No. SC94096

In the Supreme Court of Missouri

STATE OF MISSOURI,

Appellant,

v.

MARCUS MERRITT,

Respondent.

Appeal from the St. Louis City Circuit Court
Twenty-Second Judicial Circuit
The Honorable John F. Garvey, Jr., Judge

APPELLANT'S AMENDED BRIEF

CHRIS KOSTER
Attorney General

JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTIONAL STATEMENT 7

INTRODUCTION 8

STATEMENT OF FACTS 10

POINTS RELIED ON 13

ARGUMENT 16

I. (section 571.070 is constitutional). 16

A. Standard of review 16

B. Recent amendments to article I, section 23 of the Missouri Constitution. 17

C. As the amendment was procedural in nature, it should apply prospectively only 18

D. The statute is constitutional as it is narrowly tailored to advance a compelling governmental interest. 21

1. The State has a compelling interest. 22

2. Section 571.070 is narrowly tailored to advance the State's compelling interest. 25

II. (section 571.070 is constitutional). 32

A. Standard of review 32

B. The recent amendment to article I, section 23 of the Missouri Constitution does not apply to the present case. 33

1. The constitutionality of section 571.070 should be evaluated under the Missouri Constitution as it existed at the time of the criminal conduct. 33

2. Section 571.070 was a proper exercise of the State's police power under the Missouri Constitution as it existed at the time of the criminal conduct. 34

III. (section 571.070 is not a prohibited retrospective law)..... 45

A. Standard of review..... 45

B. Section 571.070 is a criminal statute and therefore not an impermissible retrospective law. 45

CONCLUSION 48

CERTIFICATE OF COMPLIANCE 49

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 21

Bernat v. State, 194 S.W.3d 863 (Mo. 2006) 21

Board of Education of City of St. Louis v. Missouri State Board of Education, 271 S.W.3d 1 (Mo. 2008) 16, 32, 45

City of Cape Girardeau v. Joyce, 884 S.W.2d 33 (Mo. App. E.D. 1994) 14, 35

District of Columbia v. Heller, 554 U.S. 570 (2008) 36

Dotson v. Kander, 435 S.W.3d 643 (Mo. 2014) 17, 18

Ex parte Bethurum, 66 Mo. 545 (1877) 12

Franklin County ex rel. Parks v. Franklin County Comm'n, 269 S.W.3d 26 (Mo. 2008) 16, 32, 45

Griffith v. Kentucky, 479 U.S. 314 (1987) 19

Guastello v. Department of Liquor Control, 536 S.W.2d 21 (Mo. 1976) 43

Heidbrink v. Swope, 170 S.W.3d 13 (Mo. App. E.D. 2005) 14, 35, 36

In re Care and Treatment of Norton, 123 S.W.3d 170 (Mo. 2003) (as modified Jan. 27, 2004) 13, 22

Lewis v. United States, 445 U.S. 55 (1980) 22, 37

People v. Blue, 544 P.2d 385 (Co. 1975) 37

State ex rel. Hall v. Vaughn, 483 S.W.2d 396 (Mo. banc 1972) 33, 34

State v. Brown, 140 S.W.3d 51 (Mo. 2004) 7

State v. Brown, 571 A.2d 816 (Me. 1990) 37, 40

State v. Draughter, 130 So.3d 855 (La. 2013) 20, 21

State v. Edwards, 983 S.W.2d 520 (Mo. 1999) 33

State v. Harris, 414 S.W.3d 447 448 (Mo. 2013) 47

State v. Honeycutt, 421 S.W.3d 410 (Mo. 2013) 15, 46, 47

State v. Horne, 622 S.W.2d 956 (Mo. 1981) 35

State v. Richard, 298 S.W.3d 529 (Mo. 2009) 14, 35, 36, 39

United States v. Barton, 633 F.3d 168 (3d Cir. 2011) 37

United States v. Chovan, 735 F.3d 1127 (9th Cir. 2013) 27

United States v. Everist, 368 F.3d 517 (5th Cir. 2004) 29

United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010) 42

United States v. McCane, 573 F.3d 1037 (10th Cir. 2009) 28

United States v. Miller, 604 F.Supp.2d 1162 (D.Tn. 2009) 29

United States v. Pruess, 703 F.3d 242 (4th Cir. 2012) 39

United States v. Rozier, 598 F.3d 768 (11th Cir. 2010) 37, 42

United States v. Scroggins, 599 F.3d 433 (5th Cir.2010) 40

United States v. Vongxay, 594 F.3d 1111 (9th Cir. 2010) 42

United States v. Yancey, 621 F.3d 681 (7th Cir. 2010) 22

Statutes

§ 195.202, RSMo. Cum. Supp. 2012 10

§ 195.233, RSMo. Cum. Supp. 2012 10

§ 217.800, RSMo. Cum. Supp. 2012 43

§ 571.070, RSMo. Cum. Supp. 2012 ..... passim

§ 610.140, RSMo. Cum. Supp. 2012 43

18 U.S.C. § 922(g)(1) (2006) 28

Other Authorities

Brief for the Brady Center to Prevent Gun Violence and the Major Cities Chiefs Association as Amici Curiae in Support of the State of Louisiana at 11-12 *State v. Draughter*, 130 So.3d 855 (2013) (No. 2013-KA-0914), 2013 WL 5404908 24

Crime in the United States, by State 2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-5 (last visited Oct. 9, 2014) 25

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Election Results, Secretary of State's Website, http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907 (last visited October 6, 2014) 18

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Garen 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, 2083 (1998) 38, 39

Wright et al., *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) 24

Zedlewski & Murphy, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law Enforcement,* Nat'l Inst. Just. J. No. 253, at 4 (Jan. 2006) 23

Constitutional Provisions

MO. CONST. art. I, § 13 (1945) 15

MO. CONST. art. I, § 23 (1945) 14, 18, 31, 35

MO. CONST. art. I, § 23 (amended 2014) 13, 18, 19

MO. CONST. art. XII, § 2(b) 18

JURISDICTIONAL STATEMENT

This appeal is from a judgment entered in the St. Louis City Circuit Court dismissing Counts I, II, and III of a felony indictment that charged Defendant Marcus Merritt with unlawful possession of a firearm in violation of section 571.070, RSMo. Cum. Supp. 2012. A dismissal of criminal charges based on the unconstitutionality of the underlying statute is a final judgment from which the State may appeal. *State v. Brown*, 140 S.W.3d 51, 53 (Mo. 2004). This appeal involves the validity of a state statute, section 571.070, RSMo Cum. Supp. 2012. Therefore, the Supreme Court of Missouri has exclusive appellate jurisdiction. MO. CONST. art. V, § 3 (as amended 1982).

INTRODUCTION

The question presented by this case is whether a defendant with a non-violent felony conviction may constitutionally be prosecuted for unlawful possession of a firearm under section 571.070 RSMo, in light of the recent amendment to article I, section 23 of the Missouri Constitution. This Court may dispose of this case on a narrow basis, as argued in Point II, by holding that the amended language, adopted after the defendant committed the charged offense, does not apply retrospectively to this case. Or the Court may resolve the case by answering the broader question and holding, as argued in Point I, that section 571.070's prohibition on firearm possession by convicted felons withstands constitutional scrutiny even under the revised version of article I, section 23.

The State urges the Court to take the latter approach. The Attorney General's Office seeks not only to defend the work of Missouri prosecutors in the appellate courts, but also to advocate for clarity in the law. There is substantial confusion among law enforcement officers, prosecutors, and circuit courts regarding whether section 571.070 may still be enforced against non-violent-felony convicts. The continued vitality of the felon-in-possession statute is of critical public importance, and the question is certain to come squarely before this Court at some point in the future. By addressing it now,

this Court can spare police, prosecutors, and judges months of uncertainty. For that reason, we ask this Court to reach the constitutional question and hold that even applying the new version of article I, section 23, the State may prosecute a non-violent felon for unlawful use of a weapon under section 571.070.

STATEMENT OF FACTS

Marcus Merritt ("Defendant") was charged via indictment in St. Louis City Circuit Court with three counts of the class C felony of unlawful possession of a firearm (§ 571.070, RSMo. Cum. Supp. 2012), one count of possession of a controlled substance (§ 195.202, RSMo. Cum. Supp. 2012), and one count of possession of drug paraphernalia (§ 195.233, RSMo. Cum. Supp. 2012). (L.F. 13-14). The indictment alleged that Defendant knowingly possessed a .44 magnum revolver, a 12-gauge shotgun, and a .22 caliber rifle. (L.F. 13-14). The indictment further alleged that on August 18, 1986, Defendant had been convicted in the United States District Court for the Eastern District of Missouri of the felony of Distribution of Phencyclidine. (L.F. 13-14).

Defendant filed a motion to dismiss the indictment with prejudice "as § 571.070 violates the Missouri Constitution as applied." (L.F. 15-24). The motion alleged that at the time Defendant was convicted of distribution of phencyclidine, that conviction did not prohibit him from owning a firearm since the version of section 571.070 in effect at the time of that conviction only made it a crime for persons convicted of statutorily defined "dangerous" felonies to possess a firearm. (L.F. 15-16). The motion further alleged that section 571.070 was amended in 2008 to make it a crime for a person

convicted of any felony to possess a firearm. (L.F. 16). The motion contended that the 2008 amendment to the statute, as applied to Defendant, violated the ban on retrospective laws contained in Article I, section 13, of the Missouri Constitution because it imposed a new duty or obligation upon him or it imposed a new disability on him. (L.F. 17-19).

Defendant argued in the alternative that section 571.070 "violate[d] Article I, Section 23 of the Missouri Constitution in that it is an absolute ban on [Defendant's] right to possess a firearm solely because he is a convicted felon instead of being a reasonable time, place, or manner restriction allowed under the police power of the State." (L.F. 20). Defendant argued that there was no substantial relationship between banning all convicted felons under all circumstances from possessing firearms and protecting the public health, safety, and morals. (L.F. 20). Defendant argued that section 571.070 violated the plain and ordinary language of article I, section 23, in that article I, section 23 "limits only carrying concealed weapons." (L.F. 21).

The State filed a response in opposition to Defendant's motion to dismiss. (L.F. 25-31). The State argued that section 571.070 was not an ex post facto law as applied to Defendant in that it did not make criminal an action Defendant took before the passing of a law, it did not aggravate a crime, it did not inflict a greater punishment than when the crime was

committed, and it did not alter the rules of evidence or require less testimony to convict than was required when the crime was committed. (L.F. 27-28). The State also argued that, based on this Court's precedent in *Ex parte Bethurum*, 66 Mo. 545 (1877), the constitutional ban on retrospective laws is limited exclusively to civil rights and remedies and has no application to crimes and punishment. (L.F. 29-30).

The trial court took up the motion off the record prior to Defendant's entry of guilty pleas to Counts IV and V. (Tr. 2). The court issued an order on July 25, 2013, granting the motion to dismiss Counts I, II, and III of the indictment. (Tr. 2; L.F. 32). The trial court's order did not identify whether it granted Defendant's motion based on a finding that section 571.070 was an impermissible retrospective law, or that it violated article I, section 23, of the constitution, or both. (L.F. 32).

POINTS RELIED ON

I. (section 571.070 is constitutional).

The trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the recent amendment to the constitution is a procedural, rather than a substantive, change in the law, and, as such, should be applied prospectively only; and as applied in this case, section 571.070 is not unconstitutional under the amended constitutional provision in that it is narrowly tailored to effectuate the compelling governmental interest of protecting the public safety and reducing the number of firearm-related and violent crimes in the State.

In re Care and Treatment of Norton, 123 S.W.3d 170, 174 (Mo. 2003) (as modified Jan. 27, 2004)

MO. CONST. art. I, § 23 (1945)

MO. CONST. art. I, § 23 (amended 2014)

Section 571.070, RSMo. Cum. Supp. 2012

II. (section 571.070 is constitutional).

In the alternative to Point I, the trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the statute under which Defendant was charged, section 571.070, does not violate article I, section 23 of the Missouri Constitution, in that the recent amendment to the constitutional provision does not apply to the present case, and section 571.070 is a proper exercise of the State's police power.

State v. Richard, 298 S.W.3d 529 (Mo. 2009)

City of Cape Girardeau v. Joyce, 884 S.W.2d 33 (Mo. App. E.D. 1994)

Heidbrink v. Swope, 170 S.W.3d 13 (Mo. App. E.D. 2005)

MO. CONST. art. I, § 23 (1945)

Section 571.070, RSMo. Cum. Supp. 2012

III. (section 571.070 is not a prohibited retrospective law).

The trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the statute under which Defendant was charged, section 571.070, is not subject to the prohibition against enacting retrospective laws contained in article I, section 13 of the Missouri Constitution, in that section 571.070 is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

State v. Honeycutt, 421 S.W.3d 410 (Mo. 2013)

MO. CONST. art. I, § 13 (1945)

Section 571.070, RSMo. Cum. Supp. 2012

ARGUMENT

I. (section 571.070 is constitutional).

The trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the recent amendment to the constitution is a procedural, rather than a substantive, change in the law, and, as such, should be applied prospectively only; and as applied in this case, section 571.070 is not unconstitutional under the amended constitutional provision in that it is narrowly tailored to effectuate the compelling governmental interest of protecting the public safety and reducing the number of firearm-related and violent crimes in the State.

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. 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." *Board of Education of City of St. Louis v. Missouri State Board of Education*, 271 S.W.3d 1, 7 (Mo. 2008) (internal quotation marks and citation omitted).

B. Recent amendments to article I, section 23 of the Missouri Constitution.

On May 7, 2014, the General Assembly passed the Senate Committee Substitute for Senate Joint Resolution 36. *Dotson v. Kander*, 435 S.W.3d 643, 644 (Mo. 2014). Senate Joint Resolution 36, otherwise known as amendment 5, sought to amend article I, section 23, of the Missouri Constitution. The following is the text of the amendment, with the alterations from the previous constitutional provision in bold:

> "Section 23. 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."

MO. CONST. art. I, § 23 (amended 2014).

The governor called for a special election, and the election was held on August 5, 2014. *Dotson*, 435 S.W.3d at 644. The resolution passed by a margin of 60.946% to 39.054%. Election Results, Secretary of State's Website, http://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750002907 (last visited October 6, 2014). The amendment took effect on September 4, 2014, while the appeal in the present case was still pending. MO. CONST. art. XII, § 2(b).

C. As the amendment was procedural in nature, it should apply prospectively only.

Even before the recent amendment to the Missouri Constitution, Missourians enjoyed the right to bear arms. The previous version of the Missouri Constitution stated: "That the right of every citizen to keep and bear arms in defense of his home, person and property . . . shall not be questioned; but this shall not justify the wearing of concealed weapons." Mo. Const. art. I, § 23 (1945). The amended provision states 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 . . . shall not be questioned." Mo. Const. art. I, § 23 (amended 2014). Thus, the amended constitutional provision leaves intact the individual right to bear arms that existed in the previous version of the constitutional provision. As the core individual right to bear arms existed in the former constitutional provision, the amended provision did not make a substantive change to the rights of Missouri citizens. *See, e.g.*, *Heller*, 554 U.S. at 592 ("[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right."). The amendment to this provision did not create a new substantive right; rather, the amendment simply made plain that statutes regulating that already-existing right would be reviewed under the strict-scrutiny standard.

As the amendment to the constitution was procedural, and not substantive, the new procedural rule should apply prospectively to all cases arising after the effective date of the amendment (September 5, 2014), and it should only apply retroactively to any case that was pending on direct review or not yet final as of the effective date of the amendment. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final . . . ."). All cases that

were final prior to the passage of the amendment should not be affected by the constitutional change.

Courts in Louisiana have recently rendered opinions that support this argument. In 2012, the citizens of Louisiana voted to amend their constitutional provision protecting the right to bear arms. *State v. Draughter*, 130 So.3d 855, 861 (La. 2013). "Before its recent amendment, [the Louisiana constitutional provision regarding the right to bear arms] provided: 'The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.'" *Id.* at 860. The state amended its constitutional provision to state: "The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction of this right shall be subject to strict scrutiny." *Id.* at 861-62.

Reviewing the language of the official ballot submitted to the citizens of Louisiana, the Louisiana Supreme Court concluded that "the right to bear arms was always fundamental; the amendment to the constitutional provision merely sought to ensure that the review standard of an alleged infringement of this fundamental right was in keeping with the refinements made to constitutional analysis" in light of other Louisiana cases. *Id.* at 863. The Court determined that, in keeping with *Griffith*, the amendment to the

Louisiana constitution would apply prospectively to all new cases and retrospectively only to those cases not yet final at the time of the effective date of the amendment. *Id.*

Here, as in Louisiana, the right to bear arms existed prior to the recent amendment to the state constitution. As such, the constitutional change was merely procedural, meaning that the amendment to article I, section 23, should apply prospectively to all cases, and retrospectively only to cases still pending on appeal or not yet final as of the effective date of the amendment.

D. The statute is constitutional as it is narrowly tailored to advance a compelling governmental interest.

The trial court's dismissal of Counts I, II, and III against Defendant should be reversed because section 571.070 survives strict scrutiny review. "To pass strict scrutiny review, a governmental intrusion must be justified by a 'compelling state interest' and must be narrowly drawn to [accomplish] the compelling state interest at stake." *Bernat v. State*, 194 S.W.3d 863, 868 (Mo. 2006) (internal citation and quotation marks omitted). Although strict scrutiny is the highest standard of review, its application is not automatically fatal to the statute at issue. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"). Here, section 571.070 passes this stringent test.

1. The State has a compelling interest.

As to the first prong of strict scrutiny review, the State has a compelling interest in prohibiting all felons from possessing firearms. This compelling interest is to protect the public safety and reduce the incidence of violent and firearm-related criminal activity. *See In re Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. 2003) (as modified Jan. 27, 2004) ("The State has a compelling interest in protecting the public from crime."). This is certainly a compelling interest in light of the increase in violent crime in the state. *See Lewis v. United States*, 445 U.S. 55, 66 (1980) (noting "the receipt and possession of a firearm by a felon constitutes a threat, among other things, to the continued and effective operation of the Government of the United States"). Courts have noted that keeping felons from accessing firearms is an effective and important means of protecting public safety in light of the fact that felons, by violating the law, have shown a disregard for the rights and safety of others. *See United States v. Barton*, 633 F.3d 168, 175 (3rd Cir. 2011) ("It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens."); *United States v. Yancey*, 621 F.3d 681, 685 (7th Cir. 2010) (noting that "someone with a felony conviction on his record is more likely than a nonfelon to engage in illegal and violent gun use.").

The State's compelling interest is supported by studies that have shown that previous convictions—including convictions for non-violent, property crimes—are correlated with future violent crime. For example, "[a] review of New York's first 1,000 hits [in its DNA database] showed that the vast majority were linked to crimes like homicide and rape, but of these, 82 percent of the offenders were already in the databank as a result of a prior conviction for a 'lesser' crime such as burglary or drugs." Zedlewski & Murphy, *DNA Analysis for "Minor" Crimes: A Major Benefit for Law Enforcement,* Nat'l Inst. Just. J. No. 253, at 4 (Jan. 2006). A study conducted in Florida similarly revealed that "52 percent of database hits against murder and sexual assault cases matched individuals who had prior convictions for burglary." *Id.* These statistics show that criminals often engage in escalating acts of criminality.

In light of these studies revealing the fact that those who have committed serious offenses in the past are more likely to reoffend, and to do so violently, it is of paramount importance to prevent previous felony offenders from possessing firearms. This is important both to stop prior offenders from committing new offenses and to limit the harm they are capable of inflicting. Indeed, there is a "reduction in risk for later criminal activity of approximately 20% to 30%" from the denial of handgun purchases

to convicted felons. *See* Wright et al., *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).

At a bare minimum, the State has a compelling interest in minimizing felons' use of firearms in any future crimes. "Domestic assaults with firearms are approximately twelve times more likely to end in the victim's death than are assaults by knives or fists." *See* Brief for the Brady Center to Prevent Gun Violence and the Major Cities Chiefs Association as Amici Curiae in Support of the State of Louisiana at 11-12 *State v. Draughter*, 130 So.3d 855 (2013) (No. 2013-KA-0914), 2013 WL 5404908 (citing *United States v. Skoien,* 614 F.3d 638, 643 (7th Cir. 2010)). Additionally, approximately two-thirds of all reported homicides in 2011 were committed with firearms. *See* Federal Bureau of Investigation, *Violent Crime, Crime in the United States, 2011,* at 1 (Sept. 2012), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.2011/violent-crime/violentcrimemain_final.pdf.

Furthermore, the Federal Bureau of Investigation's crime data shows that there were 27,155 violent crimes committed in Missouri in 2012.[1] This

[1] The FBI defines "violent crimes" for this data set as "murder/non-negligent manslaughter, forcible rape, robbery, and aggravated assault." Crime in the

demonstrates an increase in the number of violent crimes since 2011; in 2011, Missouri experienced 26,889 violent crimes.[2] This increase in violent crimes, and the high number of violent crimes committed in the state each year, demonstrates the compelling governmental interest in reducing the number of violent crimes and protecting public safety.

2. Section 571.070 is narrowly tailored to advance the State's compelling interest.

The felon-in-possession statute, section 571.070.1, is narrowly tailored to achieve the State's compelling interest. As stated above, the State has a compelling interest in promoting public safety, and those who have committed a felony—and have thereby shown a disregard for the laws of this state—pose a real threat to the public safety. This threat exists not only for

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United States, by State 2012, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/5tabledatadecpdf/table_5_crime_in_the_united_states_by_state_2012.xls (last visited Oct. 9, 2014).

[2] Crime in the United States, by State 2011, *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-5 (last visited Oct. 9, 2014).

those who have committed violent or dangerous felonies, but also for those who have committed even non-violent offenses. A 1998 study published in the Journal of the American Medical Association concluded that "even handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." Garen 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, 2083 (1998). At the end of the study period, 50.4% of gun purchasers with at least one prior misdemeanor conviction were charged with a new offense, as compared to the 9.8% who had no previous criminal convictions. *Id.* at 2085. "Handgun purchasers with at least 1 prior misdemeanor conviction were more than 7 times as likely as purchasers with no prior criminal history to be charged with a new offense[.]" *Id.* Additionally, "[s]ubjects with only 1 prior conviction, and none involving either firearms or violence, were at increased risk for . . . violent offenses [4.8 times as likely as those with no prior

convictions], and Violent Crime Index offenses[3] [5.0 times as likely as those with no prior convictions]." *Id.*

The fact that section 571.070.1 applies only to felons is itself evidence of the legislature's tailoring of the statute. Given that even those with prior misdemeanor convictions are at an increased risk to commit future crimes involving firearms and violence, the legislature could reasonably prevent at least some misdemeanants from possessing handguns. *See, e.g., United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) (upholding federal statute criminalizing possession of firearms by domestic violence misdemeanants). That the Missouri legislature has chosen to tailor the law and bar only felons from possessing weapons shows a more narrowly tailored approach. The increased risk in committing future offenses by all felons necessitates a prohibition of all felons from possessing firearms to effectively achieve the State's interest in protecting public safety and reducing the number firearm-related and violent crimes. To have a statute prohibiting only "violent" or "dangerous" felons from possessing firearms would be under-inclusive in light

[3] Violent Crime Index offenses include murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. *Id.*

of study results indicating the increased risk in re-offense by those with even non-violent, misdemeanor convictions.

Although the federal felon-in-possession statute is not identical to section 571.070, it is similar in that it permanently bans all felons from possessing weapons. 18 U.S.C. § 922(g)(1) (2006). While the Supreme Court in *Heller* declined to determine whether intermediate scrutiny or strict scrutiny applied to cases alleging an infringement on the right to bear arms as set forth in the second amendment, at least one federal court has evaluated another portion of the statute, albeit in dicta, under strict scrutiny.[4] *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010); *see also*

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[4] Respondent was unable to locate any post-*Heller* cases that invoked strict scrutiny review to evaluate the felon-in-possession section of the statute. The federal courts seem to universally agree that, under second amendment analysis in light of *Heller*, the federal felon-in-possession statute is constitutional, and courts either apply intermediate scrutiny or fail to declare what level of scrutiny they apply in upholding the statute. *See, e.g.*, *United States v. Vongxay*, 594 F.3d 1111, 1115-16 (9th Cir. 2010) (holding §922(g)(1) is constitutional without declaring the level of scrutiny applied); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009) (rejecting the

United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004) (upholding §922(g)(1), stating that the statute was a "narrowly tailored exception to the freedom to possess firearms" because "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens.").

In *Marzzarella*, the Third Circuit determined the constitutionality of §922(k), which prohibited possession of firearms whose manufacturers' serial numbers had been obliterated, altered, or removed. *Id.* at 89. Although the Court applied intermediate scrutiny in upholding the constitutionality of the statute, it went further to note that the statute would survive even strict scrutiny analysis. *Id.* at 99. The Court stated that "serial number tracing serves a governmental interest in enabling law enforcement to gather vital information from recovered firearms," and deemed this a compelling

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argument that §922(g)(1) is unconstitutional in light of *Heller* without identifying a standard of review); *United States v. Miller*, 604 F.Supp.2d 1162, 1164-68 (D.Tn. 2009) (finding §922(g)(1) constitutional under intermediate scrutiny).

governmental interest. *Id.* The Court went on to find that because the statute "restricts possession only of weapons which have been made less susceptible to tracing," and it "does not limit the possession of any otherwise lawful firearm," it is narrowly tailored. *Id.*at 100. The Court concluded, "The statute protects the compelling interest of tracing firearms by discouraging the possession and use of firearms that are harder or impossible to trace. It does this by criminalizing the possession of firearms which have been altered to make them harder or impossible to trace." *Id.* at 101.

Here, as in *Marzzarella*, section 571.070.1 is narrowly tailored to effectuate the compelling State interest advanced. As discussed above, the State has a compelling interest in reducing the number of violent and firearm-related crimes in the State. The statute at issue protects this compelling interest by criminalizing the possession of firearms by felons, who are statistically more likely than people with no previous criminal convictions to commit future crimes involving firearms and violence. By prohibiting felons from possessing firearms, the statute in turn seeks to reduce the number of violent or firearm-related crimes. This statute is narrowly tailored to achieve a compelling State interest, and, as such, the statute passes strict scrutiny review and is constitutional.

In sum, the State has a compelling interest in protecting the public safety and in reducing the number of violent and firearm-related crimes. Section 571.070.1 is narrowly tailored to effectuate these compelling State interests in that it is limited to precluding *felons* from possessing firearms, and various social studies have demonstrated that felons are at a heightened risk for committing future crimes, particularly crimes of violence and firearm-related crimes. As the State has identified a compelling interest for the statute, and demonstrated that the statute is narrowly tailored to achieve that interest, section 571.070 passes strict scrutiny review, and the statute is constitutional under article I, section 23, of the Missouri Constitution.

II. (section 571.070 is constitutional).

In the alternative to Point I, the trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the statute under which Defendant was charged, section 571.070, does not violate article I, section 23 of the Missouri Constitution, in that the recent amendment to the constitutional provision does not apply to the present case, and section 571.070 is a proper exercise of the State's police power.

A. Standard of review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks*, 269 S.W.3d at 29. "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." *Board of Education of City of St. Louis*, 271 S.W.3d at 7 (internal quotation marks and citation omitted).

B. The recent amendment to article I, section 23 of the Missouri Constitution does not apply to the present case.

1. The constitutionality of section 571.070 should be evaluated under the Missouri Constitution as it existed at the time of the criminal conduct.

The constitutionality of section 571.070 should be evaluated under the Missouri Constitution in existence at the time of the conduct underlying the charged crime. The general rule is that culpability for criminal conduct is assessed according to the law in effect at the time of the conduct giving rise to the charged crime. *See State v. Edwards*, 983 S.W.2d 520, 521 (Mo. 1999) ("Section 1.160 governs. It requires that a defendant be tried for the offense as defined by the law that existed at the time of the offense . . . ."). This Court has held that constitutional amendments are deemed prospective only, unless a contrary intention is clearly expressed in the amendment. *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398 (Mo. banc 1972) ("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, [amendments] are to be construed as having a prospective operation only . . . .") (internal citations and quotation marks omitted). In order for this Court to find retroactive effect, it must be "evident beyond

reasonable question" that the intent was to apply the amendment retroactively. *Id.*

As there is no intention evident beyond reasonable question in the amendment to apply it retroactively, it applies prospectively only. There is no indication in the amendment that the new standard of review was intended to affect persons charged with crimes allegedly committed prior to the effective date of the amendment. The constitutionality of section 571.070 in relation to the conduct that occurred in this case should be assessed, therefore, under the previous version of article I, section 23, not under the newly amended constitutional provision.

2. Section 571.070 was a proper exercise of the State's police power under the Missouri Constitution as it existed at the time of the criminal conduct.

The trial court's order dismissing Counts I, II, and III, did not identify the legal basis for its decision. But because section 571.070 does not clearly and undoubtedly violate any constitutional provision, the trial court should be reversed.

To the extent the trial court determined the statute violated article I, section 23 of the Missouri Constitution in existence at the time Defendant committed the conduct underlying the charged crime, the trial court erred.

Section 571.070 is not unconstitutional under the previous version of the constitution in that it is a valid exercise of the State's police power. Article I, section 23 of the Missouri Constitution in effect when Defendant possessed firearms stated, in relevant part: "That the right of every citizen to keep and bear arms in defense of his home, person and property . . . shall not be questioned; but this shall not justify the wearing of concealed weapons." MO. CONST. art. I, § 23 (1945). It has long been held, however, that some firerams regulations are constitutionally permissible.

The State has the inherent power to regulate the carrying of firearms as a proper exercise of the State's police power. *State v. Richard*, 298 S.W.3d 529, 531-33 (Mo. 2009); *State v. Horne*, 622 S.W.2d 956, 957 (Mo. 1981). Article I, section 23 has "never been held to deprive the General Assembly of authority to enact laws which regulate the time, place and manner of bearing firearms." *City of Cape Girardeau v. Joyce*, 884 S.W.2d 33, 34 (Mo. App. E.D. 1994). The right to keep and bear arms, as set forth in article I, section 23 does not trump the State's police power. *Heidbrink v. Swope*, 170 S.W.3d 13, 16 (Mo. App. E.D. 2005). Rather, "it is the function of the courts to determine whether a statute purporting to constitute an exercise of the police power has a real and substantial relationship to the protection of the public health, safety, morals, or welfare and whether it unjustifiably invades rights secured

by the Constitution." *Id.* "The legislature is afforded wide discretion to exercise its police power." *Richard*, 298 S.W.3d at 532.

In his motion to dismiss, Defendant argued that there "is no substantial relationship between banning all convicted felons under any circumstance from possessing firearms and protecting the public health, safety, morals or welfare." (L.F. 20). However, in his motion Defendant conceded that under some circumstances this statute would constitute a valid exercise of the State's police power. Defendant argued that the pre-2008 version of the statute that limited the crime to felons who committed "dangerous" felonies was an appropriate time, place, and manner restriction on the right to bear arms, but the 2008 revision criminalizing possession of firearms by all felons was not. (L.F. 22-23).

But it is not only dangerous felonies that pose a threat to the public health, safety, morals, or welfare. The United States Supreme Court in the analogous second amendment context recently acknowledged the "longstanding prohibitions on the possession of firearms by felons," noting that these prohibitions are "presumptively lawful." *District of Columbia v. Heller*, 554 U.S. 570, 626-27, n. 26 (2008). Given the fact that felons have already shown a willingness to violate the law, keeping firearms out of their hands bears a substantial relationship to the government's function in

protecting public safety. *See Lewis v. United States*, 445 U.S. 55, 66 (1980) (stating that in considering a statute banning felons from possessing firearms, "Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm."); *United States v. Barton*, 633 F.3d 168, 175 (3d Cir. 2011) ("It is well-established that felons are more likely to commit violent crimes than are other law-abiding citizens."); *United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) ("While felons do not forfeit their constitutional rights upon being convicted, their status as felons substantially affects the level of protection those rights are accorded."); *State v. Brown*, 571 A.2d 816, 821 (Me. 1990) ("One who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person."); *People v. Blue*, 544 P.2d 385, 391 (Co. 1975) ("To limit the possession of firearms by those who, by their past conduct, have demonstrated an unfitness to be entrusted with such dangerous instrumentalities, is clearly in the interest of the public health, safety, and welfare and within the scope of the Legislature's police power.").

In fact, the threat to public safety exists not only from those who have committed violent or dangerous felonies, but also from those who have committed even non-violent misdemeanors. A 1998 study published in the Journal of the American Medical Association concluded that "even handgun purchasers with only 1 prior misdemeanor conviction and no convictions for offenses involving firearms or violence were nearly 5 times as likely as those with no prior criminal history to be charged with new offenses involving firearms or violence." Garen 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, 2083 (1998). At the end of the study period, 50.4% of gun purchasers with at least one prior misdemeanor conviction were charged with a new offense, as compared to the 9.8% who had no previous criminal convictions. *Id.* at 2085. "Handgun purchasers with at least 1 prior misdemeanor conviction were more than 7 times as likely as purchasers with no prior criminal history to be charged with a new offense[.]" *Id.* Additionally, "[s]ubjects with only 1 prior conviction, and none involving either firearms or violence, were at increased risk for . . . violent offenses [4.8 times as likely as those with no prior

convictions], and Violent Crime Index offenses[5] [5.0 times as likely as those with no prior convictions]." *Id.*

Like the unlawful use of a weapon statute at issue in *Richard*, section 571.070 is a valid exercise of the State's police power. As discussed above, allowing felons to possess firearms "poses a demonstrated threat to public safety." *Richard*, 298 S.W.3d at 532. Based on the wide discretion given to the legislature to utilize its police power, section 571.070 "represents a reasonable exercise of the legislative prerogative to preserve public safety by regulating the possession of firearms" by felons. *Id.*

Several other jurisdictions have held that similar laws banning the possession of firearms by a felon, regardless of the nature of the underlying felony, pass constitutional muster. *See United States v. Pruess*, 703 F.3d 242, 247 (4th Cir. 2012) ("We now join our sister circuits in holding that application of the felon-in-possession prohibition to allegedly non-violent

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[5] Violent Crime Index offenses include murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Garen 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, 2083 (1998)

felons like Pruess does not violate the Second Amendment."); *United States v. Scroggins,* 599 F.3d 433, 451 (5th Cir. 2010) ("Prior to *Heller,* this circuit had already recognized an individual right to bear arms, and had determined that criminal prohibitions on felons (violent or nonviolent) possessing firearms did not violate that right."); *Brown*, 571 A.2d at 821 (finding that Maine's statute barring all felons from possessing firearms did not violate Maine's constitution because "[o]ne who has committed any felony has displayed a degree of lawlessness that makes it entirely reasonable for the legislature, concerned for the safety of the public it represents, to want to keep firearms out of the hands of such a person.").

Defendant argued in the trial court that the statute is unconstitutional because the statute had no provision allowing a felon to possess a firearm for purposes of self-defense or defense of his home. (L.F. 21-22). Defendant argued that other Missouri statutes regulating firearms, like the unlawful use of a weapon statute at issue in *Richard* that prohibited the possession of a firearm by an intoxicated person, were valid restrictions in that they provided an exception "for self-defense or defense of others and without such a provision, the exercise of the police power exceeds the limits provided by Missouri statute [sic] in similar situations dealing with possession of firearms." (L.F. 21-22). Defendant essentially argued that felons should be

treated the same as intoxicated persons are treated in 571.030, and that section 571.070 is unconstitutional without an exception to allow felons to possess weapons in self-defense or in defense of others. (L.F. 21-23).

But it was reasonable for the legislature to determine it is a bigger threat to public safety to put, for the purpose of self-defense, firearms in the hands of felons who have previously disregarded the rule of law than to allow firearms in the hands of intoxicated persons. There is a distinct difference between felons and intoxicated persons; drinking alcohol is not illegal, so an intoxicated person has not shown the same disregard for the rule of law that a felon has previously shown. The legislature could have reasonably concluded that a felon who has previously disregarded the rule of law cannot be trusted with a weapon whereas an intoxicated person who has not disregarded the rule of law may be trusted with a weapon in limited self-defense circumstances, despite his state of intoxication. In short, in the case of a felon possessing a weapon, the legislature has concluded that the State's need to protect the public from the felon's possession of a weapon outweighs the felon's need to possess the weapon in self-defense.

The Missouri legislature's apparent conclusion that felons have a limited right to bear arms is not novel. Several courts have held that felons do not fall under the protection of the Second Amendment to the United

States Constitution at all. *See United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010) ("[A]lthough the Second Amendment protects the individual right to possess firearms for defense of hearth and home, *Heller* suggests, and many of our sister circuits have held, a felony conviction disqualifies an individual from asserting that interest. . . . This is so, even if a felon arguably possesses just as strong an interest in defending himself and his home as any law-abiding individual."); *Rozier*, 598 F.3d at 771 (finding that felons are a class of persons disqualified from the protection of the Second Amendment and rejecting the defendant's argument that a statute violated the Second Amendment because he—a felon—possessed a firearm for the purpose of self-defense); *United States v. Vongxay*, 594 F.3d 1111, 1115 (9th Cir. 2010) (finding that felons are disqualified from the protections of the Second Amendment, stating, "Thus, felons are categorically different from the individuals who have a fundamental right to bear arms.").

Defendant also argued in the trial court that section 571.070 violated the Missouri Constitution because it failed to provide a method for felons to have their right to bear arms restored. (L.F. 23). In support of his argument, Defendant identified statutes from four other states providing for the restoration of the right to possess firearms to felons. For example, Defendant cited Colorado's statute providing for the restoration of the right to possess a

firearm to felons ten years after the date of their conviction. (L.F. 23). But Missouri's statute does not have to contain a restoration clause to remain constitutional.

Even if having an avenue to restore the right to felons were necessary to save the statute, Missouri law provides at least two such avenues of restoration. The first is the receipt of a gubernatorial pardon. MO. CONST. art. IV, § 7 (1945); § 217.800, RSMo. Cum. Supp. 2012. Section 571.070 does not make any exception for felons who receive a gubernatorial pardon, but the effect of a full pardon would be to remove the disqualification, and a pardoned felon would then be allowed to possess a firearm. *See Guastello v. Department of Liquor Control*, 536 S.W.2d 21, 24 (Mo. 1976) (finding that a full gubernatorial pardon obliterated a conviction such that if a disqualification from obtaining a liquor license was based upon the prior conviction alone, the disqualification was removed by the pardon).

The second, although limited, possibility for restoration of a felon's ability to possess a firearm is through an expungement. § 610.140, RSMo. Cum. Supp. 2012. Although expungement is only available for certain felonies—passing a bad check, fraudulently stopping payment of an instrument, or fraudulent use of a credit device—this remedy would also restore a felon's ability to possess a firearm. *Id.*

In sum, section 571.070 operates to keep firearms out of the hands of felons who have previously demonstrated a disregard for, or refusal to follow, the laws of this State. As such, the statute is a reasonable exercise of the legislature's prerogative to preserve the public safety. The statute thus bears a substantial relationship to the State's effort to protect the public safety and does not violate Article I, section 23 of the Missouri Constitution. This case should be remanded to the circuit court for reinstatement Counts I, II, and III.

III. (section 571.070 is not a prohibited retrospective law).

The trial court erred in dismissing Counts I, II, and III of the felony indictment filed against Defendant because the statute under which Defendant was charged, section 571.070, is not subject to the prohibition against enacting retrospective laws contained in article I, section 13 of the Missouri Constitution, in that section 571.070 is a criminal statute and the ban on retrospective laws contained in article I, section 13 relates exclusively to civil rights and remedies and has no application to crimes and punishments.

A. Standard of review.

Constitutional challenges to a statute are reviewed *de novo*. *Franklin County ex rel. Parks*, 269 S.W.3d at 29. "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." *Board of Education of City of St. Louis*, 271 S.W.3d at 7 (internal quotation marks and citation omitted).

B. Section 571.070 is a criminal statute and therefore not an impermissible retrospective law.

The trial court's order dismissing Counts I, II, and III, did not identify the legal basis for its decision. But because section 571.070 does not clearly

and undoubtedly violate any constitutional provision, the trial court should be reversed.

To the extent the trial court determined the statute was an unconstitutional retrospective law, the trial court's order should be reversed. The trial court erred in dismissing the charges against Defendant on the basis that section 571.070 was an impermissible retrospective law. In his motion to dismiss the contested charges, Defendant argued that section 571.070 was unconstitutional as applied to him in that the statute was an impermissible retrospective law. (L.F. 15-20). The trial court dismissed these charges based on Defendant's motion. (L.F. 32). But in light of the Court's recent decision in *State v. Honeycutt*, 421 S.W.3d 410 (Mo. 2013), the trial court's dismissal of the charges against Defendant must be reversed.

In *Honeycutt*, the defendant was charged with the unlawful possession of a firearm in violation of section 571.070. *Id.* at 413. The defendant's underlying felony conviction was for possession of a controlled substance and occurred in 2002. *Id.* The defendant argued that the 2008 amendment to the felon-in-possession statute, making it a crime for a felon who had been convicted of any felony (not just a dangerous felony) to possess a firearm, violated the ban on retrospective laws contained in article I, section 13 of the Missouri Constitution. *Id.* at 413-14. This Court rejected the defendant's

claim, holding that "the constitutional prohibition against enacting a law 'retrospective in its operation' applies only to laws affecting civil rights and remedies and was never intended to apply to criminal statutes." *Id.* at 414. The Court then determined that section 571.070 is a criminal statute and held that "[b]ecause the proper analysis demonstrates that § 571.070.1(1) is a criminal statute, article I, section 13's prohibition against laws retrospective in their operation does not apply." *Id.* at 426.

Here, as in *Honeycutt*, Defendant argued to the trial court that Counts I, II, and III of the indictment against him should be dismissed because section 571.070 violated the ban on retrospective laws.[6] This argument was expressly rejected in *Honeycutt*. The trial court's dismissal of Counts I, II, and III on this basis should be reversed, and this case should be remanded for the reinstatement of those charges.

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[6] Although Defendant did not argue below that this statute violated the ban on ex post facto laws, this argument is also unavailing in light of the Court's recent holding in *State v. Harris*, 414 S.W.3d 447, 448 (Mo. 2013), that section 571.070 is not an impermissible ex post facto law.

CONCLUSION

The judgment dismissing Counts I, II, and III of the indictment should be reversed and the case should be remanded to the trial court for reinstatement of these counts.

Respectfully submitted,

CHRIS KOSTER
Attorney General

/s/ Jennifer A. Rodewald
JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236

P. O. Box 899
Jefferson City, MO 65102
Phone: (573) 751-1626
Fax: (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEYS FOR APPELLANT
STATE OF MISSOURI

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06, and contains 8,835 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 24th day of October, 2014, to:

Matthew Huckeby
1010 Market Street
Suite 1100
St. Louis, Missouri 63101

/s/ Jennifer A. Rodewald

JENNIFER A. RODEWALD
Assistant Attorney General
Missouri Bar No. 64236
P.O. Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-1626
Fax (573) 751-5391
Jennifer.Rodewald@ago.mo.gov

ATTORNEY FOR APPELLANT
STATE OF MISSOURI