

**No. WD68066**

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**IN THE  
MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**JANE DOE I, et al.,**

**Respondents,**

**v.**

**THOMAS PHILLIPS, et al.,**

**Appellants.**

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**Appeal from the Jackson County Circuit Court  
The Honorable Jon R. Gray, Circuit Judge**

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**REPLY BRIEF OF APPELLANT KEATHLEY**

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## REPLY ARGUMENT

### I.

**Application of an exclusionary principle to bar public dissemination of information obtained by law enforcement authorities from offenders who are no longer required to register is neither required nor appropriate.**

The crux of the Does' argument here is that the information they provided to state authorities when they were registering under SORA (before SORA was found not to apply to them) was unconstitutionally acquired and that, because this registration information should never have been provided, state authorities should now be barred from making that information publicly available. The Does' reasoning, however, does not properly take into account the basis for the Supreme Court's decision in *Doe v. Phillips*, 194 S.W.3d 833, 852-53 (Mo. banc 2006), that they (other than Jane Doe III) cannot be constitutionally required to register under SORA.

The constitutional problem the Court found with SORA had nothing to do with whether the state could, as a general matter, impose a duty upon persons who had been convicted of certain criminal offenses to periodically report to law enforcement authorities. Neither was the Court constitutionally troubled by the particular personal information SORA required these offenders to provide. Rather than anything relating to the act of reporting itself or to the information to be provided, the Court concluded simply that imposition of the duty to register and to periodically update that registration upon offenders whose convictions occurred before SORA became effective amounted to

imposition of a new substantive duty upon these offenders for their past conduct. *Id.* at 852. And the imposition of a new substantive obligation to periodically appear at the local sheriff's office to register because of the past conduct of these offenders was barred by the Missouri Constitution's prohibition on laws that apply retrospectively. *Id.*

Relieving offenders whose convictions pre-date SORA of the duty to register completely remedies the constitutional problem found by the Supreme Court. The new duty SORA placed upon these offenders based on their past conduct has been lifted. In contrast, continued public dissemination of material these offenders provided before they were relieved of the duty to register has no impact on their rights under the retrospective law prohibition. Such continued dissemination requires nothing of them. No duties. No obligations. No conduct on their part of any kind.

It is of no significance to the question at issue here that the Does would not have provided the information and photographs that they did provide to law enforcement authorities under SORA but for their registrations that we now know should not have been required of them. The information itself is neither protected by law nor barred from dissemination by any privacy interests. *Id.* at 838 & 852 (Supreme Court noting no legal bars to publication of true information about the Does' offenses). Thus, the situation here is not analogous to ones calling for application of the exclusionary rule in criminal cases as the Does suggest. There has been no entry of the state into offenders' homes or offices to search and acquire material not already publicly available. There has been no interrogation improperly compelling the disclosure of information that is not already in

the public domain. The information provided by the Does at their past registrations includes nothing that could not be acquired from public sources.<sup>1</sup> Because there is no private information to protect, there is no reason to apply any exclusionary principle.

There is also no reason to apply an exclusionary principle here because that principle was developed to prevent the use at trial of evidence that has been illegally obtained. The information at issue here is not for use at trial, either criminal or civil. The

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<sup>1</sup> The information obtained at registrations is public even with regard to convictions on which offenders have received suspended impositions of sentence and have successfully completed probation. Even though official records relating to these crimes are no longer accessible to the public under §§ 610.105 and 610.120, RSMo Supp. 2004, the crimes are still matters of public record. The victims and the victim's families will know of the crimes. Contemporary news accounts will still be available. Law enforcement officials will be aware of the crimes and are not barred from speaking of them. *State ex rel. Thurman v. Franklin*, 810 S.W.2d 694, 699-700 (Mo. App. S.D. 1991). Sections 610.105 and 610.120 do not “close the memories of persons who have personal knowledge.” *Id.* at 700. Even the official records relating to the offenses are available during the plaintiffs' probationary periods. 610.105 (“If . . . imposition of sentence is suspended . . ., official records pertaining to the case shall thereafter be closed records *when such case is finally terminated . . .*”) (emphasis added). And even under § 610.105, “the court's judgment or order or the final action taken by the prosecutor in such matters may be accessed.”

continued public availability of this information does not place the Does at risk of loss of their freedom, or even at risk of a jury verdict finding them liable for money damages. Further, the purpose of the exclusionary rule is not to redress injuries, but to deter future unlawful police conduct. *United States v. Calandra*, 414 U.S. 338, 347 (1974). “The rule is calculated to prevent, not to repair.” *Elkins v. United States*, 364 U.S. 206, 217 (1960). Now that the Missouri Supreme Court has decided that offenders convicted prior to the effective date of SORA are not required to register, there is no risk that law enforcement authorities will continue to demand that they do so for reasons the Court found invalid. There is no potential future unlawful police conduct to deter.

Neither is removal of the information provided by the Does from the public registry justified because that information, publicly available from other sources, has been provided by the Does rather than acquired from these other public sources. Given its public nature, the particular source of the information cannot taint its use and publication by the state.

Turning to the question of the correct standard of review, the Does’ contention that an abuse of discretion standard is applicable here is not correct. Before a court reaches the point of balancing the equities and exercising its discretion in fashioning permanent injunctive relief, it must find that the plaintiff is entitled to a judgment on the merits. *Randolph v. Rodgers*, 170 F.3d 850, 857 (8th Cir. 1999) (to obtain a permanent injunction, the movant must establish that he or she is entitled to a judgment on the merits); 42 Am. Jur. 2d Injunctions § 10 (2000) (“The standard for issuing a permanent

injunction is substantially the same as that applied to a request for preliminary injunctive relief, except that the plaintiff must prove actual success on the merits rather than the likelihood of success on the merits”). As demonstrated in Superintendent Keathley’s main brief and this reply brief, the Does’ claims to relief fail as a matter of law. Because the Does cannot establish any legal entitlement to removal of the information they have provided at past registrations, there is simply no reason to engage in a balancing of equities. Rather, because there is no legal bar to the continued public availability of the information that the Does have provided, judgment should have been entered in favor of the law enforcement authorities. *See Metmor Financial, Inc. v. Landoll Corp.*, 976 S.W.2d 454, 463 (Mo. App. W.D. 1998) (a permanent injunction should not interfere with legitimate and proper action of the party against whom the injunction is sought).

## **II.**

### **There is no apparent dispute concerning Point II.**

The Does do not appear to disagree that Superintendent Keathley should not be barred from disseminating information and photographs relating to them that are publicly available from sources other than their previous registrations, so long as the material is truthful.

### III.

**Sex offenders may be constitutionally required to register for their offenses in other jurisdictions even if those offenses occurred before the 1995 effective date of SORA.**

The Does assert that when persons moving to Missouri have notice of its sex offender registration requirements is not a “relevant inquiry” in assessing the application of the retrospective law prohibition (Respondents’ Brief at p. 13). But, as noted in Superintendent Keathley’s brief (p. 32), providing “fair notice” of the legal consequences of one’s actions is the apparent purpose behind the prohibition. “The first rule of construction of a constitutional amendment is to give effect to its intent and purpose.” *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983). An understanding of the purpose behind the retrospective law prohibition is thus very relevant to an assessment of its proper application.

In response to Superintendent Keathley’s argument that SORA’s imposition of a duty to register upon persons who have been required to register in other jurisdictions is nothing more than a continuation of a previously existing obligation imposed by the other jurisdiction, the Does state that such a pre-existing obligation assumes that the other jurisdiction has a sex offender registration law before the registrant left that jurisdiction (Respondents’ Brief at p. 14). Superintendent Keathley agrees. If the other jurisdiction did not have a sex offender registration law before a sex offender left the jurisdiction for Missouri, that offender would never have been required to register in the other state and,

thus, Missouri's SORA requirement that persons required to register elsewhere must register here is not triggered. But, if that other jurisdiction did have a sex offender registration law before the offender left for this state that required the offender to register there, then the Missouri provision is triggered and the offender must register here because of his or her previously imposed registration obligation. And this is true regardless of whether or not the other jurisdiction's law was enacted before 1995. A requirement that such offenders (ones required to register in other jurisdictions before 1995) register in Missouri is consistent with the retrospective law bar because the duty to register under Missouri's SORA, as explained in Superintendent Keathley's main brief (p. 33), is the continuation of a pre-existing duty, not a newly imposed duty.

With this point too, the Does incorrectly rely on an abuse of discretion standard of review. As discussed above in the Point I reply argument, the Does' claims fail as a matter of law and Superintendent Keathley is entitled to judgment in his favor. Therefore the circuit court should not have reached the point of exercising any discretion in formulating a remedy for the Does.

#### IV.

**The Highway Patrol's continued publication of the names and offenses of sex offenders whose offenses occurred before 1995 is consistent with the terms of the circuit court's injunction.**

Superintendent Keathley understands that the words "identifying information" could easily be defined to include the names of sex offenders. But it is not unreasonable for the Superintendent to conclude that the use of these words in the injunction that was entered in this case does not include names because if that is what the circuit court meant, it could much more easily have directed the removal of all information obtained from pre-1995 offenders from the sex offender registry.

The Superintendent's conclusion on this point is supported by the circuit court's denial without comment of his motions to amend the judgments. LF 297-98, 299-300. In these motions Superintendent Keathley asked the court to define more specifically what classes of information the injunction applied to and informed the circuit court that the Highway Patrol was interpreting the injunction as written to permit continued publication of the names and offenses of pre-1995 registrants. LF 278, 289. The denial of these motions without comment implies that the court considered that the injunction already permitted the continued inclusion of pre-1995 offenders' names and offenses and that the injunction did not need any clarification to this effect. Had the court considered the continued inclusion of this information inconsistent with its injunction, it is reasonable to expect that the court would have included in its denial of the motions to amend at least a

brief statement that the Patrol should stop this continued inclusion of these names and offenses in the sex offender registry that it disclosed in the motions.

Finally, the Does again invoke application of an abuse of discretion standard of review that is inappropriate in this case for reasons discussed above.

## CONCLUSION

For the foregoing reasons and the reasons stated in his main brief, defendant-appellant Keathley urges this Court to reverse the judgment of the Jackson County Circuit Court entered in favor of the plaintiffs-respondents, to vacate the injunction, and to remand this case with instructions to deny any relief other than a declaration that the plaintiffs-respondents who were convicted or pled guilty to offenses that require registration under Missouri's Sex Offender Registration Act, but did so before January 1, 1995, may not be constitutionally required to register under Missouri's Sex Offender Registration Act because of those offenses.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**AND OF COMPLIANCE WITH RULE 84.06(b) AND (c)**

I hereby certify that one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, the 13<sup>th</sup> day of August, 2007, to:

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I also certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that the brief contains 2430 words, excluding the cover, the certificates, and the signature block.

I further certify that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses, and is virus-free.

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