Summary of SC98909, *Mary Fox, et al. v. State of Missouri, et al.*
Appeal from the Cole County circuit court, Judge Patricia S. Joyce
Argued and submitted November 2, 2021; opinion issued March 15, 2022

Attorneys: The state was represented by Jeff P. Johnson of the attorney general's office in Jefferson City, (573) 751-3321. The challengers were represented by Jeffrey C. Esparza and Michael K. Hill of the public defender's office in Kansas City, (816) 889-7699; David E. Wiegert of the public defender's office in Kansas City, (816) 889-2099; and J. Gregory Mermelstein of the public defender's office in Columbia, (573) 777-9977.

This summary is not part of the opinion of the Court. It is provided by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: The state appeals from a judgment finding a statute requiring defense attorneys to notify sexual offense victims of certain rights prior to an interview violated the attorneys' free speech rights. Challengers to the statute cross-appeal, asserting the bill enacting the statute failed to satisfy several procedural provisions of the state constitution; therefore, certain portions of the statute should be severed. In a unanimous decision written by Judge Mary R. Russell, the Supreme Court of Missouri affirms the judgment. The statute violates the defense attorneys' free speech rights by regulating content-based speech without being narrowly tailored to accomplish the state's interests. The bill resulting in the statute's enactment, however, was not procedurally deficient; amendments to the bill did not change its original purpose, and the term "survivor" was properly limited by the bill's context such that the bill contained only one subject that was properly conveyed by its title.

Facts: In 2020, the legislature passed Senate Bill No. 569. As introduced, SB 569 concerned evidentiary collection kits in sexual assault cases. The legislature amended the bill prior to its enactment. One provision added required "a law enforcement officer, prosecuting attorney, or defense attorney" to inform sexual assault survivors of their rights before commencing interviews. This includes informing survivors of a right to consult with an employee or volunteer of a rape crisis center during any interview and the right to have a support person of the survivor's choosing present. Prior to SB 569's effective date, several public defenders and criminal defendants (collectively, the challengers) sued the state for declaratory and injunctive relief, alleging SB 569 violated defense attorneys' rights to freedom of speech, the separation of powers, this Court's ability to regulate the legal profession, and the criminal defendants' rights to counsel, confrontation and due process. The challengers further alleged the amendments to and passage of SB 569 violated several of the state constitution's procedural requirements. The circuit court conducted a hearing at which defense attorneys testified the information they would be required to give survivors under the bill would adversely affect representation of their clients. The state's expert testified sexual assault survivors often have negative interactions with the criminal justice system and are more willing to participate in the process when advocates are present. The circuit court ultimately entered judgment finding SB 569, as enacted in section 595.201, RSMo, violated the defense attorneys' rights to freedom of speech. The circuit court further found the procedural aspects of SB 569's passage did not violate the state constitution. The state appeals; the challengers cross-appeal.

AFFIRMED.

Court en banc holds: (1) Section 595.201.2(4), RSMo, violates the challengers' free speech rights. Laws regulating speech based on its communicative content are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests. Professional speech can be afforded less protection when the information required is commercial speech or regulates conduct and only incidentally burdens speech. But section 595.201.2(4) is not closely related to professional conduct as it imposes new obligations on attorneys that previously did not exist in the interviewing context, creates concerns regarding defense attorneys' relationship with their clients, and does not require the exercise of professional judgment. Furthermore, the regulation of speech in this case is more significant than the statute's regulation of professional conduct. Therefore, because the statute is not a regulation of conduct that incidentally burdens speech, strict scrutiny applies, and the statute must be narrowly tailored to serve a compelling state interest. The state failed to prove the regulation of speech was narrowly tailored in that the requirement defense attorneys inform survivors of certain rights was not limited in any fashion despite less strict alternatives being available. The circuit court, therefore, properly determined section 595.201 is constitutionally invalid as applied to defense attorneys.

(2) SB 569 did not violate the original purpose provision of the Missouri Constitution, which requires no bill be amended so as to change its original purpose. The provision is not violated when the content of the introduced bill remains substantially intact throughout the legislative process as germane amendments were added. Amendments are germane when closely related or pertinent to the initial legislation. As introduced, SB 569 addressed various aspects of an electronic tracking system for evidentiary collection kits and gave sexual assault survivors corresponding rights. Taken broadly, SB 569 originally addressed issues relevant to survivors of sexual assault offenses. Subsequent amendments – which established a telehealth network for conducting forensic examinations in sexual offense cases, required individuals to inform survivors of various rights, and created a task force to study and recommend best practices regarding various aspects of addressing sexual assault claims – were germane to that purpose.

(3) SB 569 did not violate the clear title or single subject provision of the Missouri Constitution because section 595.201.3(11)'s definition of "survivor" is limited to sexual assault offenses. Although the statutory definition of survivor is broad, its context in the bill limits its scope to sexual assault offenses. And while the statute also defines "sexual assault survivor," the definition of such term does not cover all sexual assault offenses, such as attempted second-degree rape or statutory sodomy; therefore, interpreting "survivor" to be limited to survivors of sexual assault offenses does not make the language superfluous. Accordingly, SB 569 contained only one subject that was properly conveyed by its title.