

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
v.)	No. SC94564
)	
SANTONIO L. MCCOY,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
 FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
 STATE OF MISSOURI
 TWENTY-SECOND JUDICIAL CIRCUIT, DIVISION 19
 THE HONORABLE JIMMIE M. EDWARDS, JUDGE

APPELLANT’S REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Santonio McCoy, adopts the jurisdictional statement set out in his Opening Brief.

STATEMENT OF FACTS

Appellant, Santonio McCoy, adopts the statement of facts set out in his Opening Brief.

REPLY ARGUMENT

Missouri’s new amendment applies to this case as Missouri voters simply sought to refine and clarify an already-existing right; and this Court should apply “strict scrutiny” in its legal, rather than its dictionary, sense in accordance with the intent of voters. Even, however, should this Court conclude the new amendment does not apply, a heightened level of scrutiny is still required under *Heller, infra*, and - because it is so indiscriminate - § 571.070 should be struck down as being facially unconstitutional, and unconstitutional as applied to appellant.

Missouri’s Recent Amendment Applies to this Case

The idea that a Court would apply a new constitutional amendment to a case pending on appeal (though the crime happened before the amendment) is not particularly novel or unique. The Louisiana Supreme Court, in a case involving this very same issue, did just that. *See State v. Draughter*, 130 So. 3d 855, 863-64 (La. 2013). Louisiana, like Missouri, recently changed its constitution to provide that any infringement on the right to bear arms would be subject to “strict scrutiny” *Id.*, at 862. Though the crime occurred before the Louisiana amendment, the defendant argued that it should, nevertheless, apply to his case which was pending on appeal. *Id.*, at 862-863.

The Louisiana Supreme Court first noted that Louisiana – just as Missouri - “follows the general rule that a constitutional provision or amendment has prospective effect only, unless a contrary intention is clearly expressed therein.”

Id. (citation omitted); *see also State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398 (Mo. banc 1972) (“The settled rule of construction in [Missouri], applicable alike to the Constitutional and statutory provisions, is that, unless a different intent is evident beyond reasonable question, they are to be construed as having a prospective operation only”).

At the time of the amendment, Louisiana - like Missouri - already had a constitutional provision concerning the “right to bear arms;” and the court concluded that “the amendment to the (already-existing) constitutional provision merely sought to ensure that the review standard of an alleged infringement of this fundamental right was in keeping with the refinements made to constitutional analysis [from Louisiana case law]” *Id.* 863.¹ After finding no contrary intention expressed in the amendment - as here - the court determined that the amendment had a “prospective effect” from the amendment’s effective date. *Id.* The court continued, however, that “this determination (of its prospective date) does not end our inquiry in this matter ...”. *Id.*, at 864. Thereafter, the court cited *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which – as in Missouri – had been adopted

¹ The court also considered the ballot language of the proposed amendment to determine that Louisiana’s preexisting right was “fundamental.” *Id.*, at 863. (ballot proposition asked, “Do you support an amendment . . . that the right to keep and bear arms is a fundamental right and any restriction of that right requires the highest standard of review by a court?”).

by that court, and its holding that: “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” *Id.*; *see also State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. banc 2003) (approving of *Griffith* in Missouri); *see also* Appellant’s Brief, at 18-22. Accordingly, the court held, the amendment “has prospective effect from its effective date . . . and has retroactive effect to this case and all cases pending on direct review or not yet final.” *Id.*, at 864.

This Court should follow the analysis from *Draughter* on this issue. Missourian’s “right to bear arm” has been around since 1875 . Mo. Const, Art. II § 17 (1875). By this amendment, the voters intended to clarify that right, and to refine the procedures which would be used to analyze restrictions to that right.²

² Moreover, there is no sound reason that this Court should depart from the rationale underlying *Griffith*, including that a court should “resolve all cases before [it] on direct review in light of [its] best understanding of governing constitutional principles.” (See Appellant’s Brief, at 20-21) (citing *United States v. Johnson*, 457 U.S. 537, 555 (1982) (quoting *Desist v. United States*, 394 U.S. 244, 259 (1969), and *Mackey v. United States*, 401 U.S. 667, 669 (1971), respectively). To Appellant’s knowledge, there are only two cases – this case and *State v. Merritt* (SC94096) - that would be affected by a holding by this Court that the amendment applies to pending cases. In Mr. McCoy’s case the issue of the

Meaning of “Strict Scrutiny”

“Strict scrutiny” is a specific method of constitutional review that has been developed and used by courts for decades. *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 19 (Mo. banc 1986); *see also Korematsu v. United States*, 323 U.S. 214, 216 (1944). Although it is certainly possible - even likely - that some or many of the nearly one million voters to vote on this amendment were not fully versed in the intricacies of the “strict scrutiny” test, this Court for several reasons should not conclude that the voters merely intended that some sort of vague “extra tough” or otherwise indistinctly “rigorous” or “exacting” standard should apply.³

constitutionality of §571.070, RSMo was preserved throughout the proceedings below.

³ In its dictionary meaning, “strict” is defined, *inter alia*, as “stringent or exacting in or in enforcing rules, requirements, obligations, etc;” “exact or precise.” *See* “Dictionary.com”; <http://dictionary.reference.com/browse/strict?s=t> (last visited February 5, 2015). A further definition from this source specifically refers to constitutional interpretation (*i.e.*, “extremely defined or conservative; narrowly or carefully limited:” “a strict construction of the Constitution.” *Id*; *see also* Merriam Webster Online Dictionary (“tight;” “close;” “narrow;” “rigorously conforming to principle”); <http://www.merriam-webster.com/dictionary/strict> (last visited February 5, 2015). “Scrutiny” is defined, *inter alia*, as “a searching study, inquiry, or inspection” (*See id.*).

Though ultimately an issue of the voters' intent, the intent of the drafters may enlighten, and help this Court to ascertain, the voters' intent. *See e.g., Household Finance Corp. v. Shaffner*, 203 S.W.2d 734, 737 (Mo. banc 1947). Moreover, "[t]he grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed" and "[t]o this extent the intent of the amendment's drafters is influential." *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. banc 2013) (quoting *Mo. Prosecuting Attorneys v. Barton Cnty.*, 311 S.W.3d 737, 742 (Mo. banc 2010).⁴ Where, as here, there is a legal test specifically denominated as the "strict scrutiny" test, it would be highly and objectively unlikely that the legislature would employ these two words (in their same positions, and without any alterations, modifying clauses, etc.) simply with the purpose of marrying - in some generic way - the dictionary definition of "strict" with the dictionary definition of "scrutiny."

Rather, as Senator Schaefer, a co-sponsor of this amendment makes clear in his Amicus Brief in *State v. Merritt*, "strict scrutiny" was meant in its legal sense. *See* SC94096, Brief of Amicus Curiae Senator Schaefer, at 2, 4-6). Inclusion of the "strict scrutiny" test was inspired, *inter alia*, by the recognition that *District of Columbia v. Heller*, 554 U.S. 570 (2008) "did not clearly set forth the proper level

⁴ This amendment was not the product of a voter referendum, but was initiated by legislature.

of scrutiny” (*i.e.*, did not clearly set forth whether it would use rational basis scrutiny, intermediate scrutiny, or strict scrutiny). *See* Amicus Br., at 9.

Beyond the legislature’s intent, the larger context of the time in which the amendment was proposed and passed should also inform the voters’ intent on this issue. Considering that the proposed amendment was – initially from a legislative prospective – a clear and deliberate reaction to many recent developments in the area of gun laws and gun rights⁵, there is no reason to conclude that the Senator’s constituents, and the larger Missouri voting public, were oblivious to the atmosphere, and issues, that inspired amendment in the first place.

Just a year and a half before Missouri’s amendment was proposed and passed, voters in Louisiana overwhelmingly approved a proposed constitutional amendment that – just as Missouri’s later amendment - would require “strict scrutiny” of any restrictions on the right to keep and bear arms. *See Draughter, supra*.⁶ This became national and local news. Louisiana’s amendment and particularly “strict scrutiny,” as a specific constitutional standard of review, were

⁵ Primarily the U.S. Supreme Court’s “landmark” decision in *Heller* (Amicus, at 2).

⁶ *See e.g.*, The Advocate, "Gun rights amendment passes easily"; <http://theadvocate.com/home/4351688-125/gun-rights-amendment-passes-easily> (also discussing meaning of “strict scrutiny”) (last visited February 6, 2015) (Appendix to Reply Brief, A1-A3).

written about and discussed in articles leading up to the vote on Missouri's amendment.⁷ Even the very consequence which is the subject of this appeal - that the amendment may allow felons to possess firearms – was contemplated in published articles and editorials.⁸

To the extent that Respondent would argue that this Court needs to determine whether the voters - through adoption of the strict scrutiny test – specifically intended to invalidate § 571.070, RSMo, Respondent would require too much. *See* Amicus Br., at 4 (rhetorically questioning whether this Court could believe that the legislature “intended invalidate through constitutional amendment” Section 571.070). The question in this case is the voters’ intent in

⁷ *See e.g.*, Kansas City Star, “Proposed amendment would make Missouri gun rights among the strongest” <http://www.kansascity.com/news/government-politics/article679122.html> (last visited February 6, 2015) (Reply Appx. A4-A7).

⁸ *See e.g.*, the Missourian, “Prosecutor, others urge residents to take second look at Amendment 5”; <http://www.columbiainmissourian.com/a/177381/prosecutor-others-urge-residents-to-take-second-look-at-amendment-5/> (Reply Appx. A8-A12); *see also e.g.*, KOMU, St. Louis, “Smart Decision 2014: Analyzing Amendment 5 - Right to Bear Arms”; <http://www.komu.com/news/smart-decision-2014-analyzing-amendment-5-right-to-bear-arms-59147/> (pointing out that amendment could cause State to have to respect a felon’s right to a firearm) (last visited February 6, 2015) (Reply Appx. A13-A16).

relation to the constitutional amendment, not § 571.071, RSMo. For the voters' part, they could have concluded that legislature would remedy the (depending on perspective) problematic statute. Moreover, as between the well-publicized amendment and one specific statute in the Missouri Criminal Code, it's more likely that the voters were more familiar with the former, than the latter. In any event, this Court need not determine the voters' intent regarding the statute, only whether they intended that the amendment apply "strict scrutiny" according to its legal meaning.

In short, there is no reason that Missouri voters should be thought to be isolated from, or uninformed on, the issues surrounding the constitutional amendment, including what was meant by the words "strict scrutiny." It also would not be a stretch to think that the voters who voted for the amendment – whose intent is, after all, the relevant intent – were even more knowledgeable about the issues (and strict scrutiny standard) surrounding the amendment they would vote for.

The context of the words "strict scrutiny," and their placement within the larger amendment, also suggest these words were intended to have a legal meaning; as a direction to how an authority (*i.e.*, a court) should view a restriction on that right. *See* Mo. Const., Art. I § 23. "Strict scrutiny" has a technical, legal meaning, and that meaning should be applied by courts. *See Honeycutt*, 421 S.W.3d at 415.

In *State v. Honeycutt*, this Court considered that the phrase "ex post facto" had a "technical legal meaning[]" when that language was added to [the Missouri Constitution] and, in large part for that reason, this Court interpreted the phrase to have its legal – rather than dictionary – meaning. 421 S.W.3d at 415-415, 422. In *American Federation of Teachers v. Ledbetter*, this Court concluded that the term "collective bargaining" in the Missouri Constitution included a duty to negotiate in good faith, since as a "technical term" it had always been construed that way. 387 S.W.3d 360, 364 (Mo. banc 2012). "When the constitution employs words that long have had a technical meaning, as used in statutes and judicial proceedings, those words are to be understood in their technical sense unless there is something to show that they were employed in some other way." *Id.* (citing *Ex parte Bethurum*, 66 Mo. 545, 548 (Mo. 1877)).

Finally, applying other than the legal meaning of "strict scrutiny" would defeat much of the amendment's purpose. The right to bear arms was already protected. The state was already required to uphold that right. Though the amendment did substantively add "ammunition, and accessories" to the right, and called the right "unalienable," the strict scrutiny standard is the most significant modification to Missouri's preexisting "right to bear arms."

Even if this Court concludes that new Amendment does not apply, then Heightened, not Rational Basis, Scrutiny applies.

Even should this Court conclude that Missouri's current amendment does not apply to Mr. McCoy, a closer fit between the means and the end of § 571.070

must be required – even under the old amendment - than that suggested by the State, or than simply that § 571.070 is supportable by the legislature’s “valid exercise” of its “police power” (*See* Resp. Br., at 16-22).⁹

Despite that neither federal law nor specifically the Second Amendment to the United State Constitution were directly cited at the trial court level in this case, federal law, nevertheless, has a place here by way of providing the minimum, or baseline, level of protection.¹⁰ (*See* L.F. 35-44; Supp. L.F. 1-10); U.S. Const., Art. VI; *e.g.*, *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 839

⁹ As apparent support for a “rational basis”/“police power” standard, Respondent cites, *inter alia*, to *Lewis v. United States*, 445 U.S. 55, 66 (1980), and indicates that (with respect to the federal firearm statute) “Congress could *rationaly conclude* that any felony conviction . . . is a sufficient basis on which to prohibit the possession of a firearm.”). Resp. Br., at 18 (emphasis added). At times, however, Respondent does seem to use language (*e.g.*, “substantial relationship”), which would be consistent with a heightened level of scrutiny (*See* Resp. Br., at 17-18, 22).

¹⁰ State’s, of course, remain free to provide greater protections than those required by the Federal Constitution. *See California v. Ramos*, 463 U.S. 992, 1013-14 (1983). Underlying Appellant’s argument is the premise the new amendment sought to provide greater protections in Missouri. In such case, *Heller* would be irrelevant.

(Mo. banc 1985) (“The court under the supremacy clause is obliged to apply federal law, and may not apply state law, substantive or procedural, which is in derogation of federal law”).

In *District of Columbia v. Heller*, the U.S. Supreme Court determined the Second Amendment secures an individual right to keep and bear arms. 554 U.S. 570, 578 (2008). In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 790-791 (2010) that holding was made applicable to the States.¹¹ For however vaguely the U.S. Court may have set out the level of scrutiny to be applied to Second Amendment cases, the Court did note that something more than “rational basis” review must apply: “If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.” *Heller*, 554 U.S. at 629; *see also id.*, at 687-688 (BREYER, J., dissenting).

Heller did recognize that the Second Amendment was a “limited” right, but all rights – even fundamental rights – are limited. Inalienable or “unalienable” rights are also limited. *Heller*’s dicta about “presumptively lawful” restrictions, notably also was in the midst of a discussion of “longstanding” and historical

¹¹ This Court’s discussion of “police power” in *State v. Richard*, 298 S.W.3d 529, 532 (Mo. banc 2009), predates the incorporation of the Second Amendment by *McDonald*.

prohibitions on the regulations of guns.¹² Missouri’s recent blanket, perpetual, automatic, and exception-less prohibition on anyone convicted of “any felon” is of a rather recent origin, and is only a few years old. *See* § 571.070, RSMo.

Appellant does not contend that no gun restrictions can be imposed on felons, but rather that Missouri’s current felon-in-possession of a firearm statute is so disconnected from the ends that it would attempt to achieve, that it is facially unconstitutional. Appellant, in his Opening Brief, all but conceded that the former version of §571.071 would be facially constitutional even under the strict scrutiny test. (*See* App. Br., at 28). Moreover, Mr. McCoy is not a violent felon, having previously been convicted – as best as can be gleaned from the record – of various crimes associated with property, not persons (e.g., tampering, stealing, burglary) (Tr. 393-396; State’s Exhibit No. 25-29). The problem is not with a statute that would seek to limit firearms in the hands of certain people, but the way in which Missouri’s statute seeks to do so in general, and in this case - without a real or substantial connection with the ends sought to be achieved.

¹² “Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Heller*, 554 U.S. at 626-27.

Missouri's current felon in possession of a firearm statute is so indiscriminate that under any review other than rational basis, it should be struck down. Without the great deference¹³ given to laws under the rational basis standard, Section 571.070 should be held to be neither constitutional on its face, nor as applied to Mr. McCoy.

¹³ See e.g., *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 536-37 (1942) (discussing principles of deference which are given to legislation under rational basis standard, in Court's analysis, under Equal Protection clause, of an Oklahoma law that ordered the sterilization of a person convicted more than twice of a "moral turpitude" crime, but – arbitrarily - did not distinguish between the nature of crimes which were "intrinsically the same").

CONCLUSION

WHEREFORE, based on his argument, Appellant, Santonio McCoy, requests this Court to reverse the judgment of the trial court, and discharge him from his conviction for unlawful use of a firearm.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(h) and Special Rule 333, I hereby certify that on February 6, 2015 a true and correct copy of the foregoing brief was sent to via the Efiling System to Jennifer A. Rodewald, Office of the Attorney General, using her email registered with the System. In addition, I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font, and contains 2687 words, excluding the cover page, signature block, and certificates of service and of compliance.

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