

No. SC94954

**In the
Supreme Court of Missouri**

STATE OF MISSOURI,

Appellant,

v.

PIERRE CLAY,

Respondent.

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

APPELLANT'S BRIEF

**AARON LEVINSON
Assistant Circuit Attorney
Missouri Bar No. 64989**

**VERONICA HARWIN
Assistant Circuit Attorney
Missouri Bar No. 65955**

**1114 Market Street, Room 401
St. Louis, MO 63101
Phone: (314) 622-4941
Fax: (314) 622-3369**

**ATTORNEYS FOR APPELLANT
STATE OF MISSOURI**

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
JURISDICTIONAL STATEMENT.....	8
STATEMENT OF FACTS.....	9
POINTS RELIED ON.....	11
ARGUMENT.....	12
I. Section 571.070 is constitutional as it survives strict scrutiny review...	12
A. Standard of Review.....	12
B. Recent Amendments to article 1, section 23 of the Missouri Constitution.....	12
C. Section 571.070 is constitutional because it is narrowly tailored to advance a compelling government interest.....	13
1. The State has a compelling interest.....	15
2. Section 571.070 is narrowly tailored to advance that compelling government interest.....	17
3. The statute cannot be further narrowly tailored without jeopardizing the compelling interest.....	21
4. The inclusion of the phrase “convicted violent felons” in article 1, section 23 of the Missouri Constitution does not preclude the State from prohibiting “nonviolent” felons from possessing firearms.....	25
CONCLUSION.....	27
CERTIFICATES OF COMPLIANCE AND SERVICE.....	28

TABLE OF AUTHORITIES

Cases

<i>Bd. of Educ. of City of St. Louis v. City of St. Louis</i> , 879 S.W.2d 530 (Mo. banc 1994).....	25
<i>Bd. of Educ. of City of Saint Louis v. Mo. State Bd. of Educ.</i> , 271 S.W.3d 1 (Mo. banc 2008).....	12
<i>Brooks v. State</i> , 128 S.W.3d 844 (Mo. banc 2004).....	26
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992).....	15
<i>City of Cape Girardeau v. Joyce</i> , 884 S.W.2d 33 (Mo. App. E.D. 1994).....	17
<i>Dotson v. Kander (Dotson II)</i> , No. SC94482 (Mo. June 30, 2015)	13, 14, 26
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	14, 17, 18, 21
<i>Fla. Bar v. Went For It, Inc.</i> , 515 U.S. 618 (1995).....	15
<i>Franklin County ex rel. Parks v. Franklin County Comm’n</i> , 269 S.W.3d 26 (Mo. banc 2008).....	12
<i>Heidbrink v. Swope</i> , 170 S.W.3d 13 (Mo. App. E.D. 2005).....	14
<i>Hoskins v. State</i> , 329 S.W.3d 695 (Mo. banc 2010).....	19
<i>In re Care and Treatment of Norton</i> , 123 S.W.3d 170 (Mo. banc 2004).....	11, 15
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	13, 17, 18
<i>Serfass v. United States</i> , 420 U.S. 377 (1975).....	8
<i>State v. Frith</i> , 151 So.3d 946 (La. Ct. App. 2014).....	21
<i>State v. Grubb</i> , 120 S.W.3d 737 (Mo. banc 2003).....	18
<i>State v. Richard</i> , 298 S.W.3d 529 (Mo. banc 2009).....	15

<i>State v. Smothers</i> , 297 S.W.3d 626 (Mo. App. W.D 2009).....	8
<i>United States v. Carter</i> , 669 F.3d 411 (4th Cir. 2012).....	15, 17
<i>United States v. Lane</i> , 252 F.3d 905 (7th Cir. 2001).....	18
<i>United States v. Salerno</i> , 481 U.S. 739 (1987).....	15
<i>United States v. Yancey</i> , 621 F.3d 681 (7th Cir, 2010).....	18, 21
<i>Weinshenk v. State</i> , 203 S.W.3d 201 (Mo. banc 2006).....	15
<i>Yale v. City of Independence</i> , 846 S.W.2d 193 (Mo. banc 1993).....	19

Statutes

ALASKA STAT. § 11.61.200 (2015).....	20
ALASKA STAT. § 12.55.085.....	19
ARIZ. REV. STAT. § 13-901.....	19
ARIZ. REV. STAT. § 13-3101.....	20
ARIZ. REV. STAT. § 13-3102.....	20
ARK. CODE ANN. § 5-73-103.....	20
CAL. PENAL CODE § 1203 (2015).....	19
CAL. PENAL CODE § 29800 (2015).....	20
COLO. REV. STAT. § 18-1.3-102.....	19
COLO. REV. STAT. 18-12-108.....	20
CONN. GEN. STAT. § 53a-217 (2005).....	20
FLA. STAT. ANN. § 790.23 (2015).....	20
GA. CODE ANN. § 16-11-131 (2014).....	20
HAW. REV. STAT. ANN. § 134-7 (2013).....	20

IDAHO CODE ANN. § 18-3316 (2014).....	20
720 ILL. COMP. STAT. ANN. 5/24-1.1 (2014).....	20
IOWA CODE § 724.26 (2014).....	20
KY. REV. STAT. ANN. § 527.040 (2015).....	20
ME. REV. STAT. tit. 17-A, § 1348-A.....	19
MICH. COMP. LAWS § 771.1.....	19
MINN. STAT. § 624.713 (2015).....	20
MISS. CODE ANN. § 97-37-5 (2013).....	20
MO. REV. STAT. § 547.200 (2000).....	8
MO. REV. STAT. §556.016 (2013).....	18-19
MO. REV. STAT. §556.061 (2006).....	22-23
MO. REV. STAT. §565.153 (2008).....	22
MO. REV. STAT. §568.060 (2013).....	22-23
MO. REV. STAT. §571.070 (2000).....	21-22, 23, 24
MO. REV. STAT. §571.070 (2008)... 8, 11, 12, 13, 15, 17, 18, 19, 20, 21, 22, 23, 24	
NEB. REV. STAT. § 28-1206 (2015).....	20
N.H. REV. STAT. ANN. § 159:3 (2015).....	20
N.M. STAT. ANN. § 30-7-16 (2015).....	20
N.C. GEN. STAT. § 14-415.1 (2014).....	20
OKLA. STAT. ANN. tit. 21, § 1283 (2015).....	20
OR. REV. STAT. § 137.010.....	19
R.I. GEN. LAWS § 11-47-5 (2015).....	20

S.D. CODIFIED LAWS § 23A-27-13.....	19
TENN. CODE ANN. § 39-17-1307(c) (2014).....	20
18 U.S.C. § 922(g)(1).....	20
VA. CODE ANN. § 19.2-303.....	19
VA. CODE ANN. § 18.2-308.2 (2015).....	20-21
WASH. REV. CODE ANN. § 9.41.040 (2014).....	21
W. VA. CODE ANN. § 61-7-7(2013).....	21
WIS. STAT. ANN. § 941.29 (2014).....	21

Other Authorities

Bridget DiCosmo, <i>State Law Lets Felon with Gun Go Free</i> , Southeastern Missourian, Sept. 6, 2007, at 1A.....	23
Chris King, <i>Joyce leads Delegation to Study No Violence Alliance</i> , St. Louis Am., February 26, 2015, <i>available at</i> http://www.stlamerican.com/news/local_news/article_eed120d6-bd60-11e4-8644-cb284db66f5e.html (last visited July 7, 2015).....	16
Edwin Zedlewski & Mary B. Murphy, <i>DNA Analysis for “Minor” Crimes: A Major Benefit for Law Enforcement</i> , 253 Nat’l Inst. Just. J. 2 (2006).....	16
Garen J. Wintemute et al., <i>Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm Related Criminal Activity Among Authorized Purchasers of Handguns</i> , 280 JAMA 2083 (1998).....	20

Mona A. Wright, Garen J. Wintermute, and Frederick P. Rivara, <i>Effectiveness of Denial of Handgun Purchase to Persons Believed to Be at High Risk for Firearm Violence</i> , 89 Am. J. Pub. Health 88 (1999).....	16
St. Louis Metropolitan Police Department, <i>St. Louis Crime Statistics</i> , available at http://www.slmpd.org/crime_stats.shtml (last visited July 7, 2015).....	16
U.S. Dept. of Justice, Bureau of Justice Statistics, <i>Profile of Nonviolent Offenders Exiting State Prisons</i> (2004), at http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf ...	24-25
<u>Constitutional Provisions</u>	
Mo. Const. art. I, § 23 (1945).....	12-13
Mo. Const. art. I, § 23 (amended 2014).....	8, 11, 12, 13, 14, 17, 25, 26
Mo. Const. art. V, § 3 (1982).....	8
Mo. Const art. XII, § 2(b) (1945).....	13
U.S. Const. amend. II.....	14, 18

JURISDICTIONAL STATEMENT

The State appeals pursuant to section 547.200.2 RSMo. from the trial court's dismissal with prejudice of Count I of the information on Respondent's motion to dismiss. A dismissal with prejudice is a final order, making appellate jurisdiction available. *State v. Smothers*, 297 S.W.3d 626, 630 (Mo. App. W.D. 2009). Under section 547.200.2 RSMo, the State can appeal "in all other criminal cases except in those cases where the possible outcome of such an appeal would result in double jeopardy for the defendant." MO. REV. STAT. § 547.200.2 (2000). There is no risk of double jeopardy for Defendant, because "[w]ithout risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, 420 U.S. 377, 391-92 (1975). Since the State appeals from a pretrial order dismissing the case with prejudice, jeopardy had never attached in this case.

Jurisdiction for this appeal rests in the Supreme Court of the State of Missouri under article V, section 3 of the Missouri Constitution as the sole issue on appeal involves the validity of a Missouri statute, section 571.070 RSMo., under article I, section 23 of the Missouri Constitution.

STATEMENT OF FACTS

On February 25, 2015, Pierre Clay (“Defendant”) was charged by information with Count I: Unlawful Possession of a Firearm and Count II: Possession of up to 35 Grams of Marijuana after a preliminary hearing. (L.F. 3). Defendant was arraigned the same day. (L.F. 5). Count I alleged that Defendant knowingly possessed a revolver and that he was previously convicted of a felony. (L.F. 3). Specifically, Defendant was convicted on August 5, 2010 of the felony of Unlawful Use of a Weapon in the Circuit Court of the City of St. Louis, State of Missouri. (L.F. 3).

On April 10, 2015, Defendant filed a Motion to Dismiss Count I, requesting that the trial court dismiss Count I: Unlawful Possession of a Firearm on the grounds that section 571.070.1 RSMo was unconstitutional. (L.F. 6). Defendant argued that Amendment 5, which was passed by Missouri voters on August 5, 2014 and took effect September 4, 2014, significantly altered article I, section 23 of the Missouri Constitution. (L.F.7). Defendant claimed under the “new” article I, section 23 his right to bear arms is protected as he only has prior convictions for “non-violent” felonies. (L.F. 8). Defendant noted that the trial court had already dismissed a similar case in State v. Raymond Robinson, 1422-CR02936-01, and that writs of prohibition requested by the State from the Eastern District Court of Appeals and the Missouri Supreme Court were both denied. (L.F. 8-9).

The State filed a response in opposition to Defendant’s motion to dismiss. (L.F. 10). The State argued that the burden to prove the statute is unconstitutional rests on the defendant, as statutes are presumed valid. (L.F. 11). The State acknowledged that under the new language of article I, section 23, the court must review section 571.070 under strict

scrutiny review. (L.F. 11). The State argued that there is a compelling interest in preventing crime and promoting public safety. (L.F. 12). Further, the State maintained that the statute is narrowly tailored to advance that interest because it only applies to individuals that receive felony convictions, not suspended impositions of sentence or misdemeanor convictions. (L.F. 12-13).

Based on the motions, the trial court dismissed Count I: Unlawful Possession of a Firearm on April 23, 2015. The trial court followed the views set forth in the Memorandum and Order issued in State v. Raymond Robinson, 1422-CR02936, and found section 571.070 to be unconstitutional as applied to the defendant, because he had no record of violence and his only prior conviction was for carrying a concealed weapon. (L.F. 17). The State appeals from the dismissal of Count I. (L.F. 18).

POINT RELIED ON

The trial court erred in dismissing Count I of the information, the felon-in-possession-of-a-firearm charge against Respondent, because section 571.070.1 RSMo. survives strict scrutiny review in that it is narrowly tailored to effectuate the compelling governmental interest of protecting the public safety and reducing firearms related violence.

In re Care and Treatment of Norton, 123 S.W.3d 170, 174 (Mo. banc 2004)

Mo. Const. art. I, § 23 (amended 2014)

MO. REV. STAT. § 571.070 (2008)

ARGUMENT

I. The trial court erred in dismissing Count I of the information because section 571.070.1 RSMo. survives strict scrutiny review.

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). “A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts fundamental law embodied in the constitution.” *Bd. of Educ. of City of Saint Louis v. Mo. State Bd. of Educ.*, 271 S.W.3d 1, 7 (Mo. banc 2008) (internal quotation marks and citation omitted).

B. *Changes to article I, section 23 of the Missouri Constitution*

On August 5, 2014, the voters approved a change to article I, section 23 of the Missouri Constitution (“Amendment 5”). As a result of that change, Mo. Const. art. I, sec. 23 (new language in **bold**, deleted language ~~struck through~~):

“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; ~~but this shall not justify the wearing of concealed weapons.~~ **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.”

Pursuant to article XII, section 2(b) of the Missouri Constitution, the effective date of a constitutional amendment is thirty days after the election, which in this case was September 4, 2014. Amendment 5 did not alter the right to bear arms but instead was a declaration of the nature of the right. *Dotson v. Kander (Dotson II)*, No. SC94482, slip op. at 10 n.5 (Mo. June 30, 2015) (“By declaring the right to bear arms “unalienable” and imposing strict scrutiny, SJR 36 could be understood to be nothing more than a declaration of the law as it would have been declared by this Court after *McDonald* mandated that the fundamental right to bear arms applied to the states.”); *see also id.* at 15 (“[T]he central purpose of the amendment to article I, section 23, is not to change the right to bear arms, but to make certain “declarations” about that right.”).

C. Section 571.070 survives strict scrutiny review because it is narrowly tailored to serve a compelling government interest

Respondent claims that section 571.070 should be declared unconstitutional as it relates to anyone not previously convicted of a violent felony. Article I, section 23 of the Missouri Constitution guarantees that every citizen have the right to keep and bear arms. Mo. Const. art. I, § 23 (amended 2014). As amended in 2014 by Amendment 5, the Constitution now also requires that “[a]ny restriction on these rights shall be subject to

strict scrutiny.”¹ Mo. Const. art. I, § 23 (amended 2014). This addition can be broken down into two parts. First, by using the language “any restriction on these rights,” the drafters of Amendment 5 envisioned that restrictions would still exist on the right to bear arms in the State of Missouri, as there always has been under the law. *See Heidbrink v. Swope*, 170 S.W.3d 13, 15 (Mo. App. E.D. 2005) (holding that the right to bear arms is “neither absolute nor unconditional”). Second, the language “shall be subject to strict scrutiny” requires the Court to analyze any law restricting the right to bear arms under the strict scrutiny test.

Strict scrutiny requires a two-part test: (1) the government must show a compelling interest in restricting the right, and (2) the restriction must be narrowly tailored to meet that

¹ Although strict scrutiny is a legal term of art with a well-known definition, because this amendment to the Missouri Constitution was passed by the voters, it is an open question about whether this definition is controlling. *See Dotson II*, No. SC94482, Stith, J. concurring op. at 9 (“There is no reason to interpret the term “strict scrutiny” in the recently adopted amendment to require utilization of a technical legal standard that even the United States Supreme Court does not apply to regulation of the Second Amendment... Nothing in the ballot summary or the amendment itself states that the term is intended to have a strict or technical legal meaning, and certainly it never explains this meaning to the public.”). It is clear from *Heller* that section 571.070 would survive the review conducted by the Supreme Court of the United States. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (specifically noting that felon-in-possession laws are still constitutional).

interest. *Weinshenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006). The State may enact and enforce legislation restricting the right to bear arms as long as the State has a compelling interest in that law and the law is narrowly tailored to further that interest. Even when applying strict scrutiny, the State may carry its burden by relying “solely on history, consensus, and ‘simple common sense.’” *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012), citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)).

1. *The State Has a Compelling Interest in Preventing Crime and Promoting Public Safety.*

The State has a compelling interest in preventing future crime and protecting the public which supports the restriction on possession of firearms by felons under section 571.070.1 RSMo. See *United States v. Salerno*, 481 U.S. 739, 750 (1987) (“The Government’s interest in preventing crime is compelling”), and *In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2004) (“[T]he State has a compelling interest in protecting the public from crime”). The protection of the people is one of the primary functions of government, and is at the very core of its purpose. See *State v. Richard*, 298 S.W.3d 529, 532 (Mo. banc 2009) (“The function of police power is to preserve the health, welfare and safety of the people by regulating all threats harmful to the public interest.”). The regulation of firearms is important in preventing crime and protecting the public from gun violence, as firearms are often used to perpetrate violent crime and their use greatly enhances the threat to the community. In 2014, the City of St. Louis had 159 homicides, 138 of which were committed with firearms, and in the past five years, approximately

13,000 people have been the victim of a gun crime in the City of St. Louis. *See* Chris King, *Joyce leads Delegation to Study No Violence Alliance*, St. Louis Am., February 26, 2015, available at http://www.stlamerican.com/news/local_news/article_ecd120d6-bd60-11e4-8644-cb284db66f5e.html; *see also* St. Louis Metropolitan Police Department, *St. Louis Crime Statistics*, available at http://www.slmpd.org/crime_stats.shtml (St. Louis Metropolitan Police Department's crime statistics over the past five years).

Studies have shown convicted felons pose a danger of future criminal activity to society, regardless of the type of felony for which they previously have been convicted. A study of DNA databases in New York and Florida revealed that a majority of defendants with database hits on cases involving homicide or rape were already in the DNA database for prior non-violent felony convictions, such as drug possession or burglary. Edwin Zedlewski & Mary B. Murphy, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law Enforcement*, 253 Nat'l Inst. Just. J. 2, 4 (2006). Another study showed a "reduction in risk for later criminal activity of approximately 20% to 30%" from the denial of handgun purchases to convicted felons. Mona A. Wright, Garen J. Wintermute, and Frederick P. Rivara, *Effectiveness of Denial of Handgun Purchase to Persons Believed to Be at High Risk for Firearm Violence*, 89 Am. J. Pub. Health 88, 89 (1999). There is an enhanced threat of gun violence from individuals who have previously been convicted of felonies, and the State has a compelling interest in preventing those future crimes.

2. Section 571.070.1 RSMo Is Narrowly Tailored to Meet the State's Compelling Interest.

The prohibition against possession of firearms by convicted felons is narrowly tailored to protect the public from violent crimes committed through the use of firearms. All violent crimes committed with a firearm necessarily begin with possession of a firearm. Firearms are deadly weapons capable of perpetrating violence. Although firearms have many lawful uses, such as self-defense, in the wrong hands, they can represent a significant threat to the safety of society.

It is not possible to distinguish with absolute certainty those who possess firearms for lawful purposes from those with insidious motives or a willingness to use firearms to harm others. Neither the United States nor Missouri Constitutions would permit the legislature to prohibit all persons from possessing firearms. *Heller*, 554 U.S. at 629, and *McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010); Mo. Const. art. I, § 23 (amended 2014). But, on the other hand, the right to bear arms has never been found to be an unlimited right. *Heller*, 554 U.S. at 595; *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 35 (Mo. App. E.D. 1994) (“Nothing in the Missouri constitution limits the power of the legislature to enact laws pertaining to the time, place, and manner of carrying weapons.”). The public safety requires that we prohibit those deemed a danger to society from possessing firearms. *Carter*, 669 F.3d at 415 (“Placed in the wrong hands, firearms present a grave threat to public safety, and for this reason, the Anglo-American right to bear arms has always recognized and accommodated limitations for persons perceived to be dangerous.”). This leaves the legislature with the difficult task of finding a balance between these two

opposing interests – the right to bear arms, and the need to protect the public. In enacting section 571.070.1, the legislature chose to distinguish between law-abiding citizens and those who present an enhanced risk to society by prohibiting convicted felons from possessing firearms.

Protecting the public from violent crime requires the differential treatment of convicted felons with regards to firearms due to their willingness to violate the law and enhanced likelihood of committing violent crimes. *United States v. Lane*, 252 F.3d 905, 906 (7th Cir. 2001) (“A person who has been convicted of committing a felony (and not been pardoned) is no doubt more likely to make an illegal use of a firearm than a nonfelon, and the illegal use is likely to involve violence.”). Courts have found that while most felons may be non-violent, someone with a felony conviction is more likely to engage in violent gun use than a non-felon. *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir., 2010). For that reason, restrictions on convicted felons possessing firearms are longstanding and have not been found to violate the Second Amendment right to bear arms. *McDonald*, 561 U.S. at 786, *citing Heller*, 554 U.S. at 626.

The status of being a convicted felon is not an arbitrary one. *See Heller*, 554 U.S. at 626, n. 26 (felon in possession statutes are presumptively lawful regulatory measures under the federal constitution). Before someone is adjudicated a convicted felon, they have to be charged with a felony, a serious offense which carries a range of punishment in excess of one year. *State v. Grubb*, 120 S.W.3d 737 (Mo. banc 2003) (“In Missouri, a crime is a felony ‘if it is so designated or if persons convicted thereof may be sentenced to death or imprisonment for a term which is in excess of one year’”) (*citing* MO. REV. STAT. §

556.016.2). The accused then has the opportunity to contest the charges against them subject to the protections of due process. Then, after a finding of guilt is made, the individual must receive a sentence. *See Yale v. City of Independence*, 846 S.W.2d 193 (Mo. banc 1993) (holding that a suspended imposition of sentence is not a conviction). If any of those preconditions are not met, the individual is lawfully permitted to possess a firearm under Missouri law. But, by becoming a convicted felon, an individual has demonstrated a substantial inability to follow the law and so represents an enhanced risk compared to law abiding citizens which allows them to be subject to differential treatment.

Section 571.070.1 is narrowly tailored in its application in that it is limited to convicted felons—it does not apply to everyone who could be considered potentially dangerous. Those arrested for felony offenses, no matter how serious, are not subject to section 571.070.1, unless actually convicted. Neither are those who do not receive a sentence. Many states allow felony offenders to have their guilt adjudicated without actually being sentenced. *See* ALASKA STAT. § 12.55.085; ARIZ. REV. STAT. § 13-901; CAL. PENAL CODE § 1203; COLO. REV. STAT. § 18-1.3-102; ME. REV. STAT. tit. 17-A, § 1348-A; MICH. COMP. LAWS § 771.1; OR. REV. STAT. § 137.010; S.D. CODIFIED LAWS § 23A-27-13; VA. CODE ANN. § 19.2-303. In the State of Missouri, those who receive a suspended imposition of sentence on a felony are not actually convicted of the felony unless their suspended imposition of sentence is later revoked. *See Hoskins v. State*, 329 S.W.3d 695, n.3 (Mo. banc 2010) (explaining that a suspended imposition of sentence is not a final judgment or conviction unless probation is revoked). This means that individuals who receive a suspended imposition of sentence do not fall under the purview of section

571.070.1. This has a substantial practical effect in that many felony offenders, specifically offenders without significant criminal histories, are not subject to section 571.070.1.

Additionally, individuals who have previously been convicted of a misdemeanor are not prohibited from possessing a firearm, despite studies showing a higher risk of future gun violence among those with a prior misdemeanor conviction over those with no criminal history. Garen J. Wintemute et al., *Prior Misdemeanor Convictions as a Risk Factor for Later Violent and Firearm Related Criminal Activity Among Authorized Purchasers of Handguns*, 280 JAMA 2083, 2085 (1998). Even though the risk exists from individuals with prior misdemeanor convictions, the legislature has narrowed the restriction to only those with felony convictions.

Prohibiting convicted felons from possessing firearms is a widely used restriction designed to protect the public. *See* 18 U.S.C. § 922(g)(1); ALASKA STAT. § 11.61.200 (2015); ARIZ. REV. STAT. § 13-3101 and 13-3102; ARK. CODE ANN. § 5-73-103; CAL. PENAL CODE § 29800 (2015); COLO. REV. STAT. 18-12-108; CONN. GEN. STAT. § 53a-217 (2005); FLA. STAT. ANN. § 790.23 (2015); GA. CODE ANN. § 16-11-131 (2014); HAW. REV. STAT. ANN. § 134-7 (2013); IDAHO CODE ANN. § 18-3316 (2014); 720 ILL. COMP. STAT. ANN. 5/24-1.1 (2014); IOWA CODE § 724.26 (2014); KY. REV. STAT. ANN. § 527.040 (2015); MINN. STAT. § 624.713 (2015); MISS. CODE ANN. § 97-37-5 (2013); NEB. REV. STAT. § 28-1206 (2015); N.H. REV. STAT. ANN. § 159:3 (2015); N.M. STAT. ANN. § 30-7-16 (2015); N.C. GEN. STAT. § 14-415.1 (2014); OKLA. STAT. ANN. tit. 21, § 1283 (2015); R.I. GEN. LAWS § 11-47-5 (2015); TENN. CODE ANN. § 39-17-1307(c) (2014); VA. CODE ANN. § 18.2-308.2 (2015); WASH. REV. CODE ANN. § 9.41.040 (2014); W. VA. CODE ANN.

§ 61-7-7 (2013); WIS. STAT. ANN. § 941.29 (2014). Convicted felons are individuals who through their conduct have demonstrated an inability to follow the law. While not all convicted felons will use firearms in a violent manner, the risk of a convicted felon committing a violent offense is much greater than that of a law abiding citizens. *See Yancey*, 621 F.3d at 683 (felon in possession statute is designed to “keep guns out of the hands of presumptively risky people.”), *see also State v. Frith*, 151 So.3d 946, 959 (La. Ct. App. 2014) (“[c]ertain convicted felons have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity and are more likely than nonfelons to engage in illegal and violent gun use. These cases demonstrate that convicted felons are not only at risk to reoffend, but are at risk to reoffend using firearms.”). Recognizing this, in an opinion invaliding Washington D.C.’s total ban on handguns, the United States Supreme Court specifically noted that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.” *Heller*, 554 U.S. at 626.

3. *Section 571.070.1 cannot be more narrowly tailored and still effectively further the State’s compelling interest.*

Defendant argued that by failing to distinguish between different types of felonies, this statute was not narrowly tailored. However, a look at the recent history of section 571.070.1 RSMo. reveals that the statute had made such distinctions in the past but was considered under-inclusive and therefore ineffective in protecting the public. Prior to 2008, section 571.070 stated:

1. A person commits the crime of unlawful possession of a concealable firearm if he has any concealable firearm in his possession and:

(1) He has pled guilty to or been convicted of a dangerous felony as defined in section 556.061, RSMo, or of an attempt to commit a dangerous felony, or of a crime under the laws of any state or of the United States which, if committed within this state, would be a dangerous felony, or confined therefor in this state or elsewhere during the five-year period immediately preceeding the date of such possession; or

(2) He is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent.

2. Unlawful possession of a concealable firearm is a class C felony.

MO. REV. STAT. §571.070 (2000).

The statute referred to section 556.061 for a definition of “dangerous felony”. The comprehensive list of crimes included:

[A]rson in the first degree, assault in the first degree, attempted forcible rape if physical injury results, attempted forcible sodomy if physical injury results, forcible rape, forcible sodomy, kidnapping, murder in the second degree, assault of a law enforcement officer in the first degree, domestic assault in the first degree, elder abuse in the first degree, robbery in the first degree, statutory rape in the first degree when the victim is a child less than twelve years of age at the time of the commission of the act giving rise to the offense, statutory sodomy in the first degree when the victim is a child less

than twelve years of age at the time of the commission of the act giving rise to the offense, and, abuse of a child pursuant to subdivision (2) of subsection 3 of section 568.060 RSMo, and child kidnapping; MO. REV. STAT. §556.061 (2006).

Before being amended in 2008, section 571.070 only applied to a limited subsection of convicted felons – those who had pled guilty or been convicted of those 16 crimes specifically enumerated under section 556.061. Section 571.070 also did not ban those individuals from possessing all firearms, just “concealable firearms”, which were defined as “any firearm with a barrel less than sixteen inches in length, measured from the face of the bolt or standing breech.” MO. REV. STAT. §571.070 (2000). The statute also contained a strict temporal limitation, with the State having to prove that the unlawful possession of a concealable weapon occurred within five years of the predicate felony.

The many limitations on section 571.070 made the statute ineffective in its goal of protecting the public. *See* Bridget DiCosmo, *State Law Lets Felon with Gun Go Free*, *Southeastern Missourian*, Sept. 6, 2007, at 1A. Realizing this, the legislature expanded the scope of the statute considerably. In order to avoid a laundry list approach, where any offense not specifically listed was excluded from enforcement of the statute, the legislature chose to include all felonies. This was done in direct response to the many convicted felons who were threats to society but went unprosecuted and undeterred under the previous version. *Id.* (on average, only 10 cases per year were prosecuted statewide under previous statute). In addition, understanding that any firearm in the wrong hands can have lethal consequences, the legislature removed the distinction between “concealable firearms” and

all others, and chose to preclude the possession of all firearms. The temporal restrictions were also removed so as to permit effective enforcement of the statute.

In exchange for strengthening section 571.070, the drafters made a significant concession to ensure that this statute was not overly broad. While previously, a mere plea had been grounds for the deprivation of the right to bear arms, the amended statute now requires a conviction. It is clear from the history of section 571.070 that with too many caveats placed on the restriction of the right of felons to possess a deadly weapon, the law loses its efficacy. Only by getting rid of the list of specific predicate felonies and removing the type and temporal restrictions were the proponents able to ensure that these individuals who presented an enhanced risk were excluded from possessing firearms. But, in order to add a layer of protection onto such an important right and further distinguish between law abiding citizens and those presenting an enhanced risk to society, the additional requirement of a conviction was added. The experience of the legislature in amending section 571.070 demonstrates that a more narrowly tailored statute would fail to adequately protect the public.

The high rate of recidivism supports the legislature's decision to include all convicted felons, regardless of the offense, under section 571.070; the enhanced threat of violence that convicted felons represent is not limited to those convicted of violent offenses. In a 2004 study prepared by the Department of Justice, it was found that among "non-violent" releases, about 1 in 5 were rearrested for a violent crime within 3 years of discharge. U.S. Dept. of Justice, Bureau of Justice Statistics, *Profile of Nonviolent Offenders Exiting State Prisons* (2004), available at <http://www.bjs.ojp.gov/publications/2004/040101.pdf>.

ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf. Furthermore, about 8% of “non-violent” prison releasees had used a weapon during the commission of the current offense, including 3.4% of property offenses, 7.6% of drug offenses, and 19.5% of public order offenses. *Id.* Because many offenders already possessed weapons during the commission of other offenses and a significant portion of so called “non-violent” offenders continue to be implicated in violent crimes, the legislature’s decision to ban all felons from possessing firearms is necessary to protect the public from the enhanced threat of violence that even “non-violent” convicted felons represent.

4. *Inclusion of “Convicted Violent Felon” in article 1, section 23 does not prevent the legislature from prohibiting all other felons from possessing firearms.*

Inclusion of the term “convicted violent felon” in article 1, section 23 doesn’t preclude the legislature from preventing all convicted felons from possessing firearms. Mo. Const. art. I, § 23 (amended 2014). (“Nothing in this section shall be construed to prevent the general assembly from enacting general laws which limit the rights of convicted violent felons...”).

The general assembly has the authority to enact legislation on any subject in the absence of a constitutional prohibition. *Bd. of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994). Nothing in the text of Amendment 5 precludes the legislature from passing legislation relating to the right to bear arms. Rather, Amendment 5 instead provides that all restrictions must survive strict scrutiny. Mo. Const. art. I, § 23 (amended 2014). (“Any restriction on these rights shall be subject to strict scrutiny”). This Court has already rejected the view that the explicit mention of “convicted violent felons”

means that convicted nonviolent felons now receive the same constitutional right to bear arms as lifelong law-abiding citizens. *Dotson II*, No. SC94482, slip op. at 12 n.6. As this Court noted in *Dotson II*, “[t]he fact that violent felons are named does not necessarily increase the rights of nonviolent felons”. *Id.* Therefore, the specific mention of “convicted violent felons” can reasonably be construed as excluding them from the heightened constitutional review otherwise required.

This Court previously held that the recently removed language in article 1, section 23 of the Missouri Constitution excluding concealed weapons from constitutional protection did not preclude the legislature from passing laws allowing or disallowing concealed weapons. *Brooks v. State*, 128 S.W.3d 844, 847 (Mo. banc 2004). Because the authority of the legislature to regulate concealed weapons did not derive from the constitution, this Court found that the removal of the specific phrase did not consequently make concealed weapons laws unconstitutional. *Dotson II*, No. SC94482, slip op. at 12-13. Rather, concealed weapons laws are subject to the same constitutional scrutiny as other legislation affecting the right to bear arms. *Id.* Similarly, since the right to restrict convicted nonviolent felons from possessing firearms is neither explicitly permitted nor prohibited by the Missouri Constitution, the authority for the legislature to enact section 571.070 is not constitutionally derived. Like all laws affecting the right to bear arms, section 571.070 is within the authority of the legislature but should be subject to strict scrutiny.

CONCLUSION

In light of the foregoing reasons, 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,

/s/ Aaron Levinson
AARON LEVINSON
Missouri Bar No. 64989
Assistant Circuit Attorney
1114 Market St., Room 401
Saint Louis, MO 63101
Phone: (314) 622-4941
Fax: (314) 622-3369
levinsona@stlouisco.org

/s/ Veronica Harwin
VERONICA HARWIN
Missouri Bar No. 65955
Assistant Circuit Attorney
1114 Market St., Room 401
Saint Louis, MO 63101
Phone: (314) 622-4941
Fax: (314) 622-3369
harwinv@stlouisco.org

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

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 5,829 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 this July 14, 2015 to, Nick Zotos, Attorney for Respondent.

/s/ Aaron Levinson
AARON LEVINSON