

No. SC94936

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Appellant,

v.

RAYMOND ROBINSON,

Respondent.

**Appeal from the Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable Robert H. Dierker, Judge**

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. (Section 571.070 has already been found to survive strict scrutiny review).

This Court has already reviewed section 571.070 under strict scrutiny and determined that it was sufficiently narrowly tailored to survive; those cases are controlling and this Court should follow its precedent (Reply to Respondent’s Point I, Subpoint H).

Respondent argues in Point I, Subpoint H, that this Court’s recent opinions in *State v. Merritt*, No. SC94096 (Mo. August 18, 2015) and *State v. McCoy*, No. SC94564 (Mo. August 18, 2015), upholding the constitutionality of section 571.070 do not apply to this case because this Court had not considered or analyzed the significant expansion of the right to bear under the amended version of article I, section 23 of the Missouri Constitution (“Amendment 5”). This argument ignores this Court’s ruling in *Dotson v. Kander* (“*Dotson II*”), No. SC94482 (Mo. June 30, 2015), as well as the holdings in the *Merritt* and *McCoy* opinions.

The sequence of events which led to the passage of Amendment 5 is instructive in showing the purpose of amending the Missouri Constitution and the nature of this Court’s subsequent rulings. In 2008, the United States Supreme Court found that the Second Amendment of the United States Constitution conferred an individual right to bear arms, in a contentious 5-4 decision. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Two years later, again in a 5-4 decision, the Supreme Court determined that the right to bear arms was a fundamental right which applied to the states as well as the federal government. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In these two hallmark

cases, our nation's highest court affirmed the rights of law-abiding individuals to possess firearms. Despite the significance of these two rulings, the court declined to announce a standard of review under which regulations concerning the right to bear arms would be reviewed. *Heller*, 554 U.S. at 628-29 (finding total ban on handguns would fail all levels of constitutional scrutiny). As a result, courts across this nation have struggled to find the appropriate standard under which to review restrictions on the right to bear arms. *See Ezell v. United States*, 651 F.3d 684, 701 (7th Cir. 2011) (heightened scrutiny discussed in *Heller* excluded rational basis review, but no clear standard was delineated); *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (restriction on concealed firearms reviewed under two pronged approach involving means-end scrutiny); *Heller v. District of Columbia*, 670 F.3d 1244, 1256-7 (D.C. Cir. 2011) (level of scrutiny for Second Amendment challenges depends on nature of conduct regulated and degree of burden; intermediate scrutiny applied).

On August 5, 2014, Missouri voters passed Amendment 5, amending article I, section 23 of the Missouri Constitution. Amendment 5 was passed in order enshrine in the Missouri Constitution the fundamental, individual right that the Supreme Court of the United States had only narrowly decided existed in *Heller*, and to delineate a standard of review. Until the passage of this amendment, Missouri courts did not have a clear standard under which to review restrictions on the right to bear arms. Amendment 5 explicitly required that all laws regulating firearms must be subject to strict scrutiny. Following the passage of Amendment 5, numerous criminal defendants, including

Respondent, challenged the constitutionality of section 571.070 which prohibits convicted felons from possessing firearms.

After the passage of Amendment 5, an election challenge was brought alleging that the ballot title was misleading, specifically that it failed to inform voters that Amendment 5 would significantly affect many of the gun laws Missouri already had in effect. *Dotson II*, No. SC94482, slip. op. at 9. Finding that Amendment 5 did not represent a significant change in the law, this Court rejected the argument that the explicit addition of strict scrutiny as the standard of review affected current gun laws. *Dotson II*, No. SC94482, slip op. at 10, fn. 5. This Court noted that even without the passage of Amendment 5, all laws regulating firearms would have been reviewed under strict scrutiny since Missouri courts are obliged to review all laws affecting fundamental rights under that standard. *Id.* Noting that the adoption of strict scrutiny does not mean that laws affecting the right bear arms will become presumptively invalid, this Court found that the ballot title language was appropriate and Amendment 5 was lawfully adopted. *Dotson II*, No. SC94482, slip op. at 10.

This Court was then tasked with determining the constitutionality of Missouri's felon in possession law for offenses committed before the passage of Amendment 5 in *Merritt* and *McCoy*. Although it determined that unless another intent was evident, amendments to the Missouri Constitution are prospective in operation only, this Court noted that following *Heller* and *McDonald*, it would have reviewed all restrictions on firearms under strict scrutiny, the standard explicitly adopted in Amendment 5. *Merritt*, No. SC94096, slip op. at 6; *McCoy*, No. SC94564, slip op. at 5. Had that not been the

case, Amendment 5 may not have survived its ballot challenge. *State v. Merritt*, No. SC94096, slip op. at 8 (“If the constitutional amendment had *changed* the level of scrutiny under article I, section 23 to strict scrutiny, the Court might have considered the ballot summary at issue in *Dotson* unfair or insufficient.”).

With the adoption of Amendment 5 becoming irrelevant to the standard of review, this Court then determined that section 571.070 survived strict scrutiny. *Merritt*, No. SC94096, slip op. at 13; *McCoy*, No. SC94564, slip op. at 12. To survive strict scrutiny, the State must show that the law is narrowly tailored to meet a compelling government interest. *Dotson II*, No. SC94482, slip op. at 4. “The State has a compelling interest in ensuring public safety and reducing firearm-related crime.” *Merritt*, No. SC94096, slip op. at 9; *McCoy*, No. SC94564, slip op. at 8-9. Section 571.070 is narrowly tailored because felons are more likely than non-felons to engage in violent, illegal gun use and to commit violent crimes than law-abiding citizens. *Merritt*, No. SC94096, slip op. at 10; *McCoy*, No. SC94564, slip op. at 9. (citing *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) and *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010)). This Court also noted that narrow tailoring does not require the exhaustion of every possible alternative. *Merritt*, No. SC94096, slip op. at 12; *McCoy*, No. SC94564, slip op. at 11.

While the offenses in *Merritt* and *McCoy* may have been committed before Amendment 5 was adopted, the constitutional analysis of section 571.070 conducted by this Court is unchanged by the adoption of Amendment 5 and is therefore controlling on the instant case. Section 571.070 has already been found by this court to serve a compelling government interest and to be sufficiently narrowly tailored in order to

remain in effect. The State hereby requests that this Court continue to follow its own precedent and find that section 571.070 remains constitutional.

CONCLUSION

The State respectfully requests this Court vacate the trial court's order dismissing the case with prejudice and remand the case to the circuit court for further proceedings.

Respectfully Submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 1,300 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2013 software; and
2. That a copy of this brief was sent through the Missouri Court's e-filing system on October 13, 2015 to, Patrick Kutz, Attorney for Respondent.

/s/ Veronica Harwin
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