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IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI
Repondent,

v.

MICHAEL WADE,
Appellant.

No. SC92382

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE ST. LOUIS COUNTY CIRCUIT COURT, 21ST JUDICIAL CIRCUIT
THE HONORABLE CAROLYN C. WHITTINGTON, JUDGE

Appellant's Opening Brief

GARY E. BROTHERTON, Esq.

Legal Writes, LLC
601 W. Nifong Blvd.
Building 1, Suite C
Columbia, Missouri 65203
Telephone: (573) 875-1571
Facsimile: (573) 875-1572
GEBrotherton@LegalWritesLLC.com

Attorney for Appellant

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JURISDICTIONAL STATEMENT

Micheal Wade, Appellant, was convicted following a bench trial before the Honorable Carolyn C. Whittington, St. Louis County Circuit Judge, of being a sex offender present within 500 feet of a park with a playground. § 566.150, RSMo 2009. On January 13, 2012, Judge Whittington sentenced Mr. Wade to imprisonment for three (3) years but suspended the execution of that sentence and placed him on probation for five (5) years. On January 19, 2012, Mr. Wade filed his appeal to this Court challenging the constitutionality of § 566.150, RSMo 2009, which is an issue reserved for this Court's exclusive appellate jurisdiction. Mo.Const., Art. V, § 3 (as amended 1982).

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STATEMENT OF FACTS

On August 22, 2010, Sgt. Joshua Henroid was working as a Missouri State Park Ranger. TR 17. That day, he was working at Castlewood State Park, in St. Louis County. TR 18. While in the area referred to as "the beach," Sgt. Henroid saw a man with a "koozie" cup with a can in it and a cooler. TR 18. Since alcohol is prohibited in that area, Sgt. Henroid, approached the man to inquire. TR 19. The man was Michael Wade. TR 18. He was with a female friend, Manuella Cogswell. TR 19.

Mr. Wade had a soda in the "koozie" cup, but, when asked if he had any alcohol in his possession, Mr. Wade said there were two wine coolers in the cooler. TR 19. Sgt. Henroid told them they would have to dump the alcohol or leave the area, and Mr. Wade dumped it. TR 19.

When Sgt. Henroid asked for identification both Mr. Wade and Ms. Cogswell provided it. TR 20. Sgt. Henroid ran their information through the highway patrol communication center and learned that Mr. Wade is a convicted sex offender. TR 20. Since Castlewood State Park has a playground within it, Sgt. Hendroid informed Mr. Wade that he could not be in the park. TR 20. Sgt. Hendroid arrested Mr. Wade. TR 20.

Sgt. Henroid testified that the Park has approximately 1,800 acres and borders the Meramec River, about two miles of which, runs through the park.

TR 24-25. The playground is located about halfway between the park's main entrance and the sandbar where Mr. Wade was observed. TR 22-23.

A St. Louis County jury returned an indictment charging Mr. Wade with being a sex offender present within 500 feet of a park with a playground. LF 8-9, *citing* § 566.150, RSMo 2009. Before trial, defense counsel moved to dismiss the charge in light of this Court's decisions in *F.R. v. St. Charles County Sheriff's Department*, 301 S.W.3d 56 (Mo. banc 2010) and its companion case *State v. Raynor*, 301 S.W.3d 56 (Mo. banc 2010). LF 15-26. Specifically, counsel objected that § 566.150, RSMo 2009, is unconstitutionally retrospective in violation of Art. I, § 13 of the Missouri Constitution. LF 15, 18-23. The trial court overruled that motion, and Mr. Wade waived his right to a jury trial. TR 5-10. Before trial began, defense counsel renewed the motion to dismiss, which the Honorable Carolyn C. Whittington again overruled. TR 5-10.

After presenting the evidence set out above, the State offered Exhibit 1, certified records showing that, on November 25, 1996, Mr. Wade had pleaded guilty in Jefferson County, Missouri to sexual abuse in the first degree, child molestation in the second degree, statutory sodomy in the first degree. TR 30-31. Defense counsel then moved for judgment of acquittal, which the court

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overruled. TR 34-36. Following closing arguments, the trial court found Mr. Wade guilty. TR 43.

On January 13, 2012, the court sentenced Mr. Wade to a term of three (3) years' imprisonment, but suspended the execution of said sentence and placed Mr. Wade on supervised probation for five years. TR 47-48; LF 68-72. On January 19, 2012, Mr. Wade appealed to this Court in order to present his objection that § 566.150, RSMO 2009, is unconstitutionally retrospective. LF 73.

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POINT RELIED ON

The trial court erred in overruling Mr. Wade's motion to dismiss the charge that he violated § 566.150, RSMo 2009, by being a sex offender within 500 feet of a park with a playground, because such ruling violated Mr. Wade's rights to due process and to be free from prosecution for retrospective crimes. *See* U.S. Const., Amend. XIV; Mo.Const., Art. I, §§ 10 and 13. The legislature enacted § 566.150, RSMo 2009, after Mr. Wade's convictions, and that statute impose new obligations, duties or disabilities on matters already legally and finally settled against him – to wit: he pleaded guilty and was sentenced for various sexual offenses in 1996; thirteen (13) years later, the legislature rendered him unable to be within 500 feet of a park with a playground anywhere within its boundary and imposed on him the obligation and duty to monitor his distance from such parks accordingly.

F.R. v. St. Charles County Sheriff's Department, 301 S.W.3d 56 (Mo. banc 2010);

State v. Raynor, 301 S.W.3d 56 (Mo. banc 2010);

State v. Davis, 348 S.W.3d 768 (Mo. banc 2011);

U.S. Const., Amend XIV;

Mo.Const., Art. I, §§ 10, 13;

42 U.S.C. § 16913;

§ 559.115, RSMo 1996;

§ 589.400, RSMo 1998;

§§ 566.147, 589.426, RSMo 2008;

§ 566.150, RSMo 2009.

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ARGUMENT

The trial court erred in overruling Mr. Wade's motion to dismiss the charge that he violated § 566.150, RSMo 2009, by being a sex offender within 500 feet of a park with a playground, because such ruling violated Mr. Wade's rights to due process and to be free from prosecution for retrospective crimes. *See* U.S. Const., Amend. XIV; Mo.Const., Art. I, §§ 10 and 13. The legislature enacted § 566.150 after Mr. Wade's convictions, and that statute impose new obligations, duties or disabilities on matters already legally and finally settled against him – to wit: he pleaded guilty and was sentenced for various sexual offenses in 1996; thirteen (13) years later, the legislature rendered him unable to be within 500 feet of a park with a playground anywhere within its boundary and imposed on him the obligation and duty to monitor his distance from such parks accordingly.

STANDARD OF REVIEW

This Court has exclusive jurisdiction over these appeals pursuant to Missouri Constitution article V, section 3, as the cases require determination of the validity of a state statute. Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269

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> S.W.3d 26, 29 (Mo. banc 2008). A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Id*. The person challenging the statute's validity bears the burden of proving the act clearly and undoubtedly violates the constitution. *Id*. In these cases, F.R. and Raynor do not challenge the validity of the statutes as applied to sex offenders convicted after the law's effective date, but challenge the law's application as to them, whose convictions occurred before the law's effective date.

F.R. v. St. Charles County Sheriff's Department, 301 S.W.3d 56, 60-61 (Mo. banc 2010).[1] Permitting a conviction under an unconstitutional statute violates due process. *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011) ("'An offence created by [an unconstitutional law],' the Court has held, 'is not a crime.'"), *quoting Ex parte Siebold*, 100 U.S. 371, 376, 25 L. Ed. 717 (1880).

FACTS

On August 22, 2010, Sgt. Josh Henroid, a state park ranger was working at Castlewood State Park, in St. Louis County. TR 17-18. While in the area referred to as "the beach," Sgt. Henroid saw a man with a "koozie" cup with a

[1] *Accord State v. Raynor*, 301 S.W.3d 56 (Mo. banc 2010), the companion case to *F.R.*

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can in it and a cooler and approached because alcohol is prohibited in that area. TR 18-19. The man was Michael Wade. TR 18. He was with a female friend, Manuella Cogswell. TR 19.

When Sgt. Henroid asked for identification both Mr. Wade and Ms. Cogswell provided it. TR 20. Sgt. Henroid ran their information through the highway patrol communication center and learned that Mr. Wade is a convicted sex offender. TR 20.[2] Since Castlewood State Park has a playground within it, Sgt. Hendroid informed Mr. Wade that he could not be in the park and arrested him for being there. TR 20. A St. Louis County grand jury, subsequently, indicted Mr. Wade for the class D felony of being a sex offender present within 500 feet of a park with a playground. LF 8-9, 12-13, *citing* § 566.150, RSMo 2009.

ISSUE

In drafting the Bill of Rights to the 1945 Constitution, Missouri continued its consistent protection, "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

[2] On November 25, 1996, Mr. Wade pleaded guilty in Jefferson County, Missouri to sexual abuse in the first degree, child molestation in the second degree, statutory sodomy in the first degree. TR 30-31.

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enacted." Mo. Const. Art. I, § 13 (emphasis added). The question for this Court is whether the 2009 enactment of § 566.150 can impose obligations and disabilities on Mr. Wade for conduct for which he was punished in 1996. In light of *F.R.* and *Raynor* it clearly cannot.[3]

ART. I, § 13

As this Court observed in *F.R.*, *supra* at 61, "The prohibition against a law retrospective in its operation has been a part of the Missouri constitution from its 1820 beginning." Further, for at least 100 years, "this Court consistently has held that a retrospective law 'is one which creates a new obligation, imposes a new duty, or attaches a new disability with respect to transactions or considerations already past.'" *Id.*, *quoting Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (Mo.banc 1911).

In *Davis*, *supra*, the State argued that Art. I, § 13 applies only to civil statutes and § 566.150 is criminal. A year before *Davis*, however, this Court had reaffirmed that

[3] It bears noting that this issue came before this Court in *State v. Davis*, 348 S.W.3d 768 (Mo. banc 2011), where the trial court found § 566.150 unconstitutional. The State, however, had not preserved the question it posed on appeal, and this Court refused plain error review.

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> *Turney* is cited and followed in recent cases that involve new obligations, duties or disabilities on those whose convictions for sex offenses are already past. *See, e.g., Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006), and *R.L. v. Missouri Dep't of Corrections*, 245 S.W.3d 236 (Mo. banc 2008). The principle applies to laws enacted after a plea or conviction. *State v. Holden*, 278 S.W.3d 674 (Mo. banc 2009).

F.R., 301 S.W.3d at 61 (emphasis added).

§ 566.150, RSMO 2009 IS UNCONSTITUTIONALLY RETROSPECTIVE

This Court has dealt with a strikingly similar issue in *F.R.* and *Raynor*, *supra*. Those companion cases will be discussed in turn.

F.R.

> F.R. pleaded guilty to five sex offenses in 1999 and was sentenced to a prison term of seven and a half years. His sentence imposed certain obligations on him: he was required to complete a sex offender treatment program successfully before his release; he was required to register as a sex offender within 10 days of his entry into any county; and he was required to comply with certain fingerprinting and reporting requirements imposed on registered sex offenders.

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301 S.W.3d at 59 (footnotes omitted).

From the time of his parole in 2004 until he commenced the declaratory action, he had complied with each of these obligations and restrictions. *Id.*

> In June 2008, F.R. sought to move to the home of his fiancée in O'Fallon, Missouri. He notified the St. Charles County sheriff's department of his intent to reside there and was advised that its location satisfied the requirements of § 566.147. When he moved in, a flier was distributed with F.R.'s photograph, address and criminal record stating "look who's moved into your neighborhood." Two days after F.R. moved in, the sheriff measured the distance between the home and a nearby child-care facility. Measuring from property line to property line -- rather than building-to-building -- the sheriff determined the home was only 913.34 feet from the child-care facility. The sheriff informed F.R. that he must move from the home. F.R. relocated to a motel.

Id. 59-60. F.R. then sought a declaratory judgment and injunctive relief from the sheriff's forcing him to move, arguing, *inter alia*, that § 566.147 was unconstitutionally retrospective in its application. This Court agreed.

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Raynor

> Charles Raynor is a registered sex offender in Audrain County pursuant to § 589.400(7), [RSMo 1998] and 42 U.S.C. § 16913 due to a 1990 conviction in the state of Washington for indecent liberties with a child younger than 14 years old. Missouri's legislature enacted § 589.426, [RSMo 2008] effective in August 2008, imposing certain restrictions on registered sex offenders' conduct on Halloween night. On Halloween, October 31, 2008, Mexico public safety officers checked registered sex offenders' residences for compliance with § 589.426. When an officer arrived at Raynor's registered address, the officer observed a woman passing out candy to children. She informed the officer that Raynor was inside the house, but that they both believed he was in compliance with the statute because he was not handing out candy. No sign was posted at the residence stating "No candy or treats at this address." Raynor was charged with a class A misdemeanor for failure to comply with § 589.426, [RSMo 2008].

301 S.W.3d at 60 (footnote omitted). Raynor moved to dismiss the charge, arguing that § 589.426 was unconstitutionally retrospective under Art. I, § 13

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of the Missouri Constitution. The trial circuit court agreed, ruling that "the statute unconstitutionally created new obligations on Raynor with respect to his past actions." *Id.*

Mr. Wade

In 1996, when Mr. Wade pleaded guilty to the various sexual offenses noted above, he was sentenced to imprisonment for a total of seven (7) years; however the trial court reserved jurisdiction to release him on probation pursuant to § 559.115, RSMo 1996. LF 44. In March 1997, the trial court granted Mr. Wade probation for a period of five (5) years. LF 44.[4] Those sexual convictions subjected Mr. Wade to a host of restrictions, but they did not subject him to any obligation resembling that imposed thirteen (13) years later by § 566.150, RSMo 2009.

DISCUSSION

The new obligations adopted after the convictions at issue in *F.R.*, *Raynor* and here are indistinguishable. In *F.R.*, this Court explained what constitutes a "new obligation," as follows:

> [A] subsequent law that requires a sex offender to do something -- with a criminal penalty for not doing what the new law requires -- is the imposition of a new obligation or duty

[4] His probation was later revoked. LF 47.

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> imposed solely as a result of the pre-statute conviction. For instance, in *Doe v. Phillips*, 194 S.W.3d 833, there was no challenge to the state keeping a list of sex offenders following their convictions, regardless of when those convictions occurred. What [Art., I, § 13] prohibits is the imposition of a new duty or obligation -- the duty of the sex offender to take the affirmative step of registering himself. In other words, [Art., I, § 13] does not prohibit the state from keeping a registry of sex offenders, but a new law cannot require a previously convicted sex offender to put himself on the list.

301 S.W.3d at 62-63 (footnote omitted).

This Court observed that the offending statute in *F.R.* required him to determine whether a residence fell within 1,000 of a school or day-care facility before moving in and to move if it was later discovered to be. *Id*. at 63.

> A new criminal law operates retrospectively if it changes the legal effect of a past conviction. *See Jerry-Russell Bliss, Inc. [v. Hazardous Waste Management Com.]*, 702 S.W.2d [77,] 81 [(Mo.banc 1985)]. The retrospective nature of § 566.147, [RSMo 2008] is readily apparent if one considers an essential element of a felony charge against F.R. once he moved into his

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> fiancee's residence. The essential element, as applied to F.R., is the conviction that pre-dates the school residency law. The existence of this one fact imposes the obligation. Unquestionably, the new law gives a legal effect to the prior conviction -- it would be used to convict F.R. of a new crime. In fact, the prior conviction is the *sole* basis for the restriction that would result in a criminal charge.

301 S.W.3d at 63 (emphasis in original). "As applied to F.R., the school residency requirement of § 566.147 is unconstitutional. The judgment of the trial court is reversed." *Id*. at 66.

Raynor involved similar *post hoc* obligations in that years after Raynor's prior sexual offenses, § 589.426 imposed four new obligations or duties[5] that he must perform on Halloween night else be subject to a new criminal penalty under § 589.426. 301 S.W.3d at 63.

> The essential element of a misdemeanor charge against Raynor pursuant to § 589.426, is that he is "a person required to register as a sexual offender…." Raynor would not be required to register as a sex offender unless he was convicted of a sexual

[5] I.e., he must (1) avoid contact with children; (2) remain inside his residence; (3) post a sign on his door; and (4) leave his light off. *Id*.

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> offense. Raynor's 1990 sex offense conviction predates the 2008 Halloween law. Therefore, just as in F.R.'s case, the new law gives a legal effect to the prior conviction -- it would be used to convict Raynor of a new crime. Again, the *sole* reason for these requirements is Raynor's prior sex offense conviction.

301 S.W.3d at 63 (emphasis in original). "As applied to Raynor, the Halloween requirements of § 589.426 are unconstitutional. The judgment of the trial court is affirmed." *Id*. at 66.

Here, § 566.150 imposes similar *post hoc* obligations on Mr. Wade. Thirteen years after his convictions for sexual offenses, Mr. Wade must constantly monitor his location *vis a vis* any park with a playground located anywhere within its boundaries. Mr. Wade would not be required to monitor his locations but for his convictions for the sexual offenses, which predate § 566.150 by thirteen (13) years. Just as the statutes at issue in *F.R.* and *Raynor*, § 566.150 gives a legal effect to the prior conviction by subjecting Mr. Wade to prosecution for a new crime. And, as in *F.R.* and *Raynor* the *sole* reason for the new obligations on Mr. Wade is his prior sex offense convictions. This is indistinguishable from *F.R.* and *Raynor* and requires this Court to find that § 566.150 is unconstitutionally retrospective when applied to Mr. Wade, reverse his conviction and discharge him from the resulting sentence.

CONCLUSION

For the foregoing reasons, Michael Wade, appellant, prays that this Court reverse his conviction and discharge him from his sentence.

Respectfully Submitted,

/s/ Gary E. Brotherton___
Gary E. Brotherton, MOBar #38990
Attorney for Appellant

Legal Writes, LLC
601 W. Nifong Blvd.
Building 1, Suite C
Columbia, Missouri 65203
(573) 875-1571 Phone
(573) 875-1572 Fax
GEBrotherton@LegalWritesLLC.com

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Gary E. Brotherton, hereby certify the following.

- The attached brief complies with the limitations contained in Rule 84.06(b); it was completed using Microsoft Word, Office 2003, in Times New Roman size 14-point font; and it includes the information required by Rule 55.03.

- Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains _3,148_ words, which does not exceed the 31,000 words allowed for an opening brief.

- On August 16, 2012, the attached brief and appendix were served on opposing counsel, Shaun J. Mackelprang, by filing same via this Court's e-Filing System.

/s/ Gary E. Brotherton___
Gary E. Brotherton