entitled to the benefit of the "clean record reduction" granted by 34 USCA §20915(b)(1), and had no obligation to register under SORNA or any other federal law. Because that federal statute did not require the consent of any court or other agency prior to the benefit of that reduction becoming applicable, Appellant's failure to seek the application of that statute to her situation prior to this case is irrelevant.

The case of *Carr v. Missouri Attorney General Office*, 560 S.W.3d 61 (Mo. Ct. App. W.D. 2018), supports Appellant's contentions in this case. The following quotation from the *Carr* case is directly applicable to Appellant's case, to wit:

> "*Still assuming, arguendo, Carr is a tier II offender, his twenty-five-year registration period expired (at the latest) approximately two years before he was ever subject to SORNA's federal registration obligation. Therefore, Carr's present status is not as an offender 'who has been ... required to register under ... federal law,' and the circuit court erred in finding a registration obligation under SORNA triggered a registration obligation under SORA. Point II is granted." Id. at 66.*

That is exactly Appellant's situation in this case. Her time to register had expired before

SORNA became effective. The *Petrovick* and *Carr* cases require the relief Appellant seeks.

Appellant presently meets and, prior to the effective date of SORNA, met each and all of the foregoing requirements for a reduction in the duration of what otherwise might have been the period of her registration requirement under SORNA from 15 years down to 10 years. Of paramount importance is the fact that she met all of them prior to the date SORNA was enacted or deemed effective. Appellant had a "clean record" for more than ten years after her adjudication and before SORNA became law.

c. Appellant adequately established her "clean record" within the meaning of 34 USCA §2091(b)(1) for the purposes of her motion for summary judgment and this appeal.

Appellant asserted (and represents to this Court) that she has maintained a "clean record" since the date of her conviction (August 21, 1995) at all times up to and including the date of this appeal. The persons or agencies who are in the position to rebut this allegation are the Respondents in this case. As such, proof of anything contrary to Appellant's assertion in this regard is peculiarly within the power and knowledge of the Respondents to provide. In effect, Respondents argue that Appellant must "prove a negative," i.e., prove that she has not committed an offense or been convicted of any crime during the period August 21, 1995, through August 21, 2005. Where else would one turn to find any information concerning Appellant's conduct during that period except the files, records, and information available to Respondents? The case of *Swinhart v. St. Louis & S. Ry.Co.*, 207 Mo. 423, 105 S.W. 1043 (Mo. 1907), is applicable to this issue, to wit:

“ ‘When the subject–matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecution for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor, as for selling liquors, exercising a trade or profession, and the like.’ This doctrine is reaffirmed in *State v. Edwards,* 60 Mo. 490 (1875), and in criminal cases is, and since these cases has been, the established rule in Missouri. Nor has this court confined the rule to criminal cases, as defendant would have us believe. In the early case of *State ex rel. v. Schar et al*., 50 Mo. 393 (1872), an action upon a constable's bond, charging failure to return an execution, we said: “The general rule is that he who alleges an affirmative is bound to prove it. But there are some exceptions to this rule. Where the plaintiff grounds his right of action upon a negative allegation, and the proof of the affirmative is not peculiarly within the knowledge and power of the other party, the establishment of this negative is an essential element of the plaintiff's case. Where, however, the subject–matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. 1 Greenl. Ev. par. 79.” Along the same line are a number of cases from several states, cited in 20 Cent. Digest, cc. 201, 202, §§ 114, 115.”

Swinhart, 105 S.W. at 1046-1047.

Appellant filed her original petition in this matter on October 7, 2020. The Trial Court's decree was entered on August 18, 2021. During that ensuing period, Respondents had ample opportunity to research their records or to otherwise conduct what discovery they might choose. Respondents argue that they are somehow prejudiced because the Boone County Prosecuting Attorney does not have certain files possessed by Respondent Highway Patrol (see, e.g., Respondents' Sur-reply to Appellant's Statement of Uncontroverted Material Facts number 22, Appellant's Brief Appendix, p. A-55), in effect arguing that Respondents have been prejudiced by their own failure to research their records.

Further, the facts in the record demonstrate that Appellant did complete the 10-year clean record period. SORNA provides that the registration period shall be reduced for an offender who maintains a clean record by 1.) not being convicted of any offense for which imprisonment for more than 1 year may be imposed, 2.) not being convicted of any sex offenses, 3.) successfully completing any periods of supervised release, probation, and parole, and 4.) successfully completing an appropriate sex offender program certified by a jurisdiction or by the Attorney General. 34 U.S.C. § 20915(b).

Appellant established all the facts required to show she completed the ten-year clean record period. The following facts were not denied by Respondents and therefore are binding upon Respondents in this appeal under Rule 74.04(c)(2), to wit:

> 16. On August 21, 1997, Petitioner's probationary period ended, and the Circuit Court of Boone County entered its order discharging Petitioner from probation and restoring her rights. Accordingly, on August 21, 1997, Petitioner

completed her involvement in Missouri's criminal justice system. (L.F. Doc #25, p.11, ¶16).

. . .

23. Petitioner has not been adjudicated and does not have charges pending for any additional nonsexual offense for which imprisonment for more than one year may be imposed since the date of her first and only criminal offense. (Exhibit A, ¶30). (L.F. Doc #25, p.14, ¶23).

. . .

24. More than twenty-five (25) years have elapsed since the date of Petitioner's adjudication on August 21, 1995. Since the date of Petitioner's adjudication, Petitioner: (i) has not violated any laws of the type described in Section 589.401 RSMo.; (ii) has successfully and properly completed her probation; (iii) has complied in all respects with the orders of this Court in connection with its judgment and orders; (iv) has satisfied the judgment of this Court; (v) does not have any pending charges of any kind against her . . . (L.F. Doc. #25, p.14, ¶24).

32. Petitioner's adjudication was her first and only criminal offense. (L.F. Doc. #25, p.14, ¶23).

33. Petitioner was never incarcerated from and after August 21, 1995. (L.F. Doc. #25, p.14, ¶23).

. . .

40. As of the effective date of SORNA, and by said statute's express terms, Petitioner did not then have a current or prior independent obligation to

register as a sex offender under federal law. Accordingly, the provisions of 589.400.1(7) RSMo., do not apply to Petitioner. (L.F. Doc. #25, pp.22-23, ¶40)."

Additional facts showing Appellant completed the clean-record period were not properly objected to by Respondents because they responded with a general denial and request for additional time for discovery rather than citations to supporting materials. In Paragraph 14 of Appellant's Statement of Uncontroverted Facts, she alleged that she "successfully completed the required sexual offender program specified in the Sentence imposed on her by the Court," and in her later Reply Appellant supplemented that allegation with a description of the programs and citations to the supporting documents. (L.F. 25 pp. 8-9). In paragraph 39, Appellant alleged that she had complied with each section of the clean-record statute and again supplemented the allegation in her Reply with a citation to portions of the discovery showing completion of counseling and treatment that were required by her probation. (L.F. 25 pp. 20-23). Respondents' reply to those allegations was a general denial. As such, the objection was insufficient, and the facts from Paragraphs 14 and 39 should be deemed uncontroverted. *See* Rule 74.04(c)(2) ("A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.").

The foregoing facts – both those not contested and those improperly contested - are sufficient uncontroverted facts to show Appellant satisfied the clean-record period and inconsistent with Respondents' assertions that Appellant has not proven the facts required to establish her "clean record" for the purposes of 34 USCA §20915(b)(1).

d. Respondents are not entitled to (and should not be granted) discovery with respect to whether Respondent satisfactorily fulfilled the terms of her probation because the Circuit Court's judgment entered August 21, 1997, discharging Appellant from probation as a challenge to that discharge would constitute an impermissible collateral attack upon that judgment entry.

If the Supreme Court were to grant Respondents' request to pursue discovery against Appellant concerning whether she fulfilled the terms of her probation, it would violate Missouri law concerning when a trial court loses jurisdiction over a defendant's probation as well as the principles of res judicata and would constitute a collateral attack on a final judgment. The law is clear that the Circuit Court of Boone County lost its jurisdiction over Appellant's probation when her probation termination date was reached. If Respondents wanted to challenge her eligibility for that discharge, they should have made that argument prior to August 21, 1997, i.e., prior to the termination date of that period of probation. See, e.g., *State ex rel. Jones v. Eighmy*, 572 S.W.3d 503 (Mo. banc 2019).

The case of *Ideker v. PPG Industries, Inc.*, 788 F.3d 849 (8^{th} Cir. 2015), is instructive. In that case, the U.S. Court of Appeals for the 8^{th} Circuit listed the requirements for a claim that a prior adjudication may be challenged in a separate litigation, to wit:

> "In determining whether collateral estoppel applies to Ideker's claim, we must consider four factors:
>
> > "(1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with a party to the prior

> adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit."
>
> *Royal Ins. Co. of Am. v. Kirksville Coll. of Osteopathic Med., Inc.*, 304 F.3d 804, 807 (8th Cir.2002) (quoting *James v. Paul*, 49 S.W.3d 678, 682 (Mo. banc 2001) (en banc))."

Ideker, 788 F. 3d at page 853.

Each of the four elements which bar Respondents from reopening Appellant's conviction and discharge from probation are met in this regard. The issue in Appellant's criminal proceeding was her punishment and discharge from her required period of probation. It was a final judgment on the merits. The Respondents, as representatives of the State of Missouri, were in privity with the State of Missouri. The Respondents had a full and fair opportunity to object to Appellant's discharge from probation prior to August 21, 1997. Accordingly, granting Respondents the right to discovery at this very late date should not be permitted. *See also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645 (1979); and *Spath v. Norris*, 281 S.W. 3d 346 (Mo.App. W.D. 2009).

Accordingly, the Trial Court's judgment was erroneous and should be reversed and remanded with instructions to enter summary judgment for Appellant unless the remaining issue discussed in Part IV of this brief is resolved against Appellant.

IV. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND IN DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT ERRONEOUSLY FOUND THAT BECAUSE APPELLANT FAILED TO SEEK A SEPARATE "ALLOWANCE" OF A REDUCTION IN SORNA'S REQUIRED REGISTRATION PERIOD FROM 15 YEARS DOWN TO 10 YEARS AT SOME TIME IN THE PAST, THAT APPELLANT'S FAILURE TO DO SO FORECLOSES HER FROM SEEKING THAT "ALLOWANCE" IN THIS PROCEEDING, AND IN ITS HOLDING THAT APPELLANT IS "NOT ENTITLED AS A MATTER OF LAW TO RETROACTIVELY REQUEST A REDUCTION OF THE 15-YEAR FEDERAL OBLIGATION TO REGISTER UNDER SORNA" IN THAT SUCH CONSTRUCTION DISREGARDS THE EXPRESS LANGUAGE OF 34 USCA § 20915(b)(1) AND DENIES TO APPELLANT THE RELIEF TO WHICH SHE IS ENTITLED.

a. <u>This Court analyzes the appeal de novo as it is an appeal from summary judgment, and the only issue is a matter of law</u>

This case was decided on Respondent's cross motion for summary judgment motion. When reviewing a case that is on appeal from summary judgment this court analyzes the case *de novo*. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371, 380 (Mo. banc 1993). Whether to grant summary judgment is purely an issue of law. *Id.*

This court does not need to give any deference to the trial court's summary judgment decision. *Id.*

Summary judgment allows for a judgment on the merits of the case. *Id.* It is appropriate when there is no issue of genuine fact and the movant demonstrates it has a right to judgment as a matter of law. *See* Mo. R. Civ. Pro. 74.04. As explained below, the Appellant is entitled to a reversal of the trial court's summary judgment granted in Respondent's favor because there is no genuine issue as to the material fact, and those facts demonstrate that the Appellant is entitled to judgment as a matter of law because the Appellant has never been **required** to register as a sex offender under federal or state law.

b. The Appellant is Entitled to the Five (5) Year Reduction for a Clean Record Under SORNA

After considering all the relevant issues framed by the parties' respective pleadings, motions, memoranda, and arguments, the final (and primary) issue for resolution by the Supreme Court of Missouri in this case is the proper interpretation of 34 USCA § 20915(b)(1). As Appellant requested of the Trial Court and now asks the Supreme Court to resolve, the ultimate issue is whether some affirmative action other than Appellant's petition and Summary Judgment Motion in this case was required of Appellant at some point in the past in order for her to have her registration period reduced under SORNA to 10 years and that said 10-year period expired before the effective date of SORNA. The statutory language of SORNA automatically reducing the Appellant's registration by five (5) years is one of the principal reasons the Trial Court's Judgment should be reversed and judgment rendered in favor of the Appellant.

The Trial Court's reasoning in ruling against Appellant is explained in its docket entry of June 24, 2021 (L.F. Doc. #1), to wit:

> "*Further, the Court rejects Petitioner's argument that her registration period expired in 2005 (ten years after her 1995 conviction) prior to the 2006 enactment of the federal Sex Offender Registration and Notification Act ("SORNA"). The Court finds that the act does not contemplate an automatic reduction of the fifteen-year registration requirement, as the Horton court pointed out in noting that there was nothing in the record in that case to indicate that a reduction had been "allowed" or "sought" within the time period. Here, as in Horton, because Petitioner did not seek a reduction within the time period, she is not allowed to retroactively seek a declaration that her registration period was only ten years.*"

If the Trial Court's reasoning is correct as state above, and if the *Selig* case's rationale is preferred over that of the *Smith* and *Ford* cases recently decided by the Eastern District, then Appellant would have a lifetime registration requirement under that statute, e.g.:

> *". . .Article I, section 13 does not prohibit the application of SORA to those individuals who are or have been subject to the independent registration requirements of SORNA. Keathley, 290 S.W.3d at 720. When . . . the state registration requirement is based on an independent federal registration requirement, article I, section 13 is not implicated because the state registration requirement is not based solely on the fact of a past conviction. Instead, the state registration requirement is based on the person's present status as a sex offender who 'has been' required to register pursuant to SORNA." Doe v. Toelke, 389 S.W.3d 165,167 (Mo. Banc 2012).*

However, if the principle described above in the quotation from the *Toelke* case is correct, then the corollary likewise must be correct, i.e., if the Appellant was <u>not</u> required to register under SORNA, then she cannot be required to register under SORA. Thus, depending on the Supreme Court's decision in the *Smith* and *Ford* cases, the outcome of this case turns on the application of 34 U.S.C. §20915(b)(1) to Appellant.

Respondents persuaded the Trial Court that: (i) Appellant's interpretation of 34 U.S.C. § 20915(b)(1) is erroneous; (ii) Appellant had a fifteen-year obligation to register which could be reduced to ten years only if Appellant had separately requested an "allowance" of the reduction in the registration period from some authority at some previous time (not specified but apparently before this case was filed); (iii) that Appellant failed to request that "allowance"; (iv) that therefore Appellant's registration period under SORNA was 15-years; (v) that § 589.400.1(7) RSMo., imposes a lifetime registration requirement ". . . on pre-enactment offenders who are or were subject to an independent federal registration requirement." (L.F, Doc. #20; Pages 7-8; L.F. Doc. #26, Pages 3-4); (vi) when SORNA was enacted, Appellant would have had over 2 years of SORNA-required registration left before her; and (vi) since Appellant was once required to register, she must do so for life and her requested relief must be denied.

Therefore, resolving this case depends, at least in part, upon whether the Trial Court is correct that Appellant was required to register under SORNA when it became law or whether Appellant is correct that 34 U.S.C. § 20915(b)(1) mandates that she had no registration requirement under SORNA when it was enacted because she was entitled to the 5-year reduction specified in 34 USCA § 20915(b)(3)(A) that said reduction applies automatically and, thus, Appellant's registration requirement under SORNA expired before the effective date of SORNA.

It would not be necessary to address the issue described in this Point Relied on IV but for the Respondents' (and the Trial Court's) reliance upon some dicta in the case of *Horton v. State*, 462 S.W.3d 770 (Mo. App. S.D. 2015). *Horton* involved an appellant whose record on appeal did not comply with Missouri Court Rule 81.12(c)-(e), i.e., it consisted of "a docket sheet, a one-page petition, . . . a one-page judgment, and a transcript . . .that reflects a hearing at which no evidence was tendered or admitted. . ." *Id.* at 771. The appellate opinion does not reflect that the appellant in *Horton* expressly made the argument to the trial court that he was exempt from registering under SORNA as a tier I offender for more than 10 years because he had a "clean record." Instead, the appellate opinion recites that the Appellant's principal contention on appeal was that "[SORA] *does not apply to Appellant's pre-2000 plea to a misdemeanor because Appellant is a 'federal tier I sex offender' and 'may be removed from the registry 15 years after' his plea."* *Id.* at 772. However, the *Horton* opinion also contains the following unfortunate language:

> *"As a tier I sex offender under SORNA, Appellant was required to 'keep his registration current for' fifteen years 'unless. . .allowed a reduction.' 42 U.S.C. § 16915(a)(1). If allowed, the reduction for a tier I sex offender is five years. 42 U.S.C. § 16915(b)(3)(A). The record does not contain any <u>evidence that Appellant ever sought or was 'allowed' a reduction</u>. As a result, at a minimum, Appellant was required to register as a sex offender under SORNA from at least August 1, 2008, to January 2011, when his fifteen-year registration period expired. Inasmuch as Appellant 'has been' required to register under federal law, he now is required to register in Missouri under SORA even though he may no longer be required to register under federal law. [Doe v.] Toelke, 389 S.W.3d at 167." [emphasis added].*

Carefully reading the *Horton* opinion reveals that the reference to "allowed" in the above quoted language means "qualifies for" or "is eligible." Because there was no evidence in the *Horton* record to reflect that the appellant was entitled to this reduction from the 15-year registration period, the full 15-year registration obligation was deemed to exist. That is not the situation in this case, i.e., Appellant has asserted that SORNA does not and never did apply to her because she had a "clean record" for more than ten years before SORNA became effective.

The language underlined in the above quote from the *Horton* case is the language repeated by and relied upon by Respondents and by the Trial Court in opposing Appellant's requested relief. Not entirely clear, but nevertheless discernible from the language of the *Horton* case, is the fact that the appellant in *Horton* did not preserve or submit any evidence to the effect that the appellant in that case was entitled to a 10-year registration period because of a "clean record." Accordingly, the language in that case pertaining to the Appellant needing to have requested an "allowance" is dicta except to the extent that it refers to the appellant's failure to raise the issue and offer evidence of his clean record before the trial court. The Trial Court's interpretation of the *Horton* holding in Appellant's case is that Appellant should have made a prior request for a discretionary allowance of a reduction in the 15-year required registration period under SORNA.

But where should Appellant have turned or applied for the discretionary reduction in the 15-year registration period? And where does one look for the limitation period applicable to Appellant for making this application? SORNA does not make the five-year reduction in the registration requirement for a tier I offender contingent on some higher authority granting that reduction. It does not specify a procedure for seeking a discretionary allowance from some unnamed authority. It does not use the word "may" or state that any supposed reviewing authority has the "discretion" to "allow" a reduction in the registration period. Finally, it does not state that any tier I sex offender seeking the benefit of the 5-year reduction in the registration period must apply for that reduction within a certain time frame (although the Trial Court's judgment implies that Appellant should have sought that "allowance" within the 15-year registration period specified by SORNA). All of this is somehow gleaned from the words "shall be reduced" in 34 U.S.C. § 20915(b)(1).

"The word 'shall' is ordinarily 'the language of command.'" *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S.Ct. 428, 91 L.Ed. 436 (1947) (*quoting Escoe v. Zerbst*, 295 U.S. 490, 493, 55 S.Ct. 818, 79 L.Ed. 1566 (1935)). See also the case of *Bauer v. Transitional School District of the City of St. Louis*, 111 S.W.3d 405 (Mo. banc 2003), where Missouri's Supreme Court stated:

> "*Generally, the word "shall" connotes a mandatory duty. State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 920 (Mo. banc 1993). However, Missouri courts have held that "where a statute or rule does not state what results will follow in the event of a failure to comply with its terms, the rule or statute is directory and not mandatory." State v. Tisius, 92 S.W.3d 751, 770 (Mo. banc 2002); Rundquist v. Director of Revenue, 62 S.W.3d 643, 646 (Mo. App. 2001); Kersting v. Director of Revenue, 792 S.W.2d 651, 652–53 (Mo. App. 1990). Relying on this principle, respondent argues that the word "shall" in section 162.666.10 should have a directory rather than mandatory meaning because the statute does not provide a penalty for failure to comply with the March 15, 1999, deadline.*
>
> *Though not completely lacking in merit, respondent's argument is nonetheless unpersuasive, because the presence or absence of a penalty provision is "but one method" for determining whether a statute is directory or mandatory. Southwestern Bell Tel. Co. v. Mahn, 766 S.W.2d 443, 446 (Mo. banc 1989). Indeed, "[t]he absence of a penalty provision does not automatically override other considerations." Id. Whether the statutory word "shall" is mandatory or directory is primarily a function of context and legislative intent. Farmers & Merchants Bank and Trust Co. v. Director of Revenue, 896 S.W.2d 30, 32 (Mo. banc 1995)." Id.* at 408.

If Appellant had wanted to obtain a discretionary allowance that she be permitted to reduce the SORNA registration period and thus refrain from registering under SORNA at some prior date, to whom should she have turned for that permission? From whom should she have sought such an "allowance?" What was the last date when such an allowance could be sought? Neither Respondents, the Trial Court, the Southern District in the *Horton* case, nor the Court of Appeals for the Western District supply the answers to these questions. Indeed, isn't this case Appellant's first opportunity to obtain judicial confirmation of her exemption from any registration requirement under SORNA? The U.S. Attorney General's regulations do not require or suggest any obligation to seek an allowance or method for obtaining the allowance to which the Trial Court's judgment refers. Yet, Respondents and the Trial Court would have the Supreme Court believe that the word "shall" in the SORNA statute quoted above really means "may" and that Appellant must now suffer the consequences of being required to register under SORA for life because she failed at some indeterminate time in the past to divine the proper procedure for seeking a discretionary "allowance" from some unnamed authority for permission that SORNA's 15-year registration period not apply to her.

Federal law supports this contention as several courts have come to the conclusion SORNA does not create a private cause of action to be heard in federal court. *See e.g. Wiggins v. United States*, 2019 WL 5079557, at *4 (S.D. Ind. Oct. 10, 2019); *United States v. Studeny*, 2019 WL 859271, at *2 (W.D. Wash. Feb. 22, 2019) ("Defendant has failed to allege any statute that grants the Court jurisdiction to issue an order regarding his registration requirement under SORNA."); Maben v. Terhune, 2016 WL 9447153 (6th Cir. Aug. 19, 2016) ("Because SORNA does not provide a private cause of action, [plaintiff's] allegations concerning alleged violations of § 16901 failed to state a claim against the defendants."); Maben v. Terhune, 2015 WL 1469719 (E.D. Mich. Jan. 30, 2015) ("SORNA itself provides no private cause of action.

Instead, the Act requires each jurisdiction to create a registry system and to provide a criminal penalty ... for the failure of a sex offender to comply with the requirements.”).

Wiggins is particularly instructive as the facts are similar to this case. Like Appellant here, Wiggins was convicted of possession of child pornography through the U.S. military courts. *Wiggins*, 2019 WL 5079557, at *1. Like Appellant, “[b]ecause of these convictions, Wiggins is required under both federal and state law to register as a sex offender.” *Wiggins*, 2019 WL 5079557, at *1. Similar to Appellant here, Wiggins sued the United States under SORNA claiming he was entitled to have his registration period reduced under 34 U.S.C. 20915(b). *Wiggins*, 2019 WL 5079557, at *1. In finding that SORNA did not create a private cause of action, the Wiggins Court reasoned that “[t]he language of SORNA does not provide an express private cause of action. Furthermore, there is no indication in the statute that Congress had any intention of creating an implied private cause of action.” *Wiggins*, 2019 WL 5079557, at *5.

Respondents’ contention in this regard is untenable and unjust. It defies the normal rules of statutory construction. Appellant cannot be punished for this imaginary omission. “Shall” in SORNA means “must.” The language in the *Horton* case relied upon by the Trial Court is dicta and the interpretation of that language is erroneous. The Trial Court in this case was the proper authority to whom Appellant had to turn for <u>confirmation</u> that she was not subject to SORNA as the Respondent has insisted she is required to register. Now she seeks this confirmation from the Supreme Court.

In effect, the Trial Court’s judgment implies that Appellant has somehow “<u>waived</u>” her right to have a 10-year period of registration under SORNA by failing to make this argument at an earlier date before some other authority than the Trial Court in this case. Alternatively, perhaps the Trial Court’s judgment can be construed as finding that

Appellant "forfeited" her rights to this otherwise mandatory statutory construction. However, Appellant could not have forfeited a right that is automatic under the federal law, and Appellant should have never been required to register under SORNA or SORA.

Initially, a distinction needs to be made between an ostensible "forfeiture" of Appellant's rights in this case versus a "waiver" of those rights. There can be no legitimate claim of a forfeiture because neither SORA nor SORNA establishes any time limit for the making of Appellant's requests in this case. See, e.g., *U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993), to wit:

> *"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right.'"* *Id*. 113 S. Ct. at 1777.

At the time of Appellant's first registration under SORA, the cases establishing the application of Article I, § 13 of Missouri's Constitution had not been decided. Suggesting that Appellant "waived" her rights by failing at some earlier date to seek some authority's ruling that she was not required to register is akin to the line of cases pertaining to persons who pled guilty to violations of criminal statutes later found to be unconstitutional. If the applicable statute is unconstitutional, that is a jurisdictional defect that is not waived by a plea of guilty. *U.S. v. Montilla*, 870 F.2d 549 (9th Cir. 1989); *U.S. v. Broce*, 488 U.S. 563, 109 S. Ct. 757 (1989). In what proceeding or by what action on Appellant's part did she "waive" her right to claim the benefits of 34 U.S.C. § 20915(b)(1)? She signed no waiver and made no declaration at any time that she voluntarily "waived" her right to claim the reduction in SORNA's registration period which would be applicable to her. The Trial Court's determination that Appellant waived any rights to this reduction in her registration period under SORNA is clearly erroneous.

In the case of *Keeney v. Fitch*, 458 S.W.3d 838 (Mo. App. 2015), the Court discussed the case of *State ex rel. Kauble v. Hartenbach*, 216 S.W.3d 158 (Mo. banc 2007). Plaintiff Keeney pled guilty in 1989 to having violated a statute later found to be unconstitutional. In 2010 Keeney was ordered to register as a sex offender under SORA. Relevant to Appellant's situation is the following discussion by the *Keeney* court:

> "*As the Missouri Supreme Court pointed out in* Kauble, *there is no procedure available for Appellant to have his 1989 guilty plea vacated, even though the law on which it was based was deemed unconstitutional as criminalizing behavior which is legal. However, unlike in* Kauble, *Appellant's cause of action is properly postured and he has named the appropriate Respondents and therefore is entitled to the remedy which the Court indicated was proper for Mr. Kauble, once appropriately requested."* *Id*. at 846.

Furthermore, the Trial Courts' interpretation of 34 U.S.C. § 20915 violates the rule of lenity discussed above in part II of this brief and does not need to be repeated here.

Finally, this issue is squarely addressed and answered in the case of *Selig v. Russell*, 604 S.W.3d 817 (Mo. App. W.D. 2020), in which the Court stated:

> "*We see no reason to treat a request for exemption under SORNA differently from the procedure for determining an exemption under MO-SORA. . .. [Plaintiff] is not arguing that he is entitled to be removed from the registry because he has met his federal obligations under SORNA to be removed from the registry, he is arguing that his offense never fell within the bounds of SORNA. Thus, he is still only requesting a declaration of exemption, not a judgment of removal."* *Id*. at 826.

Similar to the plaintiff in the *Selig* case quoted above, Appellant is requesting this Court's confirmation that she was not and is not required to register as a sex offender under SORA. Whether the relief granted by this Court is labelled a "declaration of exemption" or instead as the grant of her request that she be relieved from any obligation to register under SORA is somewhat a matter of indifference to Appellant. What matters is that she be relieved from any future obligation to register under SORA for the reasons stated above.

V. THE TRIAL COURT ERRED IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DENYING THE APPELLANT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE TRIAL COURT (AND THE COURT OF APPEALS FOR THE WESTERN DISTRICT OF MISSOURI) ERRONEOUSLY INTERPRETED §589.400.1(7) RSMO. AS REQUIRING APPELLANT'S LIFETIME REGISTRATION REQUIREMENT UNDER MO-SORA EVEN THOUGH SHE WAS A TIER I SEX OFFENDER UNDER MO-SORA AND THEREFORE ELIGIBLE FOR REMOVAL FROM THE MO-SORA REGISTRY PURSUANT TO §589.401 RSMO. THE TRIAL COURT AND COURT OF APPEALS BASED THEIR DENIAL OF APPEALLANT'S REQUESTED RELIEF ON THE SUPPOSED SEPARATE FEDERAL REGISTRATION REQUIREMENT UNDER §589.400.1(7) RSMO. AND THE ERRONEOUS PRECEDENTS ESTABLISHED BY THE CASE OF *SELIG V. RUSSELL*, 604 S.W.3RD 817 (MO. APP. W.D. 2020). INSTEAD THE TRIAL COURT AND COURT OF APPEALS SHOULD HAVE INTERPRETED SAID STATUTES IN THE SAME MANNER AS THE EASTERN DISTRICT COURT OF APPEALS IN THE CASES OF *FORD VS. BELMAR ET AL., NO. ED109958, 2022 WL 2028209 (MO. APP. W.D. JUNE 7, 2022);* AND *SMITH VS. ST. LOUIS* COUNTY POLICE ET AL., NO. ED109734, 2022 WL 2032238 (MO. APP. W.D. JUNE 7, 2022).

The Eastern District's opinion in *Smith v. St. Louis County Police, et al.*, No. ED109734**,** *2022 WL 2032238 (Mo. App. W.D. June 7, 2022)* contains a thorough and incisive review of SORA and SORNA. Among the relevant holdings of the Eastern District in that case are the following excerpts, which acknowledge its disagreement with the Western District:

> ". . .§589.400.1(7) should not be interpreted as requiring lifetime registration for tier I and II sex offenders under MO-SORA and SORNA who are otherwise eligible for removal from the Registry pursuant to §589.401. To the extent *Selig* holds or otherwise suggests that lifetime registration is required for tier I and II sex offenders under MO-SORA simply because of their separate federal registration requirement under §589.400.1(7), we disagree with the Western District on that basis and decline to follow this case or adopt its rationale."
>
> . . .
>
> "Moreover, if the Western District's interpretation of §589.400.1(7) in *Selig* prevails in removal cases pursuant to §589.401, this interpretation would not only disregard the general provisions of §589.401, but also the specific impact of sub-section .17 of this new section, which expressly provides that once a sex offender's name is removed from the Registry pursuant to a petition filed under §589.401, they are not required to re-register unless they are required to register 'for an offense that was different from that listed on the judgment of removal.' In our view, this new provision was specifically intended to prevent tier I and tier II sex offenders from getting caught in an eternal registration/removal loop, in which Smith finds himself due to the circuit court's interpretation of §589.400.1(7) based on its application of the prior opinions in *Wilkerson* and *Selig*. . . However, we believe the 2018 Amendments, including §589.401.17, were enacted to break that eternal registration/removal loop for tier I and II sex offenders seeking permanent removal pursuant to §589.401. . . ."

Appellant urges the Supreme Court to resolve the above-described conflict between the Eastern and Western District Courts of Appeal concerning this issue, adopt the holdings and rationale of the *Smith* opinion, and allow Appellant the benefit of that change in the law.

As is established by the record in this case, Appellant has duly registered as a sex offender for more than 22 years. §589.401.4(1) only requires 10 years of registration as a condition precedent to relief from registration. Appellant sought relief in this case pursuant to §589.401 asking that she be removed from the sex offender registry, but her requests were denied by the Circuit Court of Boone County and, upon appeal, by the Court of Appeals for the Western District of Missouri.

Regardless of whether the Supreme Court accepts Appellant's contention that she was never required by SORNA to register in the first place, as explained in this brief, her 22 years of registration under SORA should now permit Appellant's request for removal from the sex offender registry to be granted pursuant to §589.401 and the principles enunciated by the Eastern District in the *Smith* case. Upon a review of the record and the law pertinent to this case, the Supreme Court can grant Appellant's request in this regard, and Appellant respectfully requests that it do so.

CONCLUSION

The outcome of this case depends upon either: (1) the proper interpretation of 34 USCA § 20915, which is part of the federal Sex Offender Registration and Notification Act ("SORNA"), and its interplay with § 589.400.1(7) RSMo.; or (2) the adoption by the Supreme Court of Missouri of the rationale and holdings of two recent cases decided by the Court of Appeals for the Eastern District of Missouri, to wit: *Ford vs. Belmar et al., No. Ed109958, 2022 WL 202820 (Mo. App.E.D. June 7, 2022);* and *Smith vs. St. Louis County Police et al., No. Ed109734, 2022 WL 2032238 (Mo. App.E.D. June 7, 2022).* An opinion by the Supreme Court which is favorable to the Appellant with respect to either issue will grant to Appellant her requested relief, i.e., the two issues are independent of each other.

SORNA requires its registration requirement be reduced from fifteen (15) years to ten (10) years if a clean record is maintained. Federal case law has interpreted this mandatory reduction to not create a private cause of action for an individual to seek a reduction through a declaratory judgment action. Thus, when SORNA was enacted, the Appellant's registration requirement, if any, should have been reduced to the ten (10) year period effecting terminating ger registration requirement prior to the enactment of SORNA or any enabling regulations published by the Attorney General of the United States.

But for SORNA's incorrect interpretation by the trial court and Western District, the Appellant would not have been required to register as a sex offender under Missouri law, and thus the Appellant should not have to register for life under MO-SORA as a person who previously was required to register a sex offender under federal law.

For the foregoing reasons in this brief, Appellant's requested relief is appropriate and just. The Trial Court's judgment should be reversed, and Appellant's Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, the undersigned certifies that:

1. This brief complies with the typeface and type style requirements of Supreme Court Rule 84.06 as this brief has been prepared in Times New Roman font, a proportionally spaced typeface, using Microsoft Office 365 in 13 point.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. This brief contains 15,198 words, excluding parts of the Brief exempted by Rule 84.06(b), as counted by Microsoft Word 365.

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2022, a true and correct copy of the foregoing was sent via electronic mail to those parties registered to receive electronic notification via the Missouri Courts eFiling System.

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