Summary of SC92382, *State of Missouri v. Michael Wade*, consolidated with SC92491, *State of Missouri v. Jason Reece Peterson*, consolidated with SC92786, *State of Missouri v. Edwin Carey*

Appeals from, respectively, the St. Louis County circuit court, Judge Carolyn C. Whittington; the Carroll County circuit court, Judge Kevin L. Walden; and the Greene County circuit court, Judge Calvin R. Holden

Argued and submitted September 3, 2013; opinion issued December 24, 2013

Attorneys: In SC92382, Wade was represented by Gary E. Brotherton of Legal Writes LLC in Columbia, (573) 474-0773. In SC92491, Peterson was represented by Scott C. Hamilton of Aull, Sherman, Worthington, Giorza and Hamilton LLC in Lexington, (660) 259-2277. In SC92786, Carey was represented by S. Dean Price Jr., a solo attorney in Springfield, (417) 865-2181. In all three cases, the state was represented by Daniel N. McPherson of the attorney general's office in Jefferson City, (573) 751-3321.

Overview: These three appeals, consolidated for opinion, involve the question of whether a particular statute involving sex offenders violates the state constitution's prohibition against retrospective laws. In a 4-3 decision written by Judge Zel M. Fischer, the Supreme Court of Missouri holds the statute in question is a criminal law and, therefore, does not violate the state constitution's prohibition against retrospective laws, which applies only to civil laws. To the extent that two of the Court's prior decisions involving sex offender statutes conflict with its most recent opinion regarding retrospective laws, due to those decisions' failure to determine whether the challenged statutes were criminal laws, they no longer should be followed.

Judge Paul C. Wilson concurs in a separate opinion joined by two other judges. He agrees with the reasoning and conclusions in the principal opinion but writes separately to express concern about the Court's willingness to draw inferences as to legislative intent from the joint committee on the codification (structure and placement) of newly enacted provisions by the joint committee on legislative research and the revisor of statutes.

Judge George W. Draper III dissents in an opinion joined by two other judges. He would hold that, because the primary effect of the statute at issue is regulatory, it is not a criminal law and, therefore, is subject to retrospective examination under the state constitution. He further would hold that the statute is unconstitutionally retrospective in its operation as applied to the three defendants. He further questions the extent to which the two prior opinions involving sex offender statutes are valid after today's decision.

Facts: The facts of these three cases – consolidated for opinion because they present the same legal question – are undisputed. Edwin Carey, Jason Peterson and Michael Wade all have prior convictions that require them to register in Missouri as sex offenders. All three are in compliance with those registration requirements. All three subsequently were charged with violating section 566.150, RSMo Supp. 2010, which prohibits any individual who has pleaded guilty to or

otherwise has been convicted of certain enumerated sex offenses from knowingly being present in or loitering within 500 feet of a public park with playground equipment or a public swimming pool. All three moved to dismiss the charges, arguing the statute was retrospective as applied to them in violation of article I, section 13 of the state constitution. The circuit courts sustained Carey's and Peterson's motions to dismiss the charges; the state appeals. The circuit court overruled Wade's motion to dismiss, found him guilty, sentenced him to three years in prison, suspended execution of his sentence and placed him on probation for five years; Wade appeals.

REVERSED AND REMANDED AS TO SC92491 AND SC92786; AFFIRMED AS TO SC92382.

Court en banc holds: (1) The state constitutional prohibition against laws retrospective in their operation does not apply to criminal laws. This Court so held in 1877 in *Ex parte Bethurum* and reaffirmed this holding last month in *State v. Honeycutt*. As noted in *Honeycutt*, this Court's decisions in two cases involving sex offenders – *R.L. v. Department of Corrections* and *F.R. v. St. Charles County Sheriff's Department* – did not implicitly overrule, *sub silentio* (without saying so directly), its holding in *Bethurum*. Neither *R.L.* nor *F.R.* held that the article I, section 13 prohibition against laws retrospective in their operation applies to criminal laws, nor did the parties in either case make such an argument. As held in *Honeycutt*, when a law is challenged under either the ex post facto or retrospective clause of article I, section 13, a court must begin its analysis by determining whether the challenged law is a criminal law or a law affecting civil rights and remedies. To the extent that *R.L.* and *F.R.* conflict with *Honeycutt* due to their failure to perform any analysis to determine whether the challenged statutes were criminal laws, they no longer should be followed.

(2) Properly analyzed pursuant to *Honeycutt*, section 566.160 is a criminal statute.

> (a) Pursuant to *Honeycutt*, this Court first must determine whether the legislature meant the statute to establish a crime and punishment for that crime or to affect civil rights and remedies. Section 566.150 is part of the criminal code, appears on its face to be a criminal statute, and does not explicitly indicate that its purpose is to protect the public by alerting them to sex offenders in their area. It is not part of a civil regulatory scheme. It is located within the section of Missouri's revised statutes titled "Crimes and Punishment, Peace Officers and Public Defenders," and chapter 566 is titled "Sexual Offenses." The statute uses the language of a criminal provision, providing a requisite mental state for the offense and prescribes a penalty for a violation. Further, the statute makes no reference to the sex offender registration list, and an offender is guilty of violating the statute independently of any registration requirement. The purpose of section 566.150 is not to provide the public with any information but rather to punish a person who was convicted of an enumerated sex offense who then knowingly loiters within 500 feet of, or is present in, a park with playground equipment or a swimming pool.
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> (b) Furthermore, even had the legislature intended this statute to aid the sex offender registration system – which it does not do in any practical matter – section 566.150 is so punitive in effect as to negate that purpose. It is the type of statute that historically has been regarded as punishment. It is designed solely to criminalize future conduct. It

"regulates" in the same manner as all other criminal statutes – to punish someone for engaging in conduct the legislature has prohibited. Section 566.150 also promotes the traditional aims of punishment: It serves as a deterrent in the same manner as other criminal statutes by making certain conduct punishable by imprisonment; it is retributive for much the same reason. It imposes a direct and affirmative restraint on a certain class of defendants. And, unlike sex offender registration statutes, which provide the public with information, section 566.150 punishes future conduct. Finally, it is excessive with respect to any regulatory purpose; rather, it creates a new crime for those with prior convictions for certain crimes based on certain future conduct.

(3) As a criminal statute, section 566.150 is not subject to article I, section 13's prohibition against laws retrospective in their operation. The circuit courts erred in dismissing the charges against Carey and Peterson on the ground that the statute was unconstitutionally retrospective as applied to them, and so these judgments are reversed and the cases remanded. The circuit court correctly overruled Wade's motion to dismiss, and so this judgment is affirmed.

Concurring opinion by Judge Wilson: The author agrees with the reasoning and conclusions in the principal opinion but writes separately to express concern about the Court's willingness to draw inferences as to legislative intent from the codification (structure and placement) of newly enacted provisions. Clear and correct precedent spanning nearly all of this Court's existence preclude such inferences regardless of the question before the Court. Article III, section 34 of the state constitution and chapter 3 of the state statutes provide the process by which laws are revised, digested and promulgated. The effect of these provisions is that the language of a given enactment exclusively is the province of the legislature, but where that language is codified in the revised statutes and the structure in which that language is published is the province of the joint committee on legislative research and the revisor of statutes, who acts under the committee's supervision. Until recently, this Court had held that the bold-faced headings assigned to each title, chapter and individual section throughout the revised statutes and the placement and structure of newly enacted language are the work solely of the codification process and, therefore, shed no light whatsoever on the legislature's purposes or intent. Here, the principal opinion's conclusion that section 566.150 is a criminal law plainly is correct and has overwhelming support, but the section number assigned to this new enactment through the codification process sheds no meaningful light on whether that enactment is a criminal law.

Dissenting opinion by Judge Draper: (1) The author would hold that, because the primary effect of section 566.150 is regulatory, it is not a criminal law and, therefore, is subject to retrospective examination under article I, section 13 of the state constitution. He further would hold that the statute is unconstitutionally retrospective in its operation as applied to Carey, Peterson and Wade. The legislature exercised its police power to protect children from violence at the hands of sex offenders when enacting the sex offender registration statutes and attendant statutes regulating the conduct of sex offenders who are required to register. Such police power is considered to evidence intent to exercise regulatory power, not to add to punishment. The Court must look at a law's substantive effect rather than its nominal label. While the statute here is included with other criminal laws and provides criminal sanctions if violated, this Court's precedent addressing sex offender registration laws and the laws that regulate registrants' conduct persuade that section 566.150 is a civil law. For example, in *R.L. v. Department of*

Corrections, this Court held that a statute imposing certain residency restrictions on a sex offender violated the constitutional prohibition against retrospective laws. Similarly, in *F.R. v. St. Charles County Sheriff's Department*, this Court invalidated two statutes violating the constitutional prohibition against retrospective laws: a statute prohibiting sex offenders from living within 1,000 feet of a school or child-care facility as well as a statute prohibiting certain conduct by sex offenders on Halloween. That the statute at issue here is codified in the portion of the statutes governing criminal rather than civil laws does not call for a different result. The author notes several cases in which laws were found to be and were treated as civil even though their violation resulted in criminal penalties. Like other statutes regulating sex offenders, section 566.150 is designed to protect the public from harm and derive from the requirement that offenders register, which has been deemed nonpunitive and civil in nature.

(2) The author questions the extent to which this Court's holdings in *R.L.* and *F.R.* are valid after today's decision. He agrees with the principal opinion's determination that *R.L.* and *F.R.* did not overrule this Court's decision in *Ex parte Bethurum*. It is error to presume that only laws requiring registration of sex offenders – and not laws otherwise intended to regulate their conduct – are civil. This Court had an opportunity in *R.L.* and *F.R.* to resolve the issue of whether the retrospective clause of article I, section 13 applies to criminal laws because the cases presented these arguments in the alternative. Instead of reading them to conclude the Court assumed, without due consideration, that the laws at issue were civil, it is equally reasonable to find the Court carefully considered the alternative *ex post facto* challenges raised and found the retrospective analysis was proper and dispositive of the issues on appeal. The principal opinion's conclusion that *R.L.* and *F.R.* still have validity in light of today's holding is perplexing and incongruous, especially when one considers that the Court failed to engage in the proper analysis in *R.L.* and *F.R.* and that, if the factors were applied, those cases ostensibly reached the wrong result given that the statutes at issue in those cases are substantially similar to section 566.150.