

No. ED101552

**In the Missouri Court of Appeals
Eastern District**

WILLIAM DAVID HILL,

Appellant,

v.

**OLIVER “GLENN” BOYER,
SHERIFF OF JEFFERSON COUNTY, MISSOURI,**

Respondent.

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY, MISSOURI

The Honorable Timothy S. Miller, Associate Circuit Judge

APPELLANT’S BRIEF

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Jurisdictional Statement

This appeal is taken from the judgment entered on April 29, 2014, after a trial *de novo*, in favor of Respondent/Defendant and against Appellant/Petitioner. A:4; LF:21. At trial, Appellant argued that he was fully qualified for issuance of a concealed carry permit and that the statutes at issue were unconstitutionally retrospective in operation as applied.¹ T:40-43; SLF:4, 9. Appellant did not file any post-trial motions and the judgment, therefore, became final on May 29, 2014. *See* Rule 81.05(a)(1). Appellant timely filed a notice of appeal on June 9, 2014. LF:37, LF:38-40. *See* Rules 81.04(a), 44.01(a).

Pursuant to Article V, Section 3 of the Missouri Constitution, “[t]he supreme court shall have exclusive appellate jurisdiction in all cases involving the validity . . . of a statute or provision of the constitution of this state” Mo. Const. art. V, § 3. However, if a party fails to properly preserve an issue, which would normally vest the Supreme Court with jurisdiction, jurisdiction lies with the Court of Appeals. *State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. 1998).

In order to properly preserve a constitutional issue, a party is “required to: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to

¹ At the time of Appellant’s application, the city or county sheriff, upon qualification, would have issued a certificate of qualification for a concealed carry endorsement; however, effective August 28, 2013, the city or county sheriff now issues a concealed carry permit. *See* § 571.101.1 RSMo (Supp. 2013). Henceforth, for consistency and to conform with the present statute, all references will be to a concealed carry permit.

the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.” *City of Eureka v. Litz*, 658 S.W.2d 519, 521 (Mo. App. 1983).

Here, Appellant challenged the constitutionality of a state statute at the first available opportunity during the trial and quoted the relevant portion of the constitutional provision. During closing arguments, Appellant argued that section 571.101 *et seq.* was unconstitutional as applied because it was “retrospective in operation.” T:42. Despite Respondent’s objection that this claim was not included in the pleadings, *id.*, the trial court overruled the objection because Appellant was unaware of the issue at the time of his original pleading. T:43. The rationale for raising a constitutional issue at the earliest available time is to prevent surprise and to allow the trial court the opportunity to rule on the issue. *Carpenter v. Countrywide Home Loans, Inc.* 250 S.W.3d 697, 701 (Mo. banc 2008). In this regard, Respondent addressed the constitutional issue in his trial brief, SLF:9, and the trial court had the opportunity to, and in fact did, evaluate and rule on the issue. LF:14.

With respect to the requirement that a party state the facts showing the violation, during closing arguments and in his post-trial brief,² Appellant averred that the legislature’s implementation of the concealed carry statutes altered the effect of, and his vested right in, the restoration of all the rights and privileges of citizenship. SLF:11. Similarly, in his post-trial brief, Appellant argued that section 571.101 *et seq.* imposed a

² The trial court limited closing arguments and specifically requested post-trial legal briefs. T:40-41.

new disability when the challenged statutes related back to Appellant's conviction and altered the legal effect of the conviction to the extent that the statutes did not permit the Respondent to consider the restoration. SLF:13.

Lastly, the constitutional question must have been preserved throughout the appellate process. In other words, "the point raised on appeal must be based upon the theory advanced at the trial court." *City of Richmond Heights v. Gasway*, 2011 WL 4388522, at *2 (Mo. App. 2011) (citing *State v. Bowens*, 964 S.W.2d 232, 236 (Mo. App. 1998)). As will be demonstrated, Appellant's argument in Point IV *infra* makes the same arguments, and relies on the same facts, that were raised during closing arguments and in his post-trial brief.

For the foregoing reason, jurisdiction properly lies with the Supreme Court. Nevertheless, even if this Court holds that Appellant has failed to properly preserve the claim that section 571.101 *et seq.* is unconstitutionally retrospective in operation as applied, this appeal still falls within the exclusive jurisdiction of the Supreme Court because the concealed carry statutes as applied are now unconstitutional in light of Article I, Section 23 of the Missouri Constitution.

Beginning on September 4, 2014, while this appeal was pending, the amended version of Article I, Section 23 became effective. *See* Mo. Const. art. XII, § 2(b) (providing effective date of amendments to constitution). The amendment makes clear that the right to keep and bear arms is unalienable and requires a court to review any restriction on these rights under strict scrutiny.

Under strict scrutiny, legislation is presumptively invalid unless it is narrowly tailored to serve a compelling government interest. *Ocello v. Koster*, 354 S.W.3d 187, 200 (Mo. banc 2011). Given this standard, Appellant expects to and does argue that section 571.101 *et seq.* violates Article I, Section 23 by infringing on his right to bear arms. In particular, as will be argued in Point II *infra*, the concealed carry statutes are not narrowly tailored to permit those persons who have had their civil rights restored after a felony conviction to obtain a permit to carry a concealed firearm.

When a statute is challenged on constitutional grounds, the party challenging the statute bears the burden of proving the statute clearly and undoubtedly violates the constitution. *State v. Young*, 362 S.W.3d 386, 390 (Mo. banc 2012). However, as the change in the constitution occurred after the judgment became final, Appellant did not have any opportunity to prove to the trial court that the challenged statutes fail to serve a compelling governmental interest or were narrowly tailored to meet that interest.

As a result, and taking into consideration the general rule that an appellate court must apply the law at the time of its decision, *Sturgess v. Guerrant*, 583 S.W.2d 258, 262 (Mo. App. 1979), on December 1, 2014, Appellant moved to remand the matter to the trial court for a new trial. On December 9, 2014, this Court ordered that the issue of remand should be taken with the case. The denial of a remand, however, ultimately divests this Court of jurisdiction to hear the appeal for two reasons.

First, as discussed previously, in order for Appellant to preserve any constitutional issue, he must raise it at the first available opportunity, identify the specific constitutional provision, state the facts demonstrating the violation, and preserve the issue throughout

the appellate process. *Litz*, 658 S.W.2d at 521. In this case, Appellant’s first opportunity to raise and discuss the constitutional issue will be in this brief. But because Appellant’s new claim involves the validity of a state statute, this appeal now falls within the exclusive appellate jurisdiction of the Supreme Court.

Second, the denial of a remand causes a conflict which should be resolved by the Supreme Court. *See* Rule 83.02 (“Transfer [to the Supreme Court] may be ordered because of the general interest or importance of a question involved in the case”). As a rule, “a constitutional issue cannot be raised for the first time on appeal.” *Willits v. Peabody Coal Co., LLC*, 400 S.W.3d 442, 453 (Mo. App. 2013) (citing *Chambers v. State*, 24 S.W.3d 763, 765 (Mo. App. 2000)). Yet, at the same time, in order to properly preserve a constitutional issue, a party must raise the issue at the first available opportunity. *Litz*, 658 S.W.2d at 521. Thus, these two principles collide when, as occurred here, a change in the constitution occurred after the trial court’s judgment became final and such change makes the appellate proceedings the first available time that a party can raise the constitutional issue.

Moreover, even if no conflict exists between the aforementioned concepts because “unpreserved points on appeal – including, and especially, constitutional claims – may be reviewed under the plain error review standard,” *Willits*, 400 S.W.3d at 453 (citing *MB Town Center, LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.2d 595, 602 (Mo. App. 2012)), doing so would prejudice Appellant and diverge from the proper standard of review. Initially, Appellant notes that “plain error review of such unpreserved points are [sic] solely within this Court’s discretion, and, in fact, rarely granted in a civil case” *Id.*

Next, in the context of this appeal, the application of plain error review presumes that Appellant was negligent in raising and preserving the constitutional issue; yet, this is not the case as Appellant is without fault and has raised the issue at the first available opportunity. Lastly, under Rule 84.13, unpreserved plain errors may be reviewed on appeal if manifest injustice or a miscarriage of justice has resulted therefrom. Rule 84.13(c). This standard, however, is contrary to Article I, Section 23 which requires a court to review any restriction on the right to keep and bear arms for strict scrutiny.

Consequently, as Appellant has timely questioned the constitutional validity of a state statute and this appeal reveals conflicts of law and standards of review, jurisdiction properly lies with the Supreme Court.

Statement of Facts

Appellant William David Hill (hereinafter “Appellant”) is a natural person and a resident of Jefferson County, Missouri. LF:4, 12; T:5. Respondent is a natural person and the duly elected Sheriff of Jefferson County, Missouri. LF:9. On March 18, 2013, Appellant submitted to Respondent, in his official capacity, an application for a permit to carry a concealed firearm. Resp’t Ex:A; LF:1,9, 11; T:5. As part of his application, Appellant submitted a photographic copy of a certificate demonstrating Appellant’s completion of a firearms safety training course. Pet’r Ex. 2; LF:6; T:10-11.

On April 3, 2013, Respondent denied Appellant’s application. Pet’r Ex. 3; LF:6, 8, 10, 11; T:12. According to Respondent, the application was denied because a background check on Appellant revealed the existence of a 1973 felony conviction for forgery. Pet’r Ex. 3; LF:6, 8, 10, 11; T:12.

Appellant concedes that the evidence presented at trial establishes, among other facts not relevant to the issues presented here, that on May 14, 1973, in the Circuit Court of Jefferson County, Missouri, Cause No. 20,785, before the Honorable Herbert K. Moss, he plead guilty to the felony offense of forgery in violation of section 561.011 RSMo (1969) (repealed 1977). Pet’r Ex. 1; Resp’t Ex. C. Appellant further concedes that the evidence presented at trial establishes that on June 12, 1973, the court sentenced him to a two (2) year term of imprisonment in the Missouri Department of Corrections, suspended the execution of the aforementioned sentence, and placed him on probation for a term of two (2) years. *Id.*

On or about June 12, 1975, after successful completion of two (2) years of probation, Appellant received his absolute discharge from probation. A:18-19; Pet'r Ex. 1; Resp't Ex.C. On July 28, 1975, the court recorded Appellant's release and discharge from probation and further restored to Appellant "all the rights and privileges of citizenship, pursuant to the provisions of Section 549.111 (2) R S Mo. Supplement 1967." *Id.* The certificate is in the name of the State of Missouri and bears the signature of Judge Moss. A:19; Pet'r Ex. 1; Resp't Ex. C.

Subsequent to the denial of the permit by Respondent, Appellant sought judicial relief in the Small Claims Court and then in the Circuit Court of Jefferson County, Missouri on a trial *de novo*. *See* LF:1-3. Judgment was entered for Respondent, and this appeal followed.

Points Relied On

I. This Court should reverse the judgment and remand the appeal to the trial court without reaching the merits because (a) after issuance of the judgment of the trial court, but before this Court rendered its decision, Article I, Section 23 of the Missouri Constitution was amended; (b) appellate courts must apply the law in existence at the time of the appellate decision; (c) current law requires this Court to review constitutional claims for strict scrutiny; and (d) strict scrutiny requires the review of information which was not developed in trial.

1. S.J. Res. 36, 97th Gen.Assemb., 2d Reg. Sess. (Mo. 2014)
2. *Sturgess v. Guerrant*, 583 S.W.2d 258 (Mo. App. 1979)
3. *State ex rel. Holland Indus., Inc. v. Div. of Transp.*, 762 S.W.2d 48 (Mo. App. 1988)
4. *State ex rel. Pfitzinger v. Wasson*, 676 S.W.2d 533 (Mo. App. 1984)

II. In light of Article I, Section 23, section 571.101 *et seq.* is unconstitutional because it is not narrowly tailored to serve the State's compelling governmental interest in that (a) section 571.101.1 requires a sheriff to issue concealed carry permits to qualified individuals; (b) section 571.101.2(3) disqualifies all individuals who have been convicted of a felony; and (c)

section 571.101 et seq. provides no exception for individuals whose rights of citizenship have been restored.

1. Mo. Const. art. I, § 23 (2014)
2. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)
3. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)
4. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012)

III. The trial court erred in entering the judgment because the court erroneously applied the law in that (a) subsequent to Appellant’s conviction, all the rights and privileges of citizenship were restored to Appellant; (b) the restoration of all the rights and privileges of citizenship has the same legal effect as a governor’s pardon; and (c) a governor’s pardon obliterates the existence of a conviction.

1. § 549.111 RSMo (1969) (repealed 1977).
2. *State ex rel. Oliver v. Hunt*, 247 S.W.2d 969 (Mo. banc 1952)
3. *Guastello v. Dep’t of Liquor Control*, 536 S.W.2d 21 (Mo. banc 1976)
4. *Magruder v. Petre*, 690 S.W.2d 830 (Mo. App. 1985)

IV. The trial court erred in entering the judgment because section 571.101 *et seq.* is unconstitutionally retrospective in operation as applied to Appellant in that (a) subsequent to Appellant’s conviction, all the rights and privileges of citizenship were restored to Appellant; (b) section 571.101 *et seq.* is a civil regulatory scheme; (c) section 571.101 *et seq.* impairs Appellant’s vested right in the restoration of the rights and privileges of citizenship; and (d) section 571.101 *et seq.* imposes a new disability upon Appellant.

1. Mo. Const. art. I, § 13
2. *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338 (Mo. banc 1993)
- 3.

Argument

I. This Court should reverse the judgment and remand the appeal to the trial court without reaching the merits because (a) after issuance of the judgment of the trial court, but before this Court rendered its decision, Article I, Section 23 of the Missouri Constitution was amended; (b) appellate courts must apply the law in existence at the time of the appellate decision; (c) current law requires this Court to review constitutional claims for strict scrutiny; and (d) strict scrutiny requires the review of information which was not developed in trial court.

A. Standard of Review

“Constitutional interpretation is a question of law and is reviewed de novo.”
Schweich v. Nixon, 408 S.W.3d 769, 773 (Mo. banc 2013).

B. Discussion

Senate Joint Resolution 36 (hereinafter “SJR36”) sought to amend Article I, Section 23 of the Missouri Constitution. S.J. Res. 36, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014), *available at* <http://www.sos.mo.gov/elections/2014ballot/SJR36.pdf>. SJR36 was truly agreed and finally passed by the General Assembly on May 7, 2014. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. banc 2014). Calling for a special election, the governor placed SJR36 on the August 5, 2014 state primary election ballot as Constitutional Amendment 5. *Id.*

On August 5, 2014, Constitutional Amendment 5 passed with 60.946% of the votes cast in the primary election.³ The amendment, therefore, became effective on September 4, 2014. *See* Mo. Const. art. XII, § 2(b) (“If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election.”). The amendment explicitly repealed Article I, Section 23 of the Missouri Constitution, and in lieu thereof, adopted and inserted a new section. Article I, Section 23 now provides:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as a result of a mental disorder or mental infirmity.

Mo. Const. art. I, § 23.

“An appellate court must decide a case on the basis of the law in effect at the time of the appellate decision.” *Sturgess*, 583 S.W.2d at 262 (citing *United States v. Schooner Peggy*, 5 U.S. 103, 110 (1801)). In *State ex rel. Holland Indus., Inc. v. Div. of Transp.*, 762 S.W.2d 48, 49 (Mo. App. 1988), Holland filed an application with the Division seeking a certificate to operate as a common carrier. Holland’s application was filed in

³ Out of 989,171 total votes cast, there were 602,863 votes in favor of the amendment, and 386,308 votes against.

<http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907> (select “Primary Election – August 5, 2014”; then click “Submit”).

October 1985, and after a hearing in March 1986, the administrative law judge denied the request in September 1986. *Holland*, 762 S.W.2d at 49. However, after the hearing, but before the judge denied the request, a new law became effective in August 1986. *Id.* at 49-50. On appeal, during oral argument, Holland advised the court of the change in law. *Id.* at 50. Because Holland failed to file a motion for rehearing based on change in law, the Division argued that the court should not consider the change. *Id.* at 51. Recognizing “[t]he rule that an appellate court must decide a case upon the basis of the law in effect at the time of decision,” *id.* at 50, the court remanded the matter to the trial court with instructions to allow Holland to submit additional evidence because an appellate court cannot review a decision based on an outdated statute. *Id.* at 51. With regard to the Division’s complaint, the court held that “application of such rule is not dependent upon a party raising the question but is to be applied by this court independent of the parties’ contentions.” *Id.*

Likewise, in *State ex rel. Pfitzinger v. Wasson*, 676 S.W.2d 533, 534 (Mo. App. 1984), three sets of parents filed a request with the school district seeking the assignment of their children to a different district. At the time of the parents’ request in 1982, the 1979 version of the relevant statute applied. The school district denied the request and the parents sought a writ of mandamus from the circuit court. *Id.* The circuit court entered judgment in favor of the parents in August 1983, *id.* at 534-35, and the school district appealed. *See id.* at 534. While the appeal was pending on direct review, a new version of the relevant statute became effective. *Id.* The court reversed and remanded the matter to the circuit court after concluding that the case should be decided under the

amended version of the relevant statute. *Pfitzinger*, 676 S.W.2d at 535. According to the court, “review of the judgment is impossible because the case was tried under one statutory provision, but another statutory provision now applies.” *Id.* at 535-36.

Like the statute at issue in *Pfitzinger*, the effective date of the constitutional amendment occurred after entry of the trial court’s judgment. Article I, Section 23 became effective on September 4, 2014, well after the trial court’s judgment became final on May 29, 2014, and after the filing of Appellant’s Notice of Appeal on June 9, 2014. Therefore, the constitutional provision in effect at the time of this Court’s opinion will be the new version of Article I, Section 23.

Moreover, like *Holland*, a remand is warranted here in order to allow the parties to submit additional evidence. Article I, Section 23 states that every citizen has the unalienable right to keep and bear arms and *any* restriction on these rights is subject to strict scrutiny. Unquestionably, by limiting the issuance of permits to select individuals, section 571.101 *et seq.* is a restriction on this right. “Under strict scrutiny, legislation is presumptively invalid and will be declared unconstitutional unless it is narrowly tailored to serve a compelling government interest.” *Ocello*, 354 S.W.3d at 200.

Neither of the parties had an opportunity to present evidence or argument to the trial court regarding whether the concealed carry statutes serve a compelling governmental interest or are narrowly tailored to meet that interest. Nor did the trial court’s final judgment address those issues. *See* LF:11-15. “When, as here, the record on appeal is inadequate through no fault of the parties, the appropriate remedy is to reverse

the judgment and remand the case for a new hearing.” *Oyler v. Director of Revenue*, 10 S.W.3d 226, 228 (Mo. App. 2000).

The only exception to the application of this rule is if manifest injustice would result or there is statutory direction or legislative history to the contrary. *Pfitzinger*, 676 S.W.2d at 535. However, neither of these exceptions applies. Nothing in SJR36 or Article I, Section 23 prohibits the courts from applying the amendment to cases currently pending on direct appeal. Indeed, according to the State of Missouri, the amendment should “apply retroactively to any case that was pending on direct review or not yet final as of the effective date of the amendment.” Appellant Am. Br., *State v. Merritt*, No. SC94096, 2014 WL 5790721 at *__ (October 24, 2014) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). Nor would manifest injustice occur if this Court reviews this case under the dictates of the newly-enacted constitutional provision. Quite the contrary, manifest injustice will occur if this Court chooses *not* to apply strict scrutiny as the citizens of this state have unequivocally found that the right to bear arms is an unalienable right that should be protected against governmental infringement at the highest level of judicial review.

Lastly, as Article I, Section 23 also obligates the State of Missouri, presumably through the Attorney General, to uphold the right to keep and bear arms against any restriction, and abolishes the State’s discretion to decline to protect these rights, a remand is necessary to afford the State the opportunity to weigh in on this appeal. Rule 52.04(a) requires the joinder of a party if, in the party’s absence complete relief cannot be accorded among the current parties, or the putative party has an interest in the action and

the absence of the party will impair or impede the party's ability to protect that interest. Rule 52.04(a). In the case *sub judice*, if this Court renders an opinion on the merits without a remand or joinder of the State of Missouri, the State will be unable to fulfill its constitutional obligation to protect against the section 571.101 *et seq.*'s infringement of these rights.

C. Conclusion

For the foregoing reasons, as this Court must apply the law as it currently exists, the record fails to provide sufficient information for this Court to render a decision, and the State of Missouri is an indispensable party, a reversal of the judgment and remand to the trial court is warranted. Therefore, Appellant respectfully requests this Court reverse the trial court's judgment and remand the matter to the trial court for a new trial with instructions to join the State of Missouri as a necessary party.

II. In light of Article I, Section 23, section 571.101 *et seq.* is unconstitutional because it is not narrowly tailored to serve the State's compelling governmental interest in that (a) section 571.101.1 requires a sheriff to issue concealed carry permits to qualified individuals; (b) section 571.101.2(3) disqualifies all individuals who have been convicted of a felony; and (c) section 571.101 *et seq.* provides no exception for individuals whose rights of citizenship have been restored.

A. Standard of Review

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks v. Franklin County Comm'n.*, 269 S.W.3d 26, 29 (Mo. banc 2008). “Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.” *Id.*

Issues raised for the first time on appeal are normally reviewed for plain error. Rule 84.13(c). Courts evaluate plain error by determining whether there was an error that is evident, obvious, and clear, and whether a manifest injustice or miscarriage of justice occurred as a result of that error. *In re J.T.*, 447 S.W.2d 212, 215 (Mo. App. 2014).

Any restriction on the right to keep and bear arms is reviewed under strict scrutiny. Mo. Const. art. I, § 23. “Under strict scrutiny, legislation is presumptively invalid and will be declared unconstitutional unless it is narrowly tailored to serve a compelling government interest.” *Ocello*, 354 S.W.3d at 200.

“Constitutional interpretation is a question of law and is reviewed *de novo*.” *Schweich*, 408 S.W.3d at 773.

B. Discussion

Discerning the intent behind a constitutional provision can be accomplished by “ascrib[ing] to the words of the constitutional provision the meaning that the people understood them to have when the provision was adopted.” *State v. Honeycutt*, 421 S.W.3d 410, 414-15 (Mo. banc 2013) (quoting *Farmer v. Kinder*, 89 S.W.3d 447, 452 (Mo. banc 2002)). “The 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 to this extent the intent of the amendment's drafters is influential." *Id.* (quoting *Mo. Prosecuting Attorneys v. Barton Cnty.*, 311 S.W.3d 737, 742 (Mo. banc 2010)) (internal quotation marks omitted). "The constitution must be interpreted to comport with the intent of its drafters." *Pearson v. Koster*, 367 S.W.3d 36, 74 (Mo. banc 2012) (citing *Keller v. Marion Cnty. Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1991)) (Price, J., dissenting).

1. No "Valid" Constitutional Claim Existed Prior to the Amendment

Prior to September 4, 2014, Article I, Section 23 of the Missouri Constitution provided:

That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify the wearing of concealed weapons.

Mo. Const. art. I, § 23 (1945).

In 2003, the General Assembly, overriding a gubernatorial veto, passed the Concealed Carry Act. CITE. The Act, now codified at section 571.101 *et seq.*, allows individuals to obtain a permit to carry concealed firearms provided they meet certain enumerated qualifications. *See* § 571.101 *et seq.* RSMo (Supp. 2012). Shortly before the Act was to become effective, several plaintiffs in *Brooks v. State*, 128 S.W.3d 844, 846 (Mo. banc 2004), sought a declaratory judgment that the Act was in violation of Article I, Section 23. The trial court ruled in favor of the plaintiffs and permanently enjoined enforcement of the law. *Id.* at 847. On appeal, the Supreme Court overturned the trial

court and held that the Concealed Carry Act was not unconstitutional under Article I, Section 23. *Brooks*, 128 S.W.3d at 847-48. According to the court, the phrase “but this shall not justify the wearing of concealed weapons” “*means simply that the constitutional right does not extend to the carrying of concealed weapons*, not that citizens are prohibited from doing so, or that the General Assembly is prohibited from enacting statutes allowing or disallowing the practice. *Id.* at 847 (emphasis added).

Thus, in accordance with *Brooks*, at the time of Appellant’s application for a concealed carry permit in March 2013, and during the entirety of the proceedings below, Appellant could not have brought or added a claim that the Concealed Carry Act, whether in whole or in part, as applied, violated his constitutional right to bear *concealed* firearms. However, effective September 4, 2014, Article I, Section 23 was amended, and now, in pertinent part, provides:

That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable.

Mo. Const. art. I, § 23.

With passage of the amendment, the phrase “but this shall not justify the wearing of concealed weapons” was removed. Logically, if inclusion of the phrase denied to a citizen a constitutional right to bear concealed firearms, then removal of the same phrase must now “grant” to a citizen a constitutional right to bear concealed firearms. Article I, Section 23, therefore, now appears to declare the existence of a “new” substantive constitutional right not previously permitted to the citizens of Missouri, to wit: the right

to bear *concealed* firearms. Of course, whether this right existed under the Second Amendment to the United States Constitution despite the holding in *Brooks* requires further analysis.

2. Article I, Section 23 Revealed a Preexisting Right
and may be Applied Retroactively

Generally, constitutional amendments are prospective only; however, if there is legislative intent to the contrary, the amendment is retroactive. “The settled rule of construction in this state, 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.” *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398 (Mo. banc 1972).

According to Sen. Kurt Schaefer, sponsor of SJR36, the purpose of the amendment to Article I, Section 23 was “not an attempt to create a right to bear arms in a completely unfettered manner; rather, it was designed to bring Missouri’s Constitution in line with the landmark U.S. Supreme Court decision of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010).” Amicus Br., *State v. Merritt*, No. SC94096, 2014 WL 5790720, at *2 (October 24, 2014) (italics in original). Indeed,

[t]he clear purposes of SJR 36 are to bring the Missouri constitution in line with *Heller* and *McDonald*, to ensure that the Missouri right to keep and bear arms remains coextensive with the federal right explicated in *Heller* and *McDonald*, and to provide a prophylactic against legislative or judicial action that would violate *McDonald*.

Id. at *5-6.

In *Heller*, the United States Supreme Court “expressly held that the Second Amendment protects an individual’s right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes such as self-defense within the home.” *State v. Richard*, 298 S.W.3d 529, 534 (Mo. banc 2009) (citing *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008)) (Fischer, J., concurring). *Heller* further confirmed that the right to possess and carry weapons for self-defense under the Second Amendment is an individual right and *preexisted* the United States Constitution. *Id.* at 533.

Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742, 748, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), the Court answered the question left open after *Heller*, that is, whether the Second Amendment was applicable to the States. In answering that question, the Court applied the process of “selective incorporation” to evaluate “whether a particular Bill of Rights guarantee is fundamental to *our* scheme of ordered liberty and system of justice.” *Id.* at 764 (italics original). Phrased differently, the Court was required to decide whether the right was “deeply rooted in this Nation’s history and tradition.” *Id.* at 767. Finding that “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty,” *id.* at 778, the Court held that the individual right to keep and bear arms, recognized by the Second Amendment, and reaffirmed in *Heller*, was made applicable to the States through the Fourteenth Amendment. *Id.* at 791.

Neither *Heller* nor *McDonald*, however, directly addressed the issue of whether an individual has the right to carry a firearm outside of the home for a lawful purpose.

Nevertheless, this question was answered in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). In *Moore*, the plaintiffs challenged the general ban on carrying a ready-to-use firearm in public. *Id.* at 934. Noting that *Heller* and *McDonald* both held that the need for defense of self, family, and property is “most acute” in the home, the court recognized that such finding does not mean that self-defense is not acute outside of the home. Consequently, the court reversed the decisions of the district courts with instructions to declare the Illinois statutes unconstitutional. *Id.* at 942. According to the court, “*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home, as when it says that the amendment guarantees the individual right to possess and carry weapons in case of confrontation. Confrontations are not limited to the home.” *Id.* at 935-36 (internal quotation marks and citations omitted). The court further stated that “[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.” *Id.* at 937.

The drafters of SJR36 intended Article I, Section 23 to conform to modern Second Amendment jurisprudence. That jurisprudence, *i.e.*, *Heller* and *McDonald*, confirms and holds that the right to keep and bear arms, including concealed firearms, has been a long-standing and fundamental right which preexisted the U.S. Constitution. Given this background and understanding, the now-repealed version of Article I, Section 23, and the holding in *Brooks* were inadvertently in conflict with the Second Amendment. Consequently, as SJR36, and Article I, Section 23, now clarify that these rights *always* existed, the amendment must apply retroactively.

3. Appellant is Within the Class of Persons Protected by Article I, Section 23

Article I, Section 23 provides that the right to keep and bear arms belongs to every “citizen.” Mo. Const. art. I, § 23. Appellant avers that he is a “citizen” and therefore has the rights enumerated in the constitutional provision.

In *Pohlabel v. State*, 268 P.3d 1264, 1265 (Nev. 2012) (cited with approval in Amicus Br., *State v. Merritt*, No. SC94096, 2014 WL 5790720, at *11 (October 24, 2014)), the defendant appealed his conviction for possession of a firearm by a felon on the grounds that the criminal statute was not narrowly tailored, and thus, unconstitutional, after *Heller* and *McDonald*. After rejecting the federal constitutional claim, the court analyzed whether the defendant, as an unpardoned felon, fell under the protection of the state constitutional right to possess firearms. *Id.* at 1269. Nevada’s constitution provides that “[e]very *citizen* has the right to keep and bear arms” *Id.* (quoting Nev. Const. art I, § 11(1)) (emphasis added). The court affirmed the conviction reasoning that the provision was not applicable to the defendant because he was not a “citizen” as contemplated by the constitution. *Id.* at 1272. Recognizing that the term “citizen” was susceptible of two interpretations: either as (1) a reference to a civilian, or generic substitute for person, defendant, or individual, or (2) a member of a community entitled to all its civil rights, protections, and privileges, *id.* at 1270, the court adopted the latter definition as being more consistent with the history and context of the constitutional provision. *Id.* at 1270-71.

The decision in *Pohlabel* is consistent with the intent of the drafters of SJR36. In drafting SJR36, the legislature purposefully utilized the term “citizen” in order to

distinguish the proposed provision from other constitutional provisions which use forms of the more generic term “person” or “people.” Amicus Br., *State v. Merritt*, 2014 WL 5790720, at *10-11 (No. SC94096 October 24, 2014) (making comparison with Mo. Const. art. I, § 5, “all men;” art. I, § 8 “every person;” and art. I, § 10 “no person”).

According to at least one drafter, “citizenship is a status, which entails individuals to a specific set of universal rights *granted by the state.*” *Id.* at *11 (quoting *Pohlabel v. State*, 268 P.3d 1264, 1270 (Nev. 2012) (emphasis added). Moreover, “[a]s the *Pohlabel* court noted, when a felon is granted executive clemency *or other relief* from collateral consequences of conviction, it is often called a ‘restoration of citizenship.’” *Id.* (citing *Pohlabel v. State*, 268 P.3d 1264, 1270-72 (Nev. 2012) (second emphasis added).

Appellant, unlike the defendant in *Pohlabel*, obtained such “other relief” by a grant of the State when, after completing his term of probation, he was “restored to all the rights and privileges of citizenship pursuant to the provisions of Section 549.111 (2) R S Mo. Supplement 1967.” A:18-19; Pet’r Ex. 1; Resp’t Ex. C. Consequently, Appellant is a “citizen” as contemplated by Article I, Section 23.

4. Section 571.101 et seq. is Not Narrowly Tailored

Assuming, *arguendo* – and for purposes of this appeal only – that the State has a compelling governmental interest in limiting the issuance of concealed carry permits to those individuals who are trustworthy and have demonstrated a proficiency with and safe handling of firearms, section 571.101 *et seq.* is not narrowly tailored to serve that interest. Section 571.101.2 identifies eleven general criteria that must be met by an applicant for a

concealed carry permit before the sheriff is authorized to issue said permit. *See* § 571.101.2 RSMo (Supp. 2012). Of particular relevance here is section 571.101.2(3), which qualifies an applicant for a permit provided the applicant “[h]as not pled guilty to or entered a plea of *nolo contendere* or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States” § 571.101.2(3) RSMo (Supp. 2012).

The concealed carry statutes do not define the term “convicted” nor do they provide any exceptions or relief to an applicant who has plead guilty or *nolo contendere* to or been convicted of a crime punishable by imprisonment for a term exceeding one year. Thus, *all* applicants who have plead guilty or *nolo contendere* to or been convicted of a felony are *forever* prevented from obtaining a permit to carry a concealed firearm and exercising their constitutional right to bear arms regardless of their individual circumstances.

In comparison, under federal law, “[i]t shall be unlawful for any person--(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 U.S.C.A. § 922(g)(1) (West 2014). The phrase “crime punishable by imprisonment for a term exceeding one year” excludes “any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or any State offense classified by the laws

of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” 18 U.S.C.A. § 921(a)(20)(A)-(B) (West 2014).

The phrase further states that

[w]hat constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

§ 921(a)(20).

Thus, unlike Missouri’s concealed carry statutes, federal law is narrowly tailored “to keep guns out of the hands of those who have demonstrated that ‘they may not be trusted to possess a firearm without becoming a threat to society.’” *Lewis v. United States*, 445 U.S. 55, 63, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980) (quoting *Scarborough v. United States*, 431 U.S. 563, 572, 97 S.Ct. 1963, 52 L.Ed.2d 582 (1977)). In *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 105, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983), the Court was called upon to determine whether the firearms disabilities imposed by the Gun Control Act of 1968 apply to someone who plead guilty to a state offense punishable by imprisonment for more than one year when the record was later expunged under state law. New Banner submitted applications with the Bureau of Alcohol, Tobacco (“BATF”) and Firearms to become a licensed dealer and manufacturer of firearms and components. *Id.* at 108. After issuance of the licenses, BATF learned that the “responsible person” for New Banner had previously plead guilty to an Iowa offense punishable by imprisonment for a term greater than one year, and subsequently revoked the licenses. *Id.* at 108-09.

New Banner sought judicial review and ultimately prevailed in the court of appeals. *Dickerson*, 460 U.S. at 109-10. The Director of BATF appealed. *Id.* at 110. Applying principles of statutory construction, *id.* at 118, the Court reversed the judgment of the court of appeals, *id.* at 122, because nothing in the legislative history of the Gun Control Act “suggests . . . that a state expunction was intended automatically to remove the disabilities imposed [by a conviction].” *Id.* at 119. According to the Court, the purpose of the legislation was to deter crime by keeping firearms away from those who may misuse them, such as those convicted of serious crimes. *Id.* at 118-19.

Yet, after the Court’s opinion in *Dickerson*, Congress enacted the Firearm Owners’ Protection Act of 1986, Pub. L. 99-308, 100 Stat. 449 (codified in scattered sections of 18 U.S.C. (1986)), which amended the definition of “crime punishable by imprisonment for a term exceeding one year” to exclude convictions followed by a restoration of civil rights. Viewing these events as a whole, Congress obviously believed that those individuals whose civil rights were restored after a felony conviction were not the type of person who would further misuse a firearm.

Here, by virtue of section 549.111, Appellant was discharged from probation and restored to all the rights and privileges of citizenship. A:18-19; Pet’r Ex. 1; Resp’t Ex. C. In order to obtain that discharge and restoration, “the court granting the probation [must have been] satisfied that the reformation of the defendant [was] complete and that he [would] not again violate the law” § 549.111.1 RSMo (1969) (repealed 1977).

In the end, the State’s compelling governmental interest can still be achieved even with the issuance of a concealed carry permit to Appellant because he is not the type

of applicant who Congress or the convicting court believes will misuse a firearm. Thus, section 571.101 *et seq.* is unconstitutional because it is not narrowly tailored so that reformed individuals can obtain a concealed carry permit.

C. Conclusion

For the foregoing reasons, section 571.101 *et seq.* is in conflict with Article I, Section 23 because it is not narrowly tailored to serve any compelling governmental interest. Therefore, Appellant respectfully requests that this Court reverse the judgment and the remand the appeal to the trial court with instruction to order Respondent to issue a concealed carry permit to Appellant.

III. The trial court erred in entering the judgment because the court erroneously applied the law in that (a) subsequent to Appellant’s conviction, all the rights and privileges of citizenship were restored to Appellant; (b) the restoration of all the rights and privileges of citizenship has the same legal effect as a governor’s pardon; and (c) a governor’s pardon obliterates the existence of a conviction.

A. Standard of Review

“On review of a court-tried case, an appellate court will affirm the circuit court’s judgment unless there is no substantial evidence to support it, it is against the weight of

the evidence, or it erroneously declares or applies the law.” *Ivie v. Smith*, 439 S.W.3d 189, 198-99 (Mo. banc 2014) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). No deference is owed to the judgment of the trial court where the evidence is uncontroverted or admitted and the issues on appeal are legal in nature. *In re Lieurance*, 130 S.W.3d 693, 696 (Mo. App. 2004).

B. Discussion

Section 571.101 mandates that the county sheriff issue a concealed carry permit to any applicant who could demonstrate that they satisfied the requirements of sections 571.101 to 571.121. § 571.101.1, RSMo (Supp. 2012). Among other requirements not relevant here, in order to qualify for issuance of a concealed carry permit, an applicant must not have “pled guilty to or entered a plea of nolo contendere or been convicted of a crime punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States” § 571.101.2(3) RSMo (Supp. 2012).

Although the statute contains no definition of “conviction,” Appellant concedes that the evidence presented at trial does establish that he was convicted of a crime punishable by a term of imprisonment exceeding one year, and placed on two (2) years of probation after imposition of a two (2) year term of imprisonment. *See Hoskins v. State of Missouri*, 329 S.W.3d 695, 699 n.6 (Mo. banc 2010) (noting that a suspended execution of sentence is a criminal conviction). This fact *in isolation* would normally render Appellant ineligible for a permit and authorize the Sheriff to deny the issuance of a concealed carry permit.

However, at the time of Appellant's discharge from probation in 1975, section 549.111 operated to absolutely discharge a defendant from probation if the court was "satisfied that the reformation of the defendant is complete and that he will not again violate the law." § 549.111.1 RSMo (1969) (repealed 1977). That same statute further provided that "[a]ny defendant who receives his final discharge under sections 549.058 to 549.161 shall be restored all the rights and privileges of citizenship." § 549.111.2 RSMo (1969) (repealed 1977).

Pursuant to this discharge statute, on June 28, 1975, the convicting court certified that Hill had "successfully completed his probation" and was "absolutely discharged" from probation on June 12, 1975. A:18-19; Pet'r Ex. 1; Resp't Ex. C. The convicting court further ordered that Hill was thereby "restored to all the rights and privileges of citizenship, pursuant to the provisions of Section 549.111 (2) R S Mo. Supplement 1967." A:18-19; Pet'r Ex. 1; Resp't Ex. C.

Hill contends that, because of the unrestricted restoration of his rights and privileges as a citizen, the conviction and all related court proceedings have no legal effect and, therefore, cannot operate to prevent Sheriff from issuing to Hill a concealed carry permit.

The restoration of all the rights and privileges of citizenship is the legal equivalent of a governor's pardon. In *State ex rel. Oliver v. Hunt*, 247 S.W.2d 969, 970 (Mo. banc 1952), the court addressed the constitutionality of section 549.170 – the predecessor of section 549.111 – in the context of a voter-eligibility appeal. In 1932, the voter was convicted of two felonies for which he was imprisoned for two years. *Id.* Ten years

later, after the voter received a final discharge from parole, he registered to, and thereafter, voted in Kansas City. *Oliver*, 247 S.W.2d at 970. However, in 1950, the board of election commissioners, as Relators, cancelled voter's registration alleging that he had never received a full pardon from the governor. *Id.* After voter's application to re-register was denied by the board, he sought relief and prevailed in the circuit court. *Id.* at 971. On appeal, the board asserted, *inter alia*, that section 549.170 unconstitutionally "encroache[d] upon the power of pardon bestowed solely upon the governor." *Id.* at 971. The court rejected the board's argument and affirmed the circuit court's reinstatement of voter's eligibility. *Id.* at 970-71, 974. The court reasoned that section 549.170 did not divest the governor of "one whit" of his power to pardon. *Id.* at 973. According to the court:

The power of the governor to pardon and the power of the legislature (subject to the limitations placed upon it by the Constitution) to say who shall exercise the rights of citizenship differ in origin and concept. The distinction is noted in *Moore v. Thorn*, 245 App.Div. 180, 281 N.Y.S. 49, 53, wherein it was held that 'The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power.' While, in this State, we have not held that the power to suspend sentences was inherently vested in the courts, yet, unless the pardoning power granted the governor by the Constitution precludes if [sic] from so doing, it is within the power of the legislature to invest the courts with that right. The parole law does that very thing. *There is no distinction in principle between suspension of sentence and restoration of civil right as provided by Section 549.170. Both to the extent each is operative, have the effect of a pardon.*

Id. at 973 (emphasis added).

After reviewing the different origins and concepts behind both gubernatorial

pardons and the judicial parole law, the court concluded “that the foregoing provisions of the Constitution do not prohibit the legislature from declaring a person whom the court has found to be worthy of parole and whom the court has finally discharged as completely reformed shall be restored to *all* rights of citizenship.” *Id.* (emphasis added).

A pardon obliterates the fact of conviction. In *Guastello v. Dep’t of Liquor Control*, 536 S.W.2d 21, 22 (Mo. banc 1976), the court addressed the effect of a pardon on a conviction. In 1961, Gaustello plead guilty to selling alcohol on Sunday for which he was fined \$500. *Id.* Several years later, Guastello received a full gubernatorial pardon and later sought renewal of his liquor license. *Id.* The application for renewal was subsequently denied by the Supervisor for Liquor Control on the basis of the conviction. *Id.* At the time, any person who had been convicted of an offense relating to the sale of alcohol was prohibited from obtaining a liquor license. *Id.* Gaustello prevailed upon judicial review and the Department of Liquor Control appealed. *Id.* On appeal, the court began its analysis by reviewing the three established views as to the effect of a pardon on a conviction and person’s guilt. *Id.* at 23.

View #1 is that conviction and guilt are both wiped out and obliterated. Thus, it makes the offender as if he had not committed the offense in the first place.

View #2 is that the fact of conviction is obliterated but the guilt remains. Under this view, if disqualification is based solely on the fact of conviction the eligibility of the offender is restored. On the other hand, if good character (requiring an absence of guilt) is a necessary qualification, the offender is not automatically once again qualified -- merely as a result of the pardon.

View #3 is that neither the fact of conviction nor the guilt are obliterated – only the punishment. Under this view, a pardon would have no effect

whatsoever on disqualification statutes like that in question. The sole effect would be to excuse any portion of the punishment not then suffered – plus, perhaps, removal of certain ‘civil’ disabilities.’

Guastello, 536 S.W.2d at 23 (internal footnotes omitted).

After reviewing earlier opinions, the court “adopt[ed] View #2 as being the most compatible, of the three alternatives, with the power of an executive to pardon and the realities of life,” *id.* at 24, and affirmed the reversal of the Supervisor’s denial. *Id.* at 25. In taking this position, the court found persuasive the analysis of a law professor, who stated:

The true line of distinction seems to be this: The pardon removes all legal punishment for the offence. Therefore if the mere conviction involves certain disqualifications which would not follow from the commission of the crime without conviction, the pardon removes such disqualifications. On the other hand, if character is a necessary qualification and the commission of a crime would disqualify even though there had been no criminal prosecution for the crime, the fact that the criminal has been convicted and pardoned does not make him any more eligible.

Id. (quoting *Damiano v. Burge*, 481 S.W.2d 562, 564-65 (Mo. App. 1972) (quoting Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 Harv. L.Rev. 647, 653 (1915))).

When *Oliver* and *Guastello* are read together and applied to case *sub judice*, it becomes clear that Hill’s conviction was “obliterated” and no longer creates a disability or operates to disqualify him from obtaining a concealed carry permit.

In contrast, in *Magruder v. Petre*, 690 S.W.2d 830 (Mo. App. 1985), the court reached a different result. In *Magruder*, the plaintiff declared his candidacy for county sheriff; however, the county clerk removed his name from the ballot after declaring him ineligible, pursuant to section 57.010, to run for said office because of a felony

conviction.⁴ *Id.* At trial, plaintiff's ineligibility was upheld and his appeal followed. *Id.* On appeal, the plaintiff argued that he was eligible for election to the office of sheriff because section 549.111 removed any ineligibility which would have otherwise disqualified him because of his felony conviction. The parties presented a single issue: which statutory provision controlled – the 1945 statute relating to the qualifications for sheriff or the 1897 statute relating to the restoration of the rights and privileges of citizenship. *Id.* The court preliminarily concluded that the statute relating to the qualifications for sheriff prevailed because it was enacted after the judicial parole statute. *Id.* at 831-32. According to the court, “[i]t is reasonable to suppose that the legislature intended by the enactment of the later statute to except from the rights and privileges of citizenship to which the convicted felon was restored upon discharge from bench parole the right or privilege to hold the office of county sheriff.” *Id.* at 832.

Notwithstanding any likely argument by Sheriff, *Magruder* is not dispositive in this case for three reasons. First, despite appearances to the contrary, the court did not decide *Magruder* based on which statute predominated over the other. Rather, the court dismissed the appeal altogether. *Id.* at 833. According to the court, because the primary and general election had already passed by the time of the court's review, any decision would have no practical effect. *Id.* at 831. The appeal was, therefore, dismissed as moot, *id.*, and any conclusion by the court regarding the predominance of the relevant statutes is *obiter dictum*.

⁴ Section 57.010 provided, in pertinent part, that “[n]o person shall be eligible for the office of sheriff who has been convicted of a felony.” *Magruder v. Petre*, 690 S.W.2d 830, 831 (Mo. App. 1985).

Second, any reliance on the principle of an implied repeal is misplaced. In *Colabianchi v. Colabianchi*, 646 S.W.2d 61, 63 (Mo. banc 1983), upon which *Magruder* relied, the court stated that “[w]here there are two acts on one subject, both should be given effect if possible, but if they are repugnant in any of their provisions, the later act, even sans a specific repealing clause, operates to the extent of the repugnancy to repeal the first.”

Recall, in *Magruder*, the court theorized that the 1945 statute, which prohibited candidates for sheriff from having felony convictions, essentially negated the 1897 statute which restored all the rights and privileges of citizenship to qualifying individuals. *Magruder*, 690 S.W.2d at 831-32. However, the *Magruder* court overlooked the fact that, *after* enactment of the 1945 sheriff disqualification statute, the legislature renewed the restoration statute and actually made substantial modifications to it. *Compare* § 549.170 RSMo (1959) (repealed 1963) with § 549.111 RSMo (1969) (repealed 1977). In the end, had the legislature wanted to prevent an individual who had been restored all the rights and privileges of citizenship from running for the office of sheriff, they could have easily done so with.

Furthermore, the application of the implied repeal principle presupposes that, at the time of controversy, both statutes are in existence. In the present case, the implied repeal concept put forth by *Magruder* is inapplicable because section 549.111 had already been repealed in or about 1977. *Id.* at 831. Consequently, the enactment of the concealed carry statutes in 2003 cannot have impliedly repealed the rights restoration statute. In other words, there was no law against which the concealed carry statute could

have stood repugnant.

Third, and perhaps most importantly, even assuming that the prohibition against an individual with a felony conviction from obtaining a concealed carry permit is somehow an exception to the restoration of all the rights and privileges of citizenship, Appellant's restoration of rights is still in force. While it is true that an individual has no vested right in a statute remaining unchanged, *Doe v. Phillips*, 194 S.W.3d 833, 851 (Mo. banc 2006), once an individual obtains a benefit from the application of the statute, the benefit becomes a vested right and cannot be removed without due process of law. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that recipient of government benefits is entitled to hearing before deprivation of benefits). There is a vast difference between a later statute repealing an earlier statute and a later statute voiding the benefit already derived from an earlier statute.

C. Conclusion

For the foregoing reasons, Hill's conviction has no legal effect and cannot be used as a basis by Sheriff for the denial of the issuance of a concealed carry permit. Therefore, Hill respectfully requests this Court reverse the trial court's judgment and remand the matter to the trial court with instructions to enter a judgment in favor of Hill and requiring Sheriff to issue a concealed carry permit to Hill.

IV. The trial court erred in entering the judgment because section 571.101 *et seq.* is unconstitutionally retrospective in operation as applied to Appellant in that

(a) subsequent to Appellant’s conviction, all the rights and privileges of citizenship were restored to Appellant; (b) section 571.101 *et seq.* is a civil regulatory scheme; (c) section 571.101 *et seq.* impairs Appellant’s vested right in the restoration of the rights and privileges of citizenship; and (d) section 571.101 *et seq.* imposes a new disability upon Appellant.

A. Standard of Review

“This Court reviews the constitutional validity of a statute *de novo*.” *Roe v. Replogle*, 408 S.W.3d 759, ___ (Mo. banc 2013). “Statutes are presumed constitutional and will be found unconstitutional only if they clearly contravene a constitutional provision.” *Honeycutt*, 421 S.W.3d at 414.

B. Discussion

Article I, Section 13 of the Missouri Constitution provides: “That no *ex post facto* law, nor law impairing the obligation of contract, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted.” Mo. Const. art. I, § 13. Accordingly, Hill avers that the portions of section 571.101 *et seq.*, which disqualify him from obtaining a concealed carry permit because of a prior felony conviction, are unconstitutionally retrospective in operation as applied.

1. Section 571.101 *et seq.* is a Civil Regulatory Scheme

When a statute is challenged under Article I, Section 13, a court’s analysis must begin with the determination of whether the law under examination is civil or criminal.

Honeycutt, 421 S.W.3d at 424. “[I]f the law is deemed ‘civil’ under the appropriate challenge, the court will need to analyze whether the law is retrospective in its operation.” *Id.* at 425.

This determination requires the utilization of a two-part test: In the first part of the test, a court will determine whether the legislature intended the statute to affect civil rights and remedies or criminal proceedings. *Id.* at 424 (quoting *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)). In the second part of the test, if the statute was intended to affect civil rights and remedies, the reviewing court must then determine whether the statutory scheme is so punitive in purpose or effect so as to negate the intention to affect civil rights or remedies. *Id.*

During the initial prong of the test, in order to “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings, . . . the Court should consider the statute’s text and its structure to determine the legislative objective.” *Id.* at 425 (internal citation and quotation marks omitted). Although the law is codified in Chapter 571 of Article XXXVIII concerning “Crimes and Punishment; Peace Officers and Public Defenders,” this fact is not dispositive of whether it is a civil or criminal law. *R.W. v. Sanders*, 168 S.W.3d 65, 69 (Mo. banc 2005) (“ . . . location and labels of statutory provision do not by themselves transform a civil remedy into a criminal one.”).

Indeed, the first two sentences of the challenged statute use the phrase “all *applicants* for concealed carry permits” and then direct what action the city or county *sheriff* must take upon the satisfaction of certain conditions. § 571.101.1 RSMo (Supp. 2012) (emphasis added). In addition, section 571.114 provides for a review mechanism

with the *civil* courts for any applicant who believes that the sheriff wrongly denied the application to obtain the concealed carry permit. § 571.114 RSMo (Supp. 2012). The use of term “applicants,” as opposed to the term “defendants;” the direction to a law enforcement officer, as opposed to a prohibition and subsequent punishment directed to citizens; and the availability of a review procedure with the civil courts demonstrate that the statutory scheme is not written in the style of nor characteristic of other provision of the criminal code.

Next, in order to determine if a statutory scheme is so punitive so as to negate the legislature’s intention, the court must examine whether the statute (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a non-punitive purpose; or (5) is excessive with respect to that purpose. *Honeycutt*, 421 S.W.3d at 426.

First, section 571.101 *et seq.* is not the type of statutory scheme that has been regarded as punishment throughout history. Although the concealed carry law is a relatively new statutory creature – having been passed by the legislature in 2003 – the evaluation of an applicant’s qualifications for issuance of a permit to carry a firearm is not punishment. *See R.W.*, 168 S.W.3d at 69 (finding registration of sex offender is a government method of making information available to law enforcement and not punishment). Moreover, the evaluation for, and granting or rejection of the permit does not subject the applicant to any form of public shaming, humiliation, or confinement. *See id.*

Second, the concealed carry law does not impose an affirmative disability or restraint on the intended beneficiaries of the statutes. Rather, the statutory scheme actually implements the already existing and unalienable constitutional right of an individual to bear firearms and grants an approved applicant authority to carry firearms where other non-permittees may not.

Third, the concealed carry law does not promote the traditional aims of punishment. “Two traditional aims of punishment are deterrence of future crimes and retribution for past crimes.” *State v. Wade*, 421 S.W.3d 429, 438 (Mo. banc 2013). The portions of section 571.101 *et seq.* concerning the issuance of a concealed carry permit for the most part accomplish neither of these traditional goals. Although the denial of an application may indirectly deter future crimes by preventing an unqualified individual from carrying firearms in public, the mere presence of a deterrent effect does not convert the application and verification process into a form of punishment. *R. W.*, 168 S.W.3d at 69-70.

Fourth, the statutory scheme does have a rational connection to a non-punitive purpose in that it enhances public safety by ensuring that only those applicants with the necessary training and qualifications are able to lawfully carry firearms in public.

Last, the statutory scheme is not excessive with respect to its regulatory purpose. As the purpose of the scheme is primarily designed to allow qualified individuals to acquire concealed carry permits, the simple and short application and verification process does not impose any “substantial physical or legal impediments” upon an applicant’s ability to obtain a permit. *Id.* at 70.

For the foregoing reasons, the concealed carry law, codified at section 571.101 *et seq.*, is a civil statutory scheme that is not so punitive so as to negate the legislature's intent to deem it civil. Thus, this Court must determine whether the statutes at issue here are unconstitutionally retrospective in operation.

2. Section 571.101 *et seq.* Impairs Vested Rights

A law is retrospective in operation when it either (a) takes away or impairs vested or substantial rights or (b) imposes new obligations, duties, or disabilities with respect to past transactions. *Missouri Real Estate Com'n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. 2010) (citing *F.R. v. St. Charles County Sheriff's Dep't*, 301 S.W.3d 56, 62 (Mo. banc 2010)).

As to the first disjunctive option, a law is improperly retrospective if it takes away or impairs vested or substantial rights. A vested or substantial right

must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of the demand, or a legal exemption from a demand made by another. A vested right has been described as a right with an independent existence, in the sense that once it vests it is no longer dependent for its assertion upon the common law or statute under which it may have been acquired. Vested right is defined as a right complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy.

Id. at 690-91 (internal citations, quotations marks, and alterations omitted).

Petitioner has a vested right in the convicting court's decree that all of his rights and privileges of citizenship were restored. In *Doe v. Roman Catholic Diocese*, 862

S.W.2d 338, 339 (Mo. banc 1993), the plaintiff filed a civil action against the diocese alleging that a priest in the employ of the church had committed sexual abuse. The diocese moved to dismiss the action alleging that the causes of action were barred by the applicable statutes of limitation. *See id.* The trial court granted the motion and dismissed the cause as time barred. *Id.* On appeal, the only issue was whether a new child sex abuse statute which authorized the actions even though they would have been barred by the statutes of limitation applicable prior to the effective date of the new statute. *Id.* at 340. The Supreme Court affirmed the dismissal reasoning that the expiration of the statute of limitations for the tort actions “created a vested right in favor of the defendant to be free from suit.” *Id.* at 342. According to the court, “once the original statute of limitations expires and bars [a] plaintiff’s action, [a] defendant has acquired a vested right to be free from suit” *Id.* at 341.

Doe is analogous to the instant case. In *Doe*, the court held that the diocese had acquired, from the statute of limitations, a vested right to be free from suit once the appropriate amount of time had passed. Here, Hill has acquired, from the judicial parole law, a vested right in the restoration of his rights once the term of probation had expired and the court found that his reformation was complete.

Consequently, as the felony disqualification provisions of the concealed carry statute impairs Hill’s enjoyment to his vested right in the restoration of all the rights and privileges of citizenship by effectively disregarding the restoration and its effect on his conviction, the concealed carry statutes as applied are retrospective in operation, and in violation of Article I, Section 13

3. Section 571.101 et seq. Imposes a New Disability

Similarly, a law is improperly retrospective if it creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *F.R. v. St. Charles County Sheriff's Dep't*, 301 S.W.3d 56, 62 (Mo. banc 2010). However, “[a] statute is not retrospective or retroactive . . . because it relates to prior facts or transactions but does not change their legal effect, or because some of the requisites for its action are drawn from a time antecedent to its passage, or because it fixes the status of an entity for the purpose of its operation.” *Phillips*, 194 S.W.3d at 851 (quoting *Jerry-Russell Bliss v. Hazardous Waste*, 702 S.W.2d 77, 81 (Mo. banc 1985)). A retrospective law “must give to something already done a different effect from that which it had when it transpired.” *Id.* at 850 (quoting *Squaw Creek Drainage Dist. v. Turney*, 138 S.W.12, 16 (1911)). Thus, a statute is retrospective and, therefore, improper when it relates to prior facts or transactions *and* changes their legal effect.

Here, section 571.101 *et seq.* imposes a new disability upon Hill’s conviction. The statutory scheme at issue relates back to prior facts and transactions in that it required Respondent, as the county sheriff, to review Appellant’s criminal past and disqualify him because of a prior conviction for a felony. Similarly, the statutory scheme alters the legal effect of Appellant’s conviction by not permitting or authorizing the Respondent from considering Appellant’s restoration of rights in determining if Appellant’s conviction remains a valid disqualifying event.

C. Conclusion

For the foregoing reasons, section 571.101 *et seq.* as applied is unconstitutionally retrospective in operation because it impairs Appellant's vested right in the court ordered restoration of his right and privileges, and attaches a new disability on his prior felony conviction. Therefore, Hill respectfully requests this Court reverse the trial court's judgment and remand the matter to the trial court with instructions to enter a judgment in favor of Appellant and requiring Respondent to issue a concealed carry permit to Appellant.

Conclusion

For the foregoing reasons, Appellant respectfully request this Court reverse the judgment of the trial court, and remand the matter to the trial court with instructions to enter judgment in favor of Appellant. In the alternative, Appellant requests this Court reverse the judgment of the trial court, and remand the matter to the trial court for a new trial with instructions to join the State of Missouri as an indispensable party and further to permit Appellant to amend his pleadings as necessary.

Respectfully submitted,

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Certificate of Compliance with Rule 84.06

Pursuant to Rule 84.06(c), the undersigned hereby certifies that this brief: (1) includes the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b) and Local Rule 360; and (3) pursuant thereto, contains 12,059 words as calculated by the Microsoft Word software used to prepare it, exclusive of the matters identified in Rule 84.06 and Local Rule 360.

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Certificate of Service

The undersigned hereby certifies that the electronic version of Appellant's Brief was served upon all registered users by means of the Court's electronic filing system (Rule 103.08), on this 2nd day of February, 2015. Pursuant to Rule 84.05(a), the undersigned further certifies that two (2) copies of Appellant's Brief will be deposited in the United States mail, postage prepaid, for delivery upon Attorney for Respondent, Victor J. Melenbrink, Office of County Counselor, P.O. Box 100, Hillsboro, Missouri 63050.

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