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IN THE SUPREME COURT OF MISSOURI

No. SC100296

JOHN DOE,
APPELLANT

vs.

ERIC T. OLSON, et al.
RESPONDENDTS.

APPEAL FROM THE CIRCUIT COURT OF SAINT LOUIS COUNTY
THE TWENTY-FIRST JUDICIAL CIRCUIT
DIVISION 9
THE HONORABLE DAVID L. VINCENT III
CAUSE NO. 21SL-CC01326

BRIEF OF RESPONDENTS SCOTT KIEFER AND THE ST. LOUIS COUNTY SHERIFF

Respectfully Submitted,

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POINTS RELIED UPON

I. The Trial Court Did Not Err in Denying Appellant's Petition for Removal from the Missouri Sex Offender Registry Because Appellant's Registration Requirements Under the Federal Sex Offender Registration and Notification Act Impose a Lifetime Registration Requirement Under Missouri's Sex Offender Registration Act.

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

Roe v. Replogle, 408 S.W.3d 759 (Mo. banc 2013)

R.W. v. Sanders, 168 S.W.3d 65 (Mo. banc 2005)

II. The Trial Court Did Not Err in Denying Appellant's Petition for Removal from the Missouri Sex Offender Registry Because Appellant's Registration Requirements Do Not Violate Appellant's Substantive Due Process Rights Because SORA accomplishes Legitimate State Interests and Appellant is not entitled to removal based upon his argument of non-dangerousness.

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

Powell v. Keel, 860 S.E.2d 344(S.C. banc. 2021).

III. The Trial Court Did Not Err in Denying Appellant's Petition for Removal from the Missouri Sex Offender Registry Because Appellant's Registration Requirements under SORA do not violate Missouri's Prohibition on Ex Post Facto laws.

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SUPPLEMENTAL STATEMENT OF FACTS

On August 28, 1997, in the Twenty-First Judicial Circuit for the State of Missouri, Appellant pleaded guilty to one count of Deviate Sexual Assault and one count of Sexual Assault in the First Degree. (Circuit Court's Amended Findings of Fact and Conclusions of Law and Order and Judgment, ("Court Order") pg. 2). Deviate Sexual Assault, a Class C Felony as created in RSMo § 566.070 (1997), no longer exists, and has been transferred to RSMo § 566.061, and is now classified as Sodomy in the Second Degree. Sexual Assault in the First Degree, was a Class C Felony as it stood at the time of Appellants guilty plea, was codified under RSMo § 566.040 (1997) and has since been transferred to RSMo § 566.031 and is now titled Rape in the Second Degree.

As a result of Appellant's own actions, and subsequent pleading of guilty to this offense, the Missouri Sex Offender Registry Act ("SORA") required Appellant to register with the Missouri Sex Offender Registry ("Registry"). (Court Order, pg. 2-3, 7.) Appellant has remained on the Registry since Appellant's plea in 1997 *Id.* After filing a petition for removal from the Registry on March 24, 2021, the Circuit Court in St. Louis County, Missouri, denied Appellant's petition, finding that SORA does not improperly infringe upon Appellant's fundamental right to privacy or substantive due process, nor does SORA violate either the United States Constitution or the Missouri Constitution's prohibition on ex post facto laws. (Court Order, generally). Appellant has filed this appeal challenging the Circuit Court's Order and Judgment.

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ARGUMENT

I. The Trial Court Did Not Err in Denying Appellant's Petition for Removal from the Missouri Sex Offender Registry Because SORA does not improperly infringe upon Appellant's Fundamental Right to Privacy or Substantive Due Process.

A. Standard of Review

Appellate Courts review questions of statutory interpretation de novo. *Holtcamp v. State*, 259 S.W.3d 537, 539 (Mo. 2008); *Dixon v. Mo. State Highway Patrol*, 583 S.W.3d 521, 523 (Mo. Ct. App. 2019). "An appellate court will reverse a judgment of a trial court when it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares or applies the law." *Dixon*, 583 S.W.3d at 523 (citing *Petrovick v. State*, 537 S.W.3d 388, 390 (Mo. App. W.D. 2018)). The Court's "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." *Bacon v. Mo. State Highway Patrol*, 602 S.W.3d 245, 248 (Mo. App. E.D. 2020) (citations omitted); accord *Holtcamp*, 259 at 539–40. If a statute is plain, then the Court must effectuate the General Assembly's intent. *Karney v. Dep't of Lab. & Indus. Rels.*, 599 S.W.3d 157, 162 (Mo. 2020). "When the words are clear, there is nothing to construe beyond applying the plain meaning of the law." *Moore v. Bi-State Dev. Agency*, 609 S.W.3d 693, 696 (Mo. 2020). A "statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 340 (Mo. banc 1993). Further, "it should be obvious that a statute cannot supersede a constitutional provision," *Id.* at 341, and "[n]either the

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language of the statute nor judicial interpretation thereof can abrogate a constitutional right." *State v. Bolin*, 643 S.W.2d 806, 810 (Mo. banc 1983). *See also State ex rel. Liberty Sch. Dist. v. Holden*, 121 S.W.3d 232, 234 n. 6 (Mo. banc 2003).

B. Discussion

i. Federal Sex Offender Registration and Notification Act

The Federal Sex Offender Registration and Notification Act ("SORNA") constitutes Title I of the Adam Walsh Child Protection and Safety Act of 2006. *Carr v. United States*, 560 U.S. 438, 441, 130 S. Ct. 2229, 2232, 176 L. Ed. 2d 1152 (2010). "SORNA provides, inter alia, that '[a] sex offender shall register ... in each jurisdiction where the offender resides.'" *Doe v. Keathley*, 290 S.W.3d 719, 720 (Mo. 2009) (citing 42 U.S.C. § 16913)[1]. "A 'sex offender' is 'an individual who was convicted of a sex offense.'" *Id*. (citing 42 U.S.C. § 16911(1))[2]. A 'sex offense' includes a 'criminal offense that has an element involving a sexual act or sexual contact with another.'" *Id*. (citing 42 U.S.C. § 16911(6)).[3] "In 2008, SORNA was applied to all sex offenders, even those who were convicted before 2006, by means of interim and final U.S. Department of Justice rules." *Peters v. Jackson Cnty. Sheriff*, 543 S.W.3d 85, 88 (Mo. App. W.D. 2018) (citing 72 Fed. Reg. 8894-01 (Feb. 28, 2007) and 73 Fed. Reg. 38,030-01 (July 2, 2008)); *see also Horton v. State*, 462 S.W.3d 770, 773 (Mo. App. S.D. 2015) ("SORNA has applied to persons who pled guilty before its enactment since at least August 1, 2008, following the United States Attorney General's

[1] Transferred to 34 U.S.C.A. § 20913.
[2] Transferred to 34 U.S.C.A. § 20911(1).
[3] Transferred to 34 U.S.C.A. § 20911(5)(A)(i).

issuance of final guidelines."). Courts have continued to uphold that "SORNA applies to individuals who committed a sex offense prior to July 20, 2006." *Keathley*, 290 S.W.3d at 720 (citing 42 U.S.C. § 16913(d)[4]; 28 C.F.R. § 72.3).

Appellant is a sex offender under SORNA because he pleaded guilty to Deviate Sexual Assault, a sex offense formerly proscribed in RSMo § 566.070. (Court Order, pg. 4). Specifically, Appellant plead guilty to having deviate sexual intercourse with a minor who was fourteen or fifteen years old and to having Sexual Intercourse with a minor who was fourteen or fifteen years old. (Court Order, pgs. 4-6). Deviate Sexual Assault, as created in RSMo § 566.070, no longer exists, and has been transferred to RSMo § 566.061, and is now classified as Sodomy in the Second Degree. (Court Order, pg. 7). To understand what specific action Appellant committed and the consequences of his conviction, the Court must look at the definition of Deviate Sexual Assault as it was when the law was still active. (Court Order, pgs. 5-6).

"The crime of 'deviate sexual assault in the first degree' is committed when a person has 'deviate sexual intercourse' with another person to whom he is not married and who is incapacitated or who is fourteen or fifteen years old. § 566.070(1), RSMo1986." *State v. Roedel*, 884 S.W.2d 106 (Mo.app.E.D.1994); (Court Order, pgs. 4-6). Additionally, the Eastern District Appellate court stated that "[d]eviate sexual intercourse" is defined in § 566.010(1), RSMo1986, as "any sexual act involving the genitals of one person and the mouth, tongue, hand, or anus of another person." *Id.*

[4] Transferred to 34 U.S.C.A. § 20913(d).

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The current definition of "deviate sexual intercourse" is found in RSMo § 567.010 and is defined as "any sexual act involving the genitals of one person and the mouth, hand, tongue, or anus of another person; or any act involving the penetration, however slight, of the penis, the female genitalia, or the anus by a finger, instrument, or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim." (Court Order, pg. 7). The Missouri Legislature redefined the specific action to which Appellant plead guilty, Sodomy in the Second Degree, in 2013, codifying: "A person commits the offense of sodomy in the second degree if he or she has deviate sexual intercourse with another person knowing that he or she does so without that person's consent." RSMo § 566.061 (2013) (Court Order, pg. 7). Additionally, the current criminal statute for an individual who has deviate sexual intercourse with a person who is fourteen or fifteen years old is found in RSMo § 566.064, Statutory Sodomy in the Second Degree. (Court Order, pg. 7). The statute states: "[a] person commits the offense of statutory sodomy in the second degree if being twenty-one years of age or older, he or she has deviate sexual intercourse with another person who is less than seventeen years of age". RSMo § 566.064. (Court Order, pg. 7). This remains the current statute for statutory sodomy in the second degree, which includes any victim under the age of seventeen. *Id.* Thus, RSMo § 566.064 includes anyone convicted under the prior Deviate Sexual Assault statute, using the minor children prong, in that the victim was fourteen or fifteen years old. (Court Order, pgs. 4-7).

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SORNA divides sexual offenders into three tiered categories: Tier I, Tier II, and Tier III. 42 U.S.C. §§ 16911(2)-(4)[5]. The relevant portion of 34 USCA § 20911 defines Tier 1 sex offenders as a "sex offender other than a Tier II or Tier III sex offender." The same statute defines a Tier II offender as "a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and-- (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor". The statute then lists a set of enumerated offenses which would designate an offender as a Tier II offender.

Included in this enumerated list of offenses that qualifies an offender as a Tier II offender is 18 USCA § 2243, which codifies the sexual abuse of a minor as a federal offense, stating in relevant part:

> Of a minor.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who--(1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging 18 USCA § 2243.

Here, Appellant plead guilty to one count of Deviate Sexual Assault in the First Degree, specifically, that he had deviate sexual intercourse with a minor who was fourteen or fifteen

[5] Transferred to 34 U.S.C.A. § 20911(2)-(4).

years old at the time of the offense. These counts fall directly in line with 18 USCA § 2243, and therefore, Appellant is properly classified as a Tier II offender under federal SORNA. (Court Order, pg. 6).

The duration of federal SORNA's registration requirements are detailed in 34 USCA § 20915. The duration of the registration requirement under the statute is based on the Tier level of the offender and is as follows: "(1) 15 years, if the offender is a tier I sex offender; (2) 25 years, if the offender is a tier II sex offender; and (3) the life of the offender, if the offender is a tier III sex offender. 34 USCA § 20915. Because Appellant is a Tier II offender under Federal SORNA and his registration requirement is 25 years, he is still required to register under federal SORNA per 34 USCA § 20911 and 34 USCA § 20915.

ii. Missouri's Sex Offender Registration Act

Missouri's Sex Offender Registration Act ("SORA," also known as "Missouri Megan's Law") first went into effect on January 1, 1995. *Doe v. Phillips*, 194 S.W.3d 833, 839 (Mo. 2006). "Megan's Law imposes registration and notification requirements on persons committing crimes listed in chapter 566, certain other sexual crimes, and certain crimes that are not inherently sexual in nature but the legislature believes to be associated with a risk of sexual offenses against minors, such as child kidnapping." *Id*.; §589.400, *et seq*. RSMo.

Following amendments to the SORA statutes by the Missouri State Legislature in 2018, sexual offenders were divided into three tiered categories to mimic SORNA classifications, with tier I offenders falling into the least severe category, and tier III offenders being the most severe offenders. *Dixon*, 583 S.W.3d at 525; RSMo § 589.400, *et*

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seq. (2018). The Missouri Statute delineating the convictions that create an offender's status as a tier III Offender include, Statutory Sodomy in the Second Degree, Sodomy in the Second Degree, and Rape in the Second Degree. RSMo § 589.414.7. Pursuant to § 589.414, RSMo, Appellant is a tier III sex offender. RSMo § 589.414.7 (2018). (Court Order, pg. 7). Sex offenders who are adjudicated for tier III offenses are required to register for "the life of the offender if the offender is a tier III sex offender." RSMo § 589.400.4(3). Therefore, under the current statutory requirements of SORA, Appellant is required to register for life and may not be removed from the SORA Registry. (Court Order, pg. 7; See also *Smith v. St. Louis County*, 659 S.W.3d 895 (Mo. banc 2023) and § 589.400.4(3) RSMo.

iii. Purpose of SORA and SORNA

Appellant, throughout his brief, argues that the legitimate state interests and purposes of SORA are inadequate while also infringing upon Appellant's constitutional rights. (Appellant's Brief, generally). Specifically, Appellant argues that the state interests and purposes of SORA and SORNA are not 1) narrowly tailored enough to withstand constitutional scrutiny and 2) rationally related to a legitimate state interest. (Appellant's Brief, generally).

The Missouri Supreme Court has held the General Assembly enacted SORA to "protect children from violence at the hand of sex offenders and to respond to the known danger of recidivism among sex offenders." *Phillips*, 194 S.W.3d at 839. Additionally, the Missouri Supreme Court in *Phillips* found further purposes in SORA including:

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> "disseminating public information in the interest of safety and law enforcement efforts…purpose and the principal effect of notification are to inform the public for its own safety… [t]he State makes the facts and underlying offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant" *Id.* at 845 (*citing Smith v. Doe*, 538 U.S. 84, 123, S.Ct. 1140 155 L.Ed.2d 164 (2003)).

Finally, the Missouri Supreme Court specifically stated that "[t]he safety of children is a legitimate state interest" *Phillips* at 845. (*citing Doe v. Miller*, 405 F.3d 700 (8th Cir.2005)). As stated above, the Missouri Supreme Court in *Phillips* found a myriad of reasons and purposes for the SORA sex offender registry.

Regarding the Federal Registry purpose, the intent of the Legislature is stated in the "Declaration of Purpose" statute found in 34 U.S.C.A. § 20913 and is given as such: "In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators." 34 U.S.C.A. 20901.

iv. Appellant's right to Privacy is not infringed upon by the SORA requirements.

Appellant contends that the Missouri Sex Offender Registration Laws (SORA) violate his right to substantive due process by improperly infringing upon his right to privacy. Appellant plead guilty to one count of Deviate Sexual Assault and one count of Sexual Assault in 1997. (Appellant's Brief P. 10). Appellant pled to Deviate Sexual Assault, specifically, to having deviate sexual intercourse with a minor who was fourteen

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or fifteen years old and to Sexual Assault, specifically, to having sexual intercourse with a minor who was fourteen or fifteen years old. RSMo §566.070 (1993) and RSMo § 566.040 (1993). (Court Order, pg. 2, 4). Appellant was placed on a period of probation for five years and the sentences were suspended. (Appellant's Brief, P. 10; Court Order pg. 2). On September 15, 2002, the trial court for Appellant's underlying offense closed the records of his plea pursuant to RSMo § 610.105 (Appellant's Brief, pg. 23; Court Order, pg. 3). Appellant's receipt of a suspended imposition of sentence and the subsequent closing of the criminal record related to this case pursuant to RSMo § 610.105 for Appellant's pleas of guilt to both Deviate Sexual Assault and Sexual Assault are the crux of Appellant's argument and how Appellant contends his specific position circumvents the proper application of SORA. (Appellant's Brief, generally).

1. The Court's Sealing of Appellant's Records is Immaterial to his status as a Sex Offender and his Fundamental Right to Privacy is not improperly infringed upon.

Appellant cites Missouri Supreme Court case *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006) as the controlling Missouri law in this matter. However, Appellant's contention that his status is different than the circumstances at issue in the *Phillips* case lacks merit. (Appellants Brief, generally). Appellant argues that SORA requirements infringe upon his fundamental right to privacy. (Appellant's brief, generally). The Missouri Supreme Court in *Phillips* noted that for a right to be considered "fundamental" under substantive due process, it must be one that is "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." and furthermore, the asserted fundamental right must

be "carefully described." *Id.* at 842. *Citing State ex rel. Nixon v. Powell,* 167 S.W.3d 702 (Mo. banc 2005).

In *Phillips*, a class of sex offenders made essentially the same argument parroted by Appellant. *Id.* In *Phillips*, one of the arguments Appellants made was that "the law's restrictions and requirements violate their rights under Missouri's equal protection clause because they apply indiscriminately both to those convicted of serious or violent sexual crimes and to those who plead guilty to minor crimes to avoid the embarrassment of a trial and received only a suspended imposition of sentence (SIS), without proof of future dangerousness." *Id.* at 839. This is the class of Sex Offender that Appellant argues does not apply to him. (Appellant's Brief, generally). Yet, Appellant is a sex offender who received a suspension of sentence. (Court Order, pg. 2). *Phillips* was decided in 2006, at which time the very statute Appellant points to as his distinguishing factor, the sealing of records found in Section 610.105, RSMo, was in full effect and provided the same sealing mechanism which Appellant now indicates shelters him from the class in *Phillips*. (Appellant's Brief, generally). Furthermore, this statute is automatic in its sealing of records for individuals who have received a suspended imposition of sentence and completed probation and does not require a petition by a criminal Defendant. Section 610.105 RSMo. The triggering mechanism for the sealing of these records is automatic and absolute. *Id.* Therefore, Appellant's argument that his position is differentiated from the class of sex offenders in *Phillips,* lacks merit as some of the offenders that the Missouri Supreme Court analyzed in that case received a suspended imposition of their sentence in their underlying and triggering sex offense convictions. *Phillips*, 194 S.W. 3d at 839.

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This information that Appellant claims is not in the "Public Domain" is still available from any number of sources. (Appellant's Brief, generally). Any newspaper that covered the guilty plea, any other news outlet, media outlet, or simply any other source of information that is not specifically the Missouri Courts System may still have the pertinent information regarding Appellant's crimes readily available for dissemination. Simply stated, information cannot be drawn back from the public domain once it is inserted, and a simple bar on certain institutions providing information to some people does not remove information from existence.

Additionally, the Court in *Phillips* specifically noted that the information regarding a Sex Offender's arrest and conviction was already in the public domain. *Id.* at 844. The Court also cited two United States Supreme Court cases noting that the "prevailing law of invasion of privacy generally recognized that the interests in privacy fade when the information involved already appears on the public record" *Id.* at 844. (*citing Cox Broad. Corp v. Cohn*, 420 U.S. 469, 494-95, 95 S.Ct. 1029, 43 L.Ed2d 328 (1975)) and "No 'substantive privacy' decision supports the claim that 'State may not publicize a record of an official act such as an arrest.'" *Phillips*, 194 S.W. 3d at 844. *citing Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). Noting these principles, this Court in *Phillips* found that the SORA requirements fail to impinge on any fundamental liberty or privacy right, and the law will withstand substantive due process scrutiny if "rationally related to a legitimate state interest." *Phillips*, 194 S.W.3d at 845. *Citing In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). This test came from the result of the Court

finding that SORA did not infringe upon the offender's fundamental right to privacy. *Id.* at 844-845.

2. SORA is rationally related to a legitimate state interest.

The Court in *Phillips* found that "Missouri has a legitimate interest in disseminating public information in the interest of safety and law enforcement efforts." *Id.* at. 845, citing *Smith,* 538 U.S. at 99, 101, 123 S.Ct. 1140 ("purpose and the principal effect of notification are to inform the public for its own safety;" "[t]he State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant"). Additionally, the Court held, "'the safety of children is a legitimate state interest,' *Miller,* 405 F.3d at 714, and the purpose of Megan's Law is to 'protect children from violence at the hands of sex offenders.'" *Id.* quoting *J.S. v. Beaird,* 28 S.W.3d 875, 876. (Mo. En Banc 2000). The Court further found that "Megan's Law bears a rational relation to this legitimate state interest and is not violative of substantive due process principles." *Id*. Therefore, there is no infringement upon a fundamental right for Appellant in this case. The proper test to determine whether the law will withstand substantive due process scrutiny is if the law is "rationally related to a legitimate state interest." *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). And that law will be upheld under the test if " 'any state of facts reasonably may be conceived to justify it.'" *Mahoney v. Doerhoff Surgical Servs*., 807 S.W.2d 503, 512 (Mo. banc 1991), *quoting, McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961).

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Just as this Court did in *Phillips*, and this Court and other Missouri Appellate Courts have done throughout the entire history of SORA, this Court should again find that the Registry is rationally related to a state interest. *Phillips*, 194 S.W. 3d at 852. The plethora of stated goals and interests of SORA were relayed by this court in *Phillips*. *Id.* at 845. These goals include, but are not limited to, 1) the dissemination of public information in the interest of safety and law enforcement 2) notifying and informing the public for its own safety 3) the dissemination of the information so members of the public may take whatever precautions they find necessary 4) the legitimate state interest in the safety of Missouri's children and 5) protecting children from violence committed by sex offenders. *Id.*

Furthermore, the Missouri Supreme Court has reached this conclusion in other cases that made similar arguments as Appellant does today. *Roe v. Replogle*, 408 S.W.3d 759 (Mo. banc 2013) found that the "registration requirement did not violate substantive due process principles because it did not implicate a fundamental right and because it was rationally related to a legitimate state interest." *Replogle* 408 S.W. 3d at 767. The Missouri Supreme Court in *R.W. v. Sanders*, 168 S.W.3d 65 (Mo. banc 2005) also found that SORA does not violate the fundamental due process rights of sex offenders. *R.W.*, 168 S.W. 3d at 71.

The Court considered the argument that Appellants made in *Phillips* that "they had a vested right in being free from further collateral consequences of their prior pleas of guilty, particularly in the case of those who were not convicted but merely pled guilty in return for an SIS," as Appellant did here, but found that "[n]othing in the Does' releases from supervision states that no further collateral consequences will be imposed. They

merely are no longer on probation or parole. Various collateral consequences still attend their prior pleas of guilty." *Id.* at 851-852. Just as the Appellants in *Phillips* who pled after Megan's Law was enacted were required to register, so here should Appellant be still required to register. *Id.* at 852-853; (Court Order pg. 2).

C. Conclusion

For the above stated reasons, Appellant fails to show that his fundamental rights have been infringed upon, and because there are a myriad of legitimate state interests found by Missouri Courts in the implementation and enforcement of SORA, the statute should be found to be constitutional as applied to Appellant. While Appellant makes arguments related to his future dangerousness, which is explored more in depth in point two of Respondent's brief, there is nothing in the law or analysis supplied by this Court's previous rulings on the issue to include future dangerousness in the analysis of substantive due process violations. Missouri Courts have supplied a variety of legitimate state interests and all of these fall well within any "state of facts reasonably conceived to justify it." *Mahoney v. Doerhoff Surgical Servs*., 807 S.W.2d 503, 512 (Mo. banc 1991), *quoting, McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Therefore, this Court should deny Appellant's first point.

II. SORA accomplishes Legitimate State Interests and Appellant is not entitled to removal based upon his argument of non-dangerousness.

A. Discussion

Appellant claims that the previously cited SORA legitimate state interests do not apply to Appellant, as he is a "non-dangerous person" and therefore there are not legitimate

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state interests in applying SORA to Appellant. (Appellant's Brief, generally). This argument must also fail.

1. There are Multiple Legitimate State Interests served by SORA

Appellant points to a variety of other states to argue that the previously mentioned legitimate state interests are not applicable to Appellant. (Appellant's Brief, generally). Specifically, Appellant cites to South Carolina Supreme Court and its finding that a "likelihood of re-offending lies at the core" of justification for the state sex offender registry. *Powell v. Keel*, 860 S.E.2d 344, 349 (S.C. banc. 2021). In *Keel*, the South Carolina Supreme Court noted that the rationale for the South Carolina Sex Offender Registry relies on a "likelihood of re-offending." *Keel*, 860 S.E. 2d at 349, *citing State v. Dykes*, 403 S.S. 499, 744 S.E.2d 505 (2013). While there are multiple differences in the statutory scheme between Missouri's and South Carolina's sex offender registries, a distinction must be made between Missouri's Court rulings and the findings of South Carolina's courts.

As stated above, while South Carolina's Courts and sex offender registry may hinge upon the dangerousness of recidivism, that is only one of the many enumerated legitimate state interests cited by Missouri Courts in SORA analysis. As explained in Point One of this brief, there are many reasons the Missouri Supreme Court has found in finding the legitimate state interests in SORA. *Phillips*, 194 S.W. ed at 845. These include dissemination of information to law enforcement, informing the public, the known rate of recidivism among sex offenders, and allowing citizens of Missouri to take whatever precautions they deem necessary in interacting with a sex offender. *Id*.; (Court Order, pg. 9-10). While Appellant may claim, and the Circuit Court found that "as to dangerousness,

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based on the evidence and affidavits received and reviewed…Mr. Doe has been a hard working law abiding citizen with a good reputation in his community since his plea of guilty in 1997, except for the felony arrests for failure to register," the Court still denied Appellant's Petition for relief seeking to end his registration requirements. (Court Order, pg. 4, 14).

2. South Carolina's Registry and Removal Process is distinctly different from Missouri's Registry and Removal Process and Appellant's Attempt to Equate it to SORA Should be Rejected.

Appellant argues that Missouri should look to South Carolina's Court findings to guide its actions here. (Appellant's Brief, Generally). The South Carolina Supreme Court in *Keel* made distinct findings regarding the state of South Carolina's Registry laws at the time of that decision. *Keel,* 860 S.E. 2d at 349. Specifically, the South Carolina Supreme Court found that any person who must register as a sex offender in South Carolina generally must register for life. *Keel,* 860 S.E. 2d at 347. Furthermore, the only possible avenue for removal from the Sex Offender Registry was to have the underlying conviction or guilty plea pardoned; reversed, vacated, or overturned on appeal; or through a successful writ of Habeas Corpus or motion for new trial in which the defendant is acquitted. *Id*.

This is a far reach from Missouri's tiered registry system. In RSMo § 589.401, the Missouri legislature created an avenue for removal from the Sex Offender Registry which is available after a set amount of time for all Tier I and Tier II offenders. One of the enumerated findings that a Trial Court must make under RSMo § 589.401 is that the Court must make a finding to the Sex Offender's current threat status to public safety. The only

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class of Sex Offenders in Missouri to whom this system is not available are the Tier III offenders, of which Appellant is classified. (Court Order, pg. 7). Tier III includes convictions for child molestation in the first and second degrees, Rape in the First and Second Degrees, Kidnapping in the First Degree, Sodomy in the First and Second Degree, and other serious offenses. RSMo § 589.414.

Appellant plead guilty to having Deviate Sexual Intercourse and Sexual Abuse in the First Degree with a minor child who was fourteen or fifteen years old at the time. (Court Order, pg. 2). In *Keel*, the Appellant plead guilty to the crime of criminal solicitation of a minor for "knowingly through the Internet contact[ed] and communicate[d] with a person ... whom he reasonably believed to be [a] twelve year-old girl, for the purpose of or with the intent of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity. *Keel,* 860 S.E. 2d at 345. This crime if committed in Missouri would likely have been charged pursuant to § 566.151 RSMo, Enticement of a child. The statute reads "[a] person twenty-one years of age or older commits the offense of enticement of a child if he or she persuades, solicits, coaxes, entices, or lures whether by words, actions or through communication via the internet or any electronic communication, any person who is less than fifteen years of age for the purpose of engaging in sexual conduct." RSMo § 566.151. Under Missouri's current tier system, this offense would delineate an offender as a Tier II sex offender. RSMo § 589.414.6 (d). If convicted of this crime in Missouri, this classification would allow the individual, after a set period of time, to petition a Circuit Court for removal from the Missouri Sex Offender Registry and during that proceeding the Court would make a finding as to that offender's current threat to public safety. RSMo §

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589.401. This is exactly the remedy that the South Carolina Registry Statutes did not provide. *Keel*, 860 S.E. 2d at 460. Yet, Missouri does provide an avenue for removal from the registry for over twenty-five specifically enumerated offenses, as the offenders convicted of these will be categorized as a Tier I or Tier II offender. RSMo § 589.414.

Thus, Appellant's argument to urge Missouri to follow the South Carolina Supreme Court here lacks merit. While Appellant in this case may claim his situation is similar, the facts are different. In *Keel*, the offender sent messages to an undercover police officer in an *attempt* to coerce sexual activity from a person he believed to be under 12 years old. *Id.* at 345. In this case, Appellant plead guilty to counts of actual sexual intercourse and deviate sexual intercourse with a person aged either fourteen or fifteen. (Court Order, pg. 2-4). The differences in these two cases are jarring and the potential dangerousness between an offender who attempted to coerce an undercover police officer into sexual acts online and an offender who has actually had sexual contact with a fourteen or fifteen year old is stark. While there may be no avenue for Appellant in this case to be removed from the registry, this is due solely to the purposeful statutory construction of the Missouri General Assembly and the findings in *Keel* should not be followed here.

3. **Although under Federal SORNA Appellant would be under a different tier and therefore eligible to petition for removal from the registry, that does not mean that SORA does not have a legitimate state interest in having him register for life.**

In Appellant's petition, he argues that under the Federal SORNA requirements he would be a tier II offender and would therefore be eligible for removal from the registry if

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the Federal rules were the only applicable registry. (Appellant's Brief, pg. 48). While Respondents admit this this is true, it should be noted that while many aspects of Missouri's SORA requirements mirror the Federal SORNA statutes, Missouri's SORA requirements are still rationally related to a legitimate state interest and therefore do not violate Appellant's constitutional rights by not being identical to the requirements set by SORNA. (Court Order, generally); *Phillips*,194, S.W. 3d at 845.

Pursuant to SORNA, Appellant is a Tier II sex offender and is subject to registration for at least twenty-five years. 34 U.S.C.A. § 20915(a)(2). The implementation of SORNA provided a standardized national system, however, "federal sex-offender registration laws have from their inception, expressly relied on state-level enforcement." *Carr*, 560 U.S. at 452. SORNA also imposes an obligation to the states to "maintain a jurisdiction-wide sex offender registry." *Doe v. Isom*, 429 S.W.3d 436, 438 (Mo. Ct. App. 2014). States each maintain their own systems and are permitted to supplement SORNA's requirements with their own specific registration requirements. See Office of Att'y Gen.; The Nat'l Guidelines for Sex Offender Reg. & Notification, 73 FR 38030, 38034 (July 2, 2008). "There is no basis for taking [SORNA]'s requirement that sex offenders register for the periods specified in [34 U.S.C. § 20915(a)] as implying that jurisdictions cannot prescribe longer or additional registration requirements for sex offenders." *Id. at 38035*. Rather, § 20915(a)'s "durational requirements for registration define the minimum, and not the maximum, requirements for the jurisdictions' registration programs." *Id.*

B. Conclusion

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Appellant has failed to provide rationale for this Court to find SORA unconstitutional as applied to Appellant. While Appellant claims that he is not a threat to reoffend, this is immaterial to the argument as Missouri Courts have provided multiple legitimate state interests in enforcing SORA that are separate from an offender's potential to reoffend. *Phillips*, 194 S.W. 3d at 844-845. Additionally, the South Carolina Supreme Court case on which Appellant relies is clearly distinguishable from the case at hand based both on the underlying offenses and the status of the two states' Registry laws. *Keel*, 860 S.E. 2d at 460. Missouri provides an opportunity for removal and an opportunity for a court to find an offender is not a threat to public safety based on their underlying offense, just as the Court did here. (Court Order, pg. 3). Additionally, States are well within their right to increase the duration of a registration requirement compared to the duration requirements under Federal SORNA. For the above stated reasons, this Court should deny Appellant's second point.

III. The Trial Court Did Not Err in Denying Appellant's Petition for Removal from the Missouri Sex Offender Registry Because Appellant's Registration Requirements under SORA do not violate Missouri's Prohibition on Ex Post Facto laws.

A. Discussion

Appellant claims that the changes in Missouri's SORA registration requirements since the time of his initial plea of guilt to now constitute a distinct enough change that the current statutory requirements of SORA now violate the Ex Post Facto laws of Missouri. (Appellant's Brief, generally). In fact, Appellant states that "if SORA was the same today as it was back in the early 2000's, there would be nothing further to say." (Appellant's Brief, pg. 64). Appellant then cites a 2005 case in front of the this very Court that found

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Missouri's SORA requirements specifically did not violate ex post facto laws. *R.W. v. Sanders*, 168 S.W. 3d 65 (Mo. banc 2005). Appellant then moves to Pennsylvania Courts and Michigan Courts for guidance on this issue after explaining the changes in Missouri's SORA laws and requirements. (Appellant's Brief, generally). The Missouri General Assembly made changes to Sex Offender laws and sexual offense criminal laws in 2008 and 2013. (Appellant's Brief, generally). Appellant argues these changes "breathtaking" regarding their classification and punishment. (Appellant's Brief, pg. 65). Yet, in October of 2013, the Missouri Supreme Court ruled that these new changes to Missouri Sex Offender laws did not violate Ex Post Facto violations. *Roe v. Replogle*, 408 S.W.3d 759 (Mo. banc 2013). Specifically, this Court noted that an "Ex Post Facto law that is intended as punishment may violate the ban and render the law void." *Id*. at 766. *citing Smith v. Doe,* 538 U.S. 84, 93, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). But, if a "statute is intended 'to enact a regulatory scheme that is civil and nonpunitive'" then it does not violate the prohibition on Ex Post Facto laws. *Replogle* at 766. *citing Smith* at 93. This Court then reaffirmed the decisions in *Phillips* and *R.W.* that the registration requirements are civil and not punitive in nature, and therefore do not violate Ex Post Facto laws. *R.W. v. Sanders*, 168 S.W. 3d at 69; *Phillips*, 194 S.W. 3d at 842; (Court Order, pg. 10-13)

1. **Changes in SORA since 2013 do not support Appellant's Claim that SORA is an Ex Post Facto Law when Applied to him.**

Appellant points to five specific changes that Missouri implemented towards SORA requirements in 2018 as the basis for his Ex Post Facto claim. (Appellant's Brief, pgs. 64-66). *R.W. v. Sanders* provides this Court's analysis when determining whether a statute

violates the Ex Post Facto prohibition. *R.W. v. Sanders*, 168 S.W. 3d at 68. It is a two-step analysis. *Id.* The first step is to decide whether the registration statutes were designed to "establish punishment" *Id*. *citing Smith* at 92. If the statutes were designed to punish, that ends the inquiry, and the Ex Post Facto violation is established. *Id.* The second step is to look at the registration statutes and after finding that they are not intended to punish, but to "establish a non-punitive, civil regulatory system, the inquiry proceeds to a determination of whether the registration statutes are sufficiently punitive in effect so as to negate the General Assembly's intent" *Id*. Additionally, the Missouri Supreme Court found that the "thrust of the registration requirements and notification requirements are civil and regulatory in nature." *Id.* at 70.

The first change cited by Appellant is the avenue for removal for the registry as explained in Point two of this brief, found in RSMo § 589.401. (Appellant's Brief, pg. 66). This is not an additional requirement for any form of registration, so it does not bring the current status of the law into violation of Ex Post Facto.

The second change that Appellant cites is based on the classification of his offense as a Tier III offender which required him to report in person every ninety days and have his photograph taken. (Appellant's Brief, pg. 66). In discussing registration requirements, the Court in *R.W.* found that registration requirements are traditionally a "government method of making available and relevant necessary information to law enforcement, not a method of punishment" and noting that offenders who violate against a minor may have to "update information more frequently, this is reasonably related to the regulatory objective of reducing recidivism and more efficiently investigating crimes against minors" *R.W.,* 168

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S.W. 3d at 69-70. As this Court has previously found, increased frequency in registration or information updating is not a punitive law. *Id.* As to the photography requirements, this Court found that the registration requirements require fingerprint and photography, but the offender is "otherwise free to travel and go about his or her daily activities." *Id*. The photography requirement is also not punitive in nature, as found by this Court. *Id.*

The third change cited by Appellant is the requirement for an Offender to report any change in an online identifier in person. (Appellant's Brief, pg. 66). This falls in the same category as the previous change, and while online identifiers may not have been as prevalent in 2005 when *R.W.* was decided, they are common now. This change remains in the same vein as the registration requirements in changing residency and workplace that have been in place since 2008. (Appellant's Brief, pg. 59). This Court in *Replogle* already found that these requirements were not prohibitive under Ex Post Facto laws and there is nothing to indicate the addition of reporting of online identifiers would push this requirement from regulatory into punitive. *Replogle,* 408 S.W. 3d at 766-777.

The fourth change cited by Appellant is the requirement of submission of a DNA sample. (Appellant's Brief, pg. 66). This Court in *R.W.* noted that the offender must provide a fingerprint sample. *R.W.,* 168 S.W. 3d at 70. The same analysis should apply to a DNA sample, and as this Court found, the offender is still "free to travel and go about his or her daily activities." *Id.* Furthermore, this Court noted the most important factor in the Ex Post Facto analysis is that the requirement has a "rational connection to a non-punitive purpose." *Id*. Law enforcement regularly collects DNA samples in the investigation of sex crimes and the ability of law enforcement to use DNA to both identify and exonerate suspects is a

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recent development as technology progresses. This is an extremely vital tool in the investigator's arsenal and the non-punitive purpose is clear.

The fifth and final change cited by Appellant is described as "further expansion of what registry information was published as well as the means of publication." (Appellant's Brief, pg. 66). This Court has already discussed the dissemination of truthful information. In *R.W*. this Court found that disseminating accurate information for the purpose of furthering a legitimate state interest or governmental objective is "generally not regarded as punishment" *R.W*., 168 S.W. 3d at 69. *citing Smith* at 98, 123 S.Ct. 1140. Just because the dissemination of this truthful information is now done via the internet instead of a newspaper does not shift the statute into a punitive category. *Id.* Based on the analysis in Point one that this does not improperly infringe upon an individual's fundamental rights and showing the legitimate state interest involved in this dissemination, this change also does not make the registration requirements punitive.

B. Conclusion

Based on the above, Appellant fails to show how any changes in Missouri's SORA laws would violate the Ex Post Facto prohibitions. This Court should follow its previous rulings and find that the current SORA requirements do not violate the Ex Post Facto prohibition relative to Appellant, and deny his third claim.

CONCLUSION

Appellant's previous convictions for Deviate Sexual Assault and Sexual Assault in the First Degree result in an obligation to register under SORA for life. The previous

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holdings of this Court in finding that SORA does not violate the fundamental rights of Appellant, that the registration requirements are rationally related to a legitimate state interest, and the requirements do not violate Ex Post Facto laws should be upheld.

WHEREFORE, Respondents Scott Kiefer and the St. Louis County Sheriff respectfully request the Court affirm the judgment of the trial court and deny Appellant's claims.

Respectfully Submitted,

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AFFIDAVIT OF SERVICE CERTIFICATION PURSUANT TO RULE 84.06

I, Steven Ebert, hereby certify that I am the attorney of record for Respondents, St. Louis County Police Department and St. Louis County Sheriff's Office, and that the foregoing Brief of Respondents:

1. Includes the information required by Rule 55.03;

2. Complies with the limitations in Missouri Supreme Court Rule 84.06;

3. Contains 7,244 words and 553 lines.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Missouri Supreme Court Rule 103.08 this document has been filed for submission using the Court's electronic filing system on April 5, 2024, on all parties and counsel of record.

/s/ *Steven M. Ebert II*
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