SC89130

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex relatione* JOHN DOE,
Relator,

v.

THE HONORABLE STANLEY MOORE,
Respondent.

On Original Petition for Writ of Prohibition

REPLY BRIEF OF THE RELATOR

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Respondent's only argument as to why this Court should not make absolute the Preliminary Writ it issued on February 29, 2008, is that because trial courts have discretion to impose probation conditions, Respondent "had the power" to change Relator's probation supervision status to that of "sex offender" at the time he entered his orders of May 7, 2007, and December 13, 2007, and order sex offender treatment (Respondent's Brief 12).

Respondent argues that circuit courts and the Division have jurisdiction to "determine *any* conditions of probation [they] deem necessary to ensure the successful completion of probation," the orders which Relator challenges were "within [the circuit court's] jurisdiction" at the time the orders were entered (Respondent's Br. 12) (emphasis added). Respondent contends that this is true because the General Assembly has vested circuit courts and the Division of Probation and Parole ("the Division") with discretion to impose, determine, modify, and enlarge conditions of probation (Respondent's Br. 12).

It is true that in §§ 559.021, 559.100, and 217.705, R.S.Mo., the General Assembly long has granted both trial courts and the Division wide discretion to determine probation conditions (Brief of the Relator 27). But Respondent's argument ignores the undeniable limits on the scope of this discretionary probation power as announced by this Court and as detailed in Relator's opening brief (Br. of

Relator 27-28). In Missouri, the General Assembly never has granted either trial courts or the Division unlimited power to impose anything they wish as probation conditions. For this reason, this Court consistently has disallowed courts and the Division from using their discretionary probation power to effect new probation conditions on an existing probationer which either had no legislative prescription at the time of the probationer's guilty plea or which the General Assembly enacted subsequent to the probationer's guilty plea or conviction.

Respondent ignores a century of law holding that probation conditions in Missouri only can be imposed as authorized by the General Assembly. What Respondent proposes would be a dangerous and unprecedented expansion of the powers of both the executive and the judiciary.

A. The law of Missouri is that only the General Assembly may authorize conditions of probation and parole. Probation conditions later authorized by the General Assembly which are applied retrospectively violate the Constitution.

Probation did not exist at common law. *Ex parte United States*, 242 U.S. 27, 43-45 (1916). Instead, any reprieve from sentence which resembles probation must be authorized by the relevant legislature, because "the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements

of consideration which would be otherwise beyond the scope of judicial authority." *Id.* at 42; *accord Ex parte Thornberry*, 300 Mo. 661, 669, 254 S.W. 1087, 1090 (Mo. banc 1923). If it were otherwise,

> it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and leave no law to be enforced.

United States, 242 U.S. at 42.

Probation did not exist in federal law until Congress passed the National Probation Act in 1925. *United States v. Murray*, 275 U.S. 347, 350 (1928). It did not exist in Missouri until 1919, when the General Assembly granted judges the discretion to suspend sentences and "parole" convicted defendants who otherwise would be imprisoned. *Ex parte Smith*, 232 Mo. App. 521, 119 S.W.2d 65, 72 (Mo. App. 1938). Probation in its current form in Missouri began in 1937, when the General Assembly created the Board of Probation and Parole (today the Division) in 1937. *Id.*

In this context, this Court long has held that "fixing punishment for a crime defined by statute is the province of the legislature, not the courts." *State v. Higgins*, 592 S.W.2d 151, 156 (Mo. banc 1979) (citing *State v. Alexander*, 315 Mo. 199, 285 S.W. 984, 985 (Mo. 1926); *State v. Wheeler*, 318 Mo. 1173, 2 S.W.2d 777, 779 (Mo. 1928); and *State v. Motley*, 546 S.W.2d 435, 437 (Mo. App. 1976)). Accordingly, the power of a judge "to grant probation is dependent upon the authorization given him by" the probation provisions of the Revised Statutes. *State ex rel. Douglas v. Buder*, 485 S.W.2d 609, 610 (Mo. banc 1972). "Trial courts are authorized in certain cases to suspend the imposition of sentence, or to parole or place defendants on probation … but this stems from statutory authorization and is not inherent to the judicial power." *Motley*, 546 S.W.2d at 437.

This Court applied this principle in *State ex rel. St. Louis County v. Stussie*, 556 S.W.2d 186 (Mo. banc 1977), which Relator discussed in his opening brief (Br. of Relator 27). Respondent argues that *Stussie* is "not helpful" to Relator because it only relates to incarceration (Respondent's Br. 18). Respondent is correct that in *Stussie*, this Court did note that trial courts "have wide discretion in imposing *certain* conditions on a probationer" (Respondent's Br. 13). *Id.* at 189 (quoting *People v. Ledford*, 173 Colo. 194, 196, 477 P.2d 374, 375 (banc 1970)) (emphasis added). But if Respondent were correct that trial courts have unfettered discretionary jurisdiction to "determine *any* conditions of probation it deems

necessary to ensure the successful completion of probation" (Respondent's Br. 12) (emphasis added), then in *Stussie*, the Circuit Court of St. Louis County would have been acting within its jurisdiction in ordering temporary incarceration to impose probation, even though no statute authorized as much. Indeed, the General Assembly did later authorize trial courts to impose temporary incarceration as a condition of probation. *Id.* So, like any of the requirements placed on Relator in Respondent's contested orders, temporary incarceration does relate to the goal of ensuring "successful completion of probation." § 559.100, R.S.Mo.

In *Stussie*, however, this Court rejected wholesale Respondent's argument that *any* probation condition related to ensuring "successful completion of probation" is within a trial court's discretionary probation power. Instead, this Court reaffirmed that the power to impose probation is a legislative grant of authority to trial courts and must be construed within the confines prescribed by the General Assembly. The "certain" conditions of probation which are authorized are those which the General Assembly authorizes trial courts to impose, not whatever a trial court or the Division may wish to fashion *sua sponte*.

This approach finds further support in this Court's more recent decisions in *Doe v. Blunt*, 225 S.W.3d 421 (Mo. banc 2007), and *R.L. v. Mo. Dept. of Corrections*, 245 S.W.3d 236 (Mo. banc 2008), with respect to the retrospective application of newly-created probation conditions. Respondent's argument that

any condition of probation may be imposed which relates to ensuring successful completion of probation cannot be squared with *Blunt* and *R.L.*

Rather than being merely "another sex offender registration case," as Respondent dismissively states (Respondent's Br. 17), *Blunt* is very instructive. In *Blunt*, after a change in the law, a probationer found himself facing a new, retrospectively-applied probation condition that he register as a sex offender; when he refused, a probation violation was filed against him. 225 S.W.3d at 422. Under Respondent's argument, the trial court and the Division would have had discretion to impose that condition, because it related to rehabilitation and ensuring successful completion of probation. Indeed, today, this is one of the probation conditions placed on sex offenders (Appendix to Br. of Relator A83, A92-A5). But in *Blunt*, this Court rejected Respondent's contention and held instead that regardless of the discretionary probation power, a condition of probation cannot be placed on a probationer which the General Assembly did not authorize at the time the probationer pleaded guilty. 225 S.W.3d at 422.

This Court rejected Respondent's argument again this year in *R.L.* In that case, again after a change in the law, a probationer retrospectively was required as a new probation condition that he move from his home located within 1000 feet of a school, even though he pleaded guilty before the statute which promulgated the new requirement was in effect; when he refused to move, he received a threat from

the Division. *R.L.*, 245 S.W.3d at 237. Under Respondent's argument, the trial court and the Division would have had discretion to impose that condition, because it related to rehabilitation and ensuring successful completion of probation. Instead, this Court held that, as in *Blunt*, the new condition of probation could not be placed on the probationer, because the General Assembly did not authorize that condition at the time the probationer pleaded guilty. *Id*.

This Court maintains that the "liberty given to a person on conditional probation, parole, or pardon is subject to all conditions which are not illegal, immoral or impossible of performance" (Respondent's Br. 13). *Nicholson v. State*, 524 S.W.2d 106, 110 (Mo. banc 1975) (quoting *State v. Brantley*, 353 S.W.2d 793, 796 (Mo. 1962)). Thus, this Court rejects illegal probation conditions. In *Stussie*, the Court rejected as illegal a trial court's imposition of a probation condition which no legislative prescription authorized. In *Blunt*, the Court rejected as illegal the Division's authority to impose a probation condition which the General Assembly did not authorize until after the probationer pleaded guilty, in violation of Article I, § 13, of the Constitution of Missouri. The Court held the same in *R.L.* Read together, *Blunt* and *R.L.* authoritatively hold that a legislative grant of authority to impose a condition of probation cannot constitutionally be applied retrospectively to a probationer when the statute conferring that authority did not exist at the time of the probationer's guilty plea. Such a retrospective application

is plainly illegal, as it violates the Constitution of Missouri. In *R.L.*, the trial court held that it also violated the *Ex Post Facto* Clauses of the State and Federal Constitutions, although this Court did not reach that question. 245 S.W.3d at 237 n.1.

B. Respondent's orders of May 7, 2007, and December 13, 2007, retrospectively apply new probation conditions authorized by the General Assembly in Missouri House Bill 1698, effective months after Relator's plea of guilty.

This case is no different than *Blunt* and *R.L.*, except that it concerns more new, retrospectively-applied probation conditions than those cases. Respondent argues that "the ban on retrospective and ex post facto laws is irrelevant to the real issue in this case, as no law which became effective after Doe's offense is necessary to support the legality of the amended conditions of probation" (Br. of Respondent 17). Respondent baldly asserts that "no new statute was required or relied on to modify Doe's probation conditions" (Br. of Respondent 19). But these statements ignore the substance of Missouri House Bill 1698 (2006). They ignore the changes which the General Assembly effected therein to the probation conditions authorized for someone who pleaded guilty to endangering the welfare of a child in the first degree.

The Revised Statutes only recognize two types of "sex offense" designations for which a person who pleads guilty may be considered a "sex offender": those contained in Chapter 566, R.S.Mo., titled "Sexual Offenses," and those for which registration is required by § 589.400, R.S.Mo., titled the "Sex Offender Registration Act" (which includes all crimes contained in Chapter 566). At the time Relator pleaded guilty, neither such designation applied to the crime of endangering the welfare of a child in the first degree. If Relator's offense were a "sexual offense" *de facto*, the General Assembly would have placed it in Chapter 566. The differentiation of endangering the welfare of a child in the first degree "of a sexual nature" from that not of a "sexual nature" itself originates in H.B. 1698's amendment to § 589.400.1(2).

As in *Stussie*, *Blunt*, and *R.L.*, at the time Relator pleaded guilty in March of 2006, no statutes authorized designating persons who pleaded guilty to Relator's offense as "sex offenders". Contrary to Respondent's contentions, and as recounted in detail in Relator's opening brief (Br. of Relator 35-39), *every single one* of the new duties, obligations, and disabilities which Respondent's orders of May 7 and December 13 apply to Relator are rooted in amendments to the Revised Statutes only applied to Relator's offense by H.B. 1698, effective months after Relator's guilty plea. These restrictions on Relator's liberties were not contemplated for someone who pleaded guilty to his offense before the passage of

H.B. 1698. Respondent cites no authority for his proposition that they *were* contemplated.

The relevant statutes enacted or amended in H.B. 1698 expressly manifest of the General Assembly's intention to grant new authority to trial courts and the Division to designate persons who pleaded guilty to endangering the welfare of a child in the first degree as sex offenders. H.B. 1698 added endangering the welfare of a child in the first degree to § 589.400, R.S.Mo., as an offense for which a person who pleads guilty must register as a sex offender. In so doing, the General Assembly added Relator's offense to § 589.042, R.S.Mo., which provides that the

> court or the board of probation and parole *shall have the authority* to require a person who is required to register as a sexual offender under sections 589.400 to 589.425, R.S.Mo., to give his or her assigned probation or parole officer access to his or her personal home computer as a condition of probation or parole...

(emphasis added). This is one of Relator's new probation conditions (Appx. to Br. of Relator A33, A83).

The negative implication of this statute is that before the passage of H.B. 1698, courts and the Division did not have such authority with respect to persons who pleaded guilty to endangering the welfare of a child in the first degree. Again, this is because the imposition of probation conditions "stems from statutory

authorization and is not inherent to the judicial power." *Motley*, 546 S.W.2d at 437.

Similarly, because H.B. 1698 made Relator's offense registrable, it first made § 589.415, R.S.Mo., applicable to Relator. Unlike for persons convicted of a non-sex-offense class C felony, this section requires that the probation officer assigned to "a sexual offender who is required to register pursuant to sections 589.400 to 589.425 *shall* notify the appropriate law enforcement officials whenever the officer has reason to believe that the offender will be changing his or her residence." The statute also requires Relator to notify his probation officer and receive her approval of any change in residence (Appx. to Br. of Relator A21, A34). The mandatory language "shall" confers both a duty and an authority to collect that information from Relator as a condition of his probation and deliver the information to relevant law enforcement. That legislative grant of authority could not exist for Relator before H.B. 1698.

H.B. 1698 also first promulgated § 566.149, R.S.Mo., which mandates that any "person who has pleaded guilty or nolo contendere to, or been convicted of, or been found guilty of violating any of the provisions of this chapter or the provisions of … section 568.045, RSMo, endangering the welfare of a child in the first degree … *shall* not be present in or loiter within five hundred feet of any school building, on real property comprising any school;" this is one of Relator's

new probation conditions (Appx. to Br. of Relator A38, A54-A55, A83). This requirement existed *nowhere* in the law of Missouri before the passage of H.B. 1698. It was not a crime before H.B. 1698. The General Assembly had authorized no such requirement as a condition of probation before H.B. 1698.

H.B. 1698 added Relator's offense to the residency restrictions of § 566.147. Relator's probation requires that he obey this statute (Appx. to Br. of Relator A83). After H.B. 1698, this statute provides:

> Any person who, since July 1, 1979, has been or hereafter has pleaded guilty … to … section 568.045, RSMo, endangering the welfare of a child in the first degree … *shall* not reside within one thousand feet of any public school … or any private school … or child-care facility, which is in existence at the time the individual begins to reside at the location.

§ 566.147, R.S.Mo. (emphasis added).

At the time of Relator's guilty plea, before Relator's offense was listed in § 566.147, the General Assembly had authorized no such requirement as either a crime or as a condition of probation for endangering the welfare of a child in the first degree. Indeed, that the General Assembly left Relator's offense out of the statute means that it deliberately did so, as per the canon of *expressio unius est exclusio alterius*, "it would make sense only if all omissions in legislative drafting

were deliberate." Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 182 (1985). Additionally, this was the same probation condition which was at issue in *R.L.*, and which this Court held could not be retrospectively applied.

This analysis also applies to sex offender treatment under §§ 566.140 and 566.141, R.S.Mo. Respondent is correct that in *Kelly v. Gammon*, 903 S.W.2d 248 (Mo. App. 1995), the Missouri Court of Appeals, Eastern District, held that sex offender treatment is "not penal in nature," but rather "is a rehabilitative program which [persons convicted of sexual assault offenses are] required to complete before [they are] eligible for parole." 903 S.W.2d at 250-251. In *Kelly*, however, the Court of Appeals only analyzed this requirement in a limited scope: whether it violated the prohibition on *ex post facto* laws to require a prisoner – not a probationer – to complete sex offender treatment for the crime of rape before he could be eligible for parole.

Kelly had nothing to do with probation, the bar on retrospective laws, or the re-designation of an offense as a "sex offense." Unlike endangering the welfare of a child in the first degree, rape *long* has been a "sexual offense" contained in Chapter 566, R.S.Mo. Moreover, the General Assembly had required persons convicted of a "sexual offense" to undergo sex offender treatment long before the appellant in *Kelly* brought his challenge. This is why the Court of Appeals held that the requirement that the appellant undergo sex offender treatment "did not

result in appellant receiving additional punishment for the crime he committed in 1983. Appellant is still sentenced to fifteen years imprisonment. The only effect of appellant not completing MOSOP has been to extend his possible *early* release date." *Kelly*, 903 S.W.2d at 250-251 (emphasis the Court's).

This case is far different than *Kelly*. Relator is not in prison. His sex offender treatment is not by virtue of the Sexual Assault Prevention Act, but rather by virtue of H.B. 1698 re-designating his offense as a "sex offense" months after he pleaded guilty. He challenges this new obligation not only on an *ex post facto* basis, but also on the basis of it being a retrospective application of law in violation of Article I, § 13, of the Constitution of Missouri. When analyzing whether a law is unconstitutionally retrospective, its punitive value is not a consideration; rather, the question is whether it imposes a new duty with respect to a past transaction or occurrence. *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006).

In this case, as detailed in Relator's opening brief (Br. of the Relator 33-34), the newly-imposed requirement that Relator undergo sex offender treatment or risk revocation of his probation unequivocally is a new duty and obligation with respect to the past transaction of his guilty plea. Sex offender treatment for the purposes of Relator's probation, unlike that at issue in *Kelly*, is grounded in §§ 566.140 and 566.141, R.S.Mo. Relator's offense is not located in Chapter 566, R.S.Mo., titled "Sexual Offenses," but rather is in Chapter 568, R.S.Mo., titled "Offenses Against

the Family." Section 566.140 limits its provisions to "Any person who has pleaded guilty to or been found guilty of violating the provisions of this chapter and is granted a suspended imposition or execution of sentence or placed under the supervision of the board of probation and parole." Relator did not plead guilty to any provision of Chapter 566. This section simply cannot apply to him.

Similarly, § 566.141 applies its provisions to any "person who is convicted of or pleads guilty or nolo contendere to any sexual offense involving a child." Respondent insists that the fact that Relator's offense is not contained in Chapter 566, "Sexual Offense" is "irrelevant" (Respondent's Br. 16). But with regard to this provision, it is extremely relevant. By its own terms, Relator's offense is not a "sexual offense." It is not found in Chapter 566. As Relator previously pointed out (Br. of Relator 33-34), absent further amendments such as those in H.B. 1698, the doctrine of *ejusdem generis* mandates that the term "sexual offense" in that statute be read to mean offenses contained in that chapter, titled "sexual offenses." At the time Relator pleaded guilty, his offense was not listed as a registrable offense in the "Sex Offender Registration Act." After H.B. 1698, however, it *became* a "sexual offense" within the meaning § 566.141 because the General Assembly added the offense to the second type of "sexual offenses" expressed in the Revised Statutes: an offense requiring registration as a "sex offender" under the Sex Offender Registration Act.

Before H.B. 1698, the General Assembly simply provided no authority whatsoever for someone who pleaded guilty to endangering the welfare of a child in the first degree to be required to undergo sex offender treatment as a condition of probation; no statute *anywhere* included the crime as a "sex offense." That the Division may have decided on its own that the offense is a "sex offense" is immaterial. Exclusive power to prescribe the "certain" probation requirements which courts and the Division are authorized to impose within their discretion for a given offense lies with the General Assembly, not the Division of Probation and Parole.

Because H.B. 1698 transformed endangering the welfare of a child into a "sexual offense" and anyone pleading guilty to it into a "sex offender," it also subjected Relator to the Division's other enumerated requirements for "sex offenders," which ordinary probation does not entail. Relator detailed these requirements in his opening brief (Br. of Relator 36-39). Not coincidentally, H.B. 1698 also first promulgated § 632.505, R.S.Mo., which authorizes certain conditions on release from civil confinement as a "sexually violent predator." Most of the other new requirements placed on Relator are very similar to the conditions in § 632.505, including:

> (1) Maintain a residence approved by [the Division] and not change residence unless approved by the [Division];

(2) Maintain employment unless engaged in other structured activity approved by the [Division];

…

(5) Not be employed or voluntarily participate in an activity that involves contact with children without approval of the [Division];

…

(10) Not have any contact with any child without specific approval by the [Division];

(11) Not possess material that is pornographic, sexually oriented, or sexually stimulating;

(12) Not enter a business providing sexually stimulating or sexually oriented entertainment;

(13) Submit to a polygraph, plethysmograph, or other electronic or behavioral monitoring or assessment;

…

(15) Attend and fully participate in assessment and treatment as directed by the [Division];

…

(18) Pay fees to the [Division] to cover the costs of services and monitoring; [and]

…

(20) Comply with any registration requirements under sections 589.400 to 589.425, RSMo.

§ 632.505, R.S.Mo. (some references changed for emphasis from the Department of Mental Health to the Division of Probation and Parole). No references to these conditions exist anywhere else in the Revised Statutes. Section 632.505 provides that its conditions shall be enforced not only by the Department of Mental Health, but also by both the court and the Department of Corrections (of which the Division is a component).

Plainly, all of the new sex offender probation conditions imposed in Respondent's orders of May 7, 2007, and December 13, 2007, are retrospective applications of authority granted in one way or another only by virtue of H.B. 1698's changes to the law of Missouri, which thoroughly transformed Relator's crime from a "crime against the family" into a "sexual offense." Those conditions certainly could be imposed on any person who pleads guilty today to endangering the welfare of a child in the first degree. But only H.B. 1698 authorizes courts and the Division the power to impose those conditions on persons who plead guilty to Relator's offense. Relator pleaded guilty months before H.B. 1698 took effect. Before then, his offense was not a sex offense, and he could not have been considered a sex offender.

C. The Division of Probation and Parole's designation of a "discretionary sex offender classification" is irrelevant to this case; alternatively, applying that designation to Relator is an unconstitutionally retrospective application of an administrative rule.

Respondent argues that regardless of when the General Assembly added Relator's offense to the list of "sex offenses" in § 589.400 and the other relevant statutes, the "Probation and Parole rules on the use of the sex offender supervision protocol recognize that it may be appropriate for an offender who is not being supervised for a sex offense to be supervised under the protocol, and that this may be ordered by the supervising court" (Respondent's Br. 16 n.3). It is true that today, the Division states in its ORANGE BOOK that "An offender whose current supervision is not the result of a conviction for a sex offense may be ordered by the Court or Parole Board to be designated as a Discretionary Sex Offender and will thereafter be supervised as a sex offender" (Appx. to Br. of Relator A89).

But there is no indication whatsoever that this is what occurred in this case. The Division publishes specific forms to be filled out when a probationer is to be made a "discretionary sex offender" (Appx. A13). None of those forms are present anywhere in any record in this case. Moreover, the term "Discretionary Sex Offender" occurs nowhere in Respondent's orders of May 7 and December 13, or anywhere else in the record. But even if this somehow is why Relator is being

supervised as a sex offender, the ORANGE BOOK is not law and cannot be treated as such. If anything, the Division's *sua sponte* assertion that it has the power to make non-sex offenders into sex offenders is a usurpation by the executive branch of what constitutionally is the General Assembly's exclusive role. Indeed, such a power, too, cannot be squared with this Court's holdings in *Stussie*, *Blunt*, or *R.L.*, as discussed *ante*.

Only California and Arizona have a form of discretionary sex offender status, although that status only relates to registration. *See People v. Hofsheier*, 37 Cal. 4th 1185, 1197-1198, 129 P.3d 29, 35 (2006); *see also State v. Cameron*, 185 Ariz. 467, 469, 916 P.2d 1183, 1185 (1996). But even in those states, the authority to make this discretionary determination is prescribed by positive law. *See* Cal. Penal Code § 290(a)(2)(E); *see also* Ariz. Rev. Stat. § 13-3821(C)-(D).

Moreover, at the time of Relator's guilty plea there *was* no ORANGE BOOK (the current ORANGE BOOK, issued in the second half of 2007, is the first promulgation of these rules and regulations). At that time, the designation of "discretionary sex offender" did not exist in the Division's rules and regulations governing probation. The Division created the designation of "discretionary sex offender" in October of 2006 (Appendix A13), many months after Relator's guilty plea. It did not promulgate the ORANGE BOOK until more than a year after Relator's plea. Previously, the Division only released a WHITE BOOK: *Rules and*

Regulations Governing the Conditions of Probation, Parole, and Conditional Release (Appendix A1-A11). The current WHITE BOOK notes that "certain offenders are also required to register with the chief local law enforcement official of the county of residence," but directs that the "specific requirements regarding registration are outlined in a separate booklet, *Rules and Regulations Governing the Conditions of Probation, Parole, and Conditional Release for Sex Offenders*" (Appx. to Br. of Relator A106). At the time of Relator's plea, however, the WHITE BOOK detailed sex offender supervision on its own and referred to no special sex offender probation guidelines (Appx. A8-A9).

The retrospective application of new administrative rules requiring new duties, obligations, and disabilities based on a past transaction also violates Article I, § 13, of the Constitution of Missouri, and the same standards apply. *St. Louis Police Officers' Ass'n v. Sayad*, 685 S.W.2d 913, 917 (Mo. App. 1984). Even assuming *arguendo* that designating a person as a "discretionary sex offender" when the General Assembly has not deemed his crime a registrable offense in the Sexual Offender Registration Act somehow is within the discretionary probation power of courts and the Division, the administrative rule creating this designation also cannot be applied to Relator, as it, too, would be unconstitutionally retrospective. It created new duties, obligations, and disabilities based on the past

transaction of Relator's guilty plea, many months before the Division promulgated its new rules.

D. Respondent's argument would result in an absurd public policy.

Respondent essentially argues that this Court should grant the executive and judicial branches of our state government immense powers which they never have held and which this Court previously denied to them in *Stussie*, *Blunt*, and *R.L.*, among other cases detailed *ante*. Respondent seeks to give the executive and the judiciary the power to impose probation conditions without legislative authorization and the power retrospectively to apply newly-prescribed probationary measures which previously did not exist. If this Court accepts Respondent's argument, its precedents upholding the requirement that probation conditions only may be imposed as by statute – and not retrospectively so – would be nugatory. No longer would either trial courts or the Division of Probation and Parole need to abide by the General Assembly's grant and restriction of their authority.

This would be an end-run around the Constitution. In the Respondent's chilling version of our legal system, courts and the Division of Probation and Parole could devise any new probation requirements they wish, at any time, no matter what the General Assembly may or may not have enacted or when the General Assembly enacted it. Thankfully, however, our state and federal

Constitutions exist to prohibit such an absurd policy through their respective bars on retrospective laws and *ex post facto* laws, as well as the separation of powers.

The law of Missouri is that judges have discretion to impose probation conditions within the limits prescribed by the General Assembly at the time of the relevant transaction for which probation was granted: in this case, Relator's guilty plea in March of 2006. The answer to the questions posed by this case is not, as Respondent argues, blindly reenacting the Star Chamber by replacing positive law with the absolute and unlimited discretion of judges and executive agencies. Instead, the answer is to uphold our constitutional freedoms from retrospective and *ex post facto* applications of law.

Prohibition lies in this case to do exactly that. This Court should make absolute the Preliminary Writ which it issued on February 29, 2008.

Conclusion

Only H.B. 1698, effective three months after Relator's guilty plea and, possibly, the new sex offender rules enacted by the Division of Probation & Parole ten months after Relator's guilty plea, provide authority to impose sex offender probation status and its new duties, obligations, or disabilities, for Relator's offense. In ordering that Relator be supervised as a sex offender and undergo sex offender treatment, the Division retrospectively requested and Respondent retrospectively applied these later enactments to Relator.

As such, and as further detailed in Relator's opening brief, Respondent's orders of May 7, 2007, and December 13, 2007, violate Article I, §13, of the Constitution of Missouri. They also violate Article I, § 10, of the Constitution of the United States.

This Court should make absolute the Preliminary Writ of Prohibition which it entered on February 29, 2008. The Court should prohibit Respondent from doing anything other than vacating his orders of May 7, 2007, and December 13, 2007, revising Relator's status and probation conditions, and in lieu thereof returning Relator to his original probation conditions entered on July 3, 2006.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the enclosed CD-ROM has been scanned for viruses using Norton AntiVirus 2008 and is virus free. I also certify that I used Microsoft Word 2003 for word processing. I further certify that this Brief of the Relator complies with the word limitations contained in Supreme Court Rule 84.06(b) and that this brief contains 5,399 words.

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Jonathan Sternberg, Attorney

Certificate of Service

I hereby certify that on May 7, 2008, I mailed a true and accurate copy and CD-ROM of this Reply Brief to the following:

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I further certify that on May 7, 2008, as a courtesy, I mailed a true and accurate copy and CD-ROM of this Reply Brief to the following:

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Circuit Judge
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APPENDIX

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