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

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This Court has exclusive jurisdiction over this appeal pursuant to Article 5, Section 3 of our Missouri Constitution because it involves the constitutional validity of a statute. *Rodriquez v. Suzuki Motor Co.*, 996 S.W. 2d 47, 51 (Mo. banc 1999).

STATEMENT OF FACTS

Respondent commends the Appellant for the completeness of its Statement of Facts, but pursuant to Rule 84.04(c) and 84.04(b) of our Missouri Rules of Civil Procedure, completes the State of Facts as follows:

On September 26, 2009, Respondent Pierre Clay, age 17, was driving his girlfriend Donita from his family home to her brother's apartment when he was stopped for a stop sign violation by two (2) uniformed officers of the St. Louis Metropolitan Police Department. When they "ran" his driving record, they found his driver's license to be suspended. When they asked him if he had any guns or drugs in the car, he said that he had a gun under his seat. After his arrest, upon inquiry, he told the police that he had the gun for his and his girlfriend's protection.

Pierre Clay pleaded guilty. Despite the fact that he had never been arrested before, Pierre Clay did not receive a suspended imposition of sentence by the circuit court judge because of his personal policy (at that time) against such action for weapons' offenses. On August 5, 2010, Pierre Clay received a two (2) year sentence the execution of which was suspended and a one (1) year probationary period was granted. One (1) year later, on August 5, 2011, Pierre Clay was discharged from probation.

On January 26, 2015 Respondent Pierre Clay, now 23, was driving his same girlfriend Donita from his family home to her family home. This time two (2) Task Force "Detectives" (known in the St. Louis City as "The Jump Out Boys") in an undercover capacity in an undercover vehicle with tinted windows, forcibly stopped the Respondent for a purported traffic violation. When they "ran" his record they learned of

his prior conviction and that his driver's license was suspended. When they asked him if he had any guns or drugs in his car he said that he had a gun under his seat. After his arrest he told the police that he had the gun for he and his girlfriend's protection. He was never given a ticket by the "Jump Out Boys" because they "don't do that."

ARGUMENT

The State is disingenuous in its presentation of the reason for the revision of §571.070.1 in 2008 removing the right to bear arms of non-dangerous felons and the application of Article I, Section 23, as amended, mandates a determination of unconstitutionality of that removal, especially in light of the racist history of Missouri's Right to Bear Arms.

Why, when a White man is asked, "Why do you have this gun?" and he answers "For my protection!," he is believed, but, when a Black man is asked the same question, he is not? The honest answer to the broader question provides the real reason why strict scrutiny of the most current provision of Section 571.070.1 RSMo, in light of Article I, Section 23, as recently amended, is no longer acceptable.

The initial inquiry regarding the amendment to Article I, Section 23, commonly known as the Right to Bear Arms provision, is directed toward our first Missouri Constitution of 1820. "We, the people of Missouri," Section Three (3) of Article XIII, a "Declaration of Rights," states:

> "3. That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms, in defense of themselves and of the state, cannot be questions."

Sounds simple, and it was… but not for the 15.4% of the Missouri Black population (vs. the current Black population of 11.8%) who were already dyed-in-the-wool

SLAVES…they simply were not considered "people." For when our First General Assembly met at the Missouri Hotel in September 1820 to enact legislation to give effect to the Constitution, they passed, as statues, numerous stringent regulations governing slavery and control of Blacks adopting "Code Noir" by the French and later Spanish and Virginia "Black Codes" or "Slave Codes" thereafter. The codes guaranteed that the Black slave worked only for one White and stood in servile relation to even the "lowest" of Whites. As such, a slave was not permitted to keep a gun in Missouri. "Slave Patrols," appointed by local courts and paid $12 per month, were authorized as local militia to, without more, stop and search slaves leaving their master's property without permission or pass as well as to search their dwellings on their master's property for guns and contraband, including liquor. When the slave population grew, so did the enforcement of more Black Code and White rule, especially after the Indian Removal Act of 1830 resulted in treaties with the five (5) Native American tribes of "savages" which repulsed them to Oklahoma. Then even Black religious services and any assemblages needed state or local permission and "official" presence of White militiamen. In 1847 a law specifically prohibiting education of Blacks was passed, an education which would have included reading and writing. The confirmation of White and control, of course, came with *Dred Scott v. John F.A. Sanford* 60 U.S. 393 (1857) ….The courts lent their support to the slave masters. Blacks were simply "unfit to associate with the white race" and "had no rights which the white man was bound to respect." Civil War and Congress, not the courts, effectively "overruled" overt slavery.

At the end of the Civil War, the U.S. Government actually made a good faith effort (although established in the Department of War and headed by a Union Army General) called the Freedmen's Bureau (Bureau of Refugees, Freedmen and Abandoned Lands) to aid in solving the everyday problems such as food, clothing, education and medical care for freed slaves. The Bureau also recognized the constitutional right of the new freedmen to bear arms as "secured to and enjoyed by all citizens" and allowed Black soldiers to return home with some of the surplus weapons of the war. Unfortunately, the Freedman Bureau, despite its legacy in establishing some twenty-five (25) Black colleges and universities, lost all effect and it was abruptly abandoned in 1872. Southern states, instead, (re-) enacted the Black Codes to keep the ex-slaves in *de facto* slavery and submission. Freedman could not keep their firearms without local police permission. In many cases, self-appointed authorities assumed the role of the white locals and the Ku Klux Klan was formed as a disarmament posses despite the Civil Rights Act of 1865 and the Fourteenth Amendment of 1868.

While the politics of Reconstruction and the 14th Amendment eventually forced states to publically repeal laws regarding Black gun control, Jim Crow Laws then spread through Missouri in response to Blacks having defended themselves in Pierce City and elsewhere in Missouri from 1901 to 1907 and again in 1920 nearby in East St. Louis, Illinois. See State of Missouri, Official Manual, "The Role of the Negro in Missouri History" 1973-1974; Missouri Secretary of State, Missouri State Archives, "Missouri's African American History," Digital History Series; Kopel, David, *The Truth About Gun Control*, Encounter Books, NY 2013; Winkler, Adam, *Gunfight*, Norton & Co., NY

2013; Whitney, Craig R., *Living With Guns*, Public Affairs Persens Group, Phila. PA, 2012.

The Depression, World War II and the Cold War seemed to trump the attention to any gun control for decades. However, the assassination of Dr. Martin Luther King, Jr. (who, incidentally, had just been denied a gun permit by the Montgomery Sheriff after the bombing of his home in April 1968 and two (2) months later, of Senator Robert Kennedy "triggered" the Gun Control Act of 1968 [GCA]. The GCA allowed for the procedure to individually petition for a "relief from disability" any previously convicted felon who was then denied a legal gun. And since 1968, twenty-three (23) states have chosen, through legislation or vote to add a right to bear arms to their constitutions, to readopt the right or to strengthen that existing right. In total, forty-four (44) states now have an express constitutional right to arms and 37 specially protect the right of self-defense.

In the year 2000, the Missouri Legislature finally and narrowly tailored our gun control laws and Section 571.070.1 to allow a lawful possession of even a "concealable" firearm by a non-violent felon who had not been convicted of one of sixteen (16) specifically enumerated "dangerous" felonies and even scrutinized a second chance "cleansing" provision for a relief from disability of other prior felons.

Section 571.070.1 RSMo [2000]

1. A person commits the crime of unlawful possession of a concealable firearm if he has 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 therefore in this state or elsewhere during the five-year period immediately preceding 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].

These gun rights for prior non-dangerous felons were supported by the public and especially by women who had, as a result of financial pressures or prior dependency issues in their past, been convicted of non-violent financial or drug offenses. Indeed, as shown by the National Crime Victimization Studies: Providing a gun to a woman has a much greater effect on women's ability to defend herself and deter assailants than providing a gun to a man. And it has been shown that, for some unknown reason, rapists are particularly deterred by handguns. See Lott, John R., Jr., *More Guns, Less Crime*, 3d Edition, University of Chicago Press, 2010.

In 2008, legislators eliminated the prior non-dangerous felon and time-limited dangerous felon exclusions from Section 571.070.1 R.S.Mo., to wit:

Section 571.070.1 RSMo [2008]

1. A person commits the crime of unlawful possession of a firearm if such person knowingly has any firearm in his or her possession and: (1) Such person has been convicted of a felony under the laws of this state, or of a crime under the

laws of any state or of the United States which, if committed within this state, would be a felony; or (2) Such person is a fugitive from justice, is habitually in an intoxicated or drugged condition, or is currently adjudged mentally incompetent;

2. Unlawful possession of a firearm is a class C felony.
3. The provisions of subdivision (1) of subsection 1 of this section shall not apply to the possession of an antique firearm.

The change was in fact made in 2008 as a professed response to a sudden spike in the homicide rate in Missouri that did not simultaneously occur in any other of our united states. The sworn reasons now given by all prosecutors to This Court for this sudden 2008 change in the unlawful use of weapon law are that convicted felons of any sort are more likely to cause "a high rate of recidivism" and the enhanced threat of violence that convicted felons forever bring to the public. However, this state's professed reasons for the change in the 2008 law are misleading to the public and to This Court. In 2014, Dr. Daniel Webster, the Director of Johns Hospital Center for Gun Policy and Research and Professor of Health Policy and Management at their Bloomberg School of Public Health noticed something "different" in Missouri in 2008. In his studies, he found that while Missouri (along with several other states) originally required a handgun purchaser license (HPL) and background check for purchasers of handguns sold by unlicensed (private) gun dealers. However, on August 28, 2007, Missouri repealed the purchaser licensing law so that purchasers at private sales no longer had to obtain background checks. There was an immediate two (2)-fold increase in the number of guns recovered by police that

had been sold by a licensed gun dealer (selling to a private dealer) and an increase in the flow of Missouri guns to Illinois and Iowa, two (2) neighboring states which still had the licensing laws that Missouri had repealed. Data from death certificates showed that Missouri homicides were 25% higher through the inquiry period until the end of 2012 despite the fact that in the eight (8)states that border Missouri declined 2.2% and the National average declined 5.5%. Further, based on the consistency of these rates throughout St. Louis and Kansas City and suburban areas, it was shown that the increase was not a result of new gang wars, a breakdown in municipal law enforcement or the usual implied Black crime. Further study showed a 16% increase in overall murder rates over the first five (5) years the law was no longer in place.

Needless to say, Missouri prosecutors and lawmakers both knew, or should have known and know now, that the reason for the increase in seized crime guns and crime rates was shown **NOT** to be derived from the professed recidivism of prior felons or from violence generated by them. Instead, public safety was affected by the questionable **and** obviously unnecessary repeal of previously acceptable gun control laws. There was NO showing that prior felons had anything to do with the spike in violent crime. The State, and not any non-dangerous felon, was the responsible party for the increase in gun crime. And attempt of the State to divert blame to prior felons before This Court is, as said, irritatingly BOGUS. The State, in good faith, should honorably withdraw its appeal in shame because of its own deceit.

But why did the State try to deceive This Court? Because it knows that the 2008 revising of Section 571.070.1 was not "narrowly tailored" at all. Indeed, if it were truly

tailored to effectuate the "compelling governmental interest of protecting the public safety and reducing firearms-related violence," the law would eliminate guns from the hands of the public, in public, altogether. As will be more fully explained later, the issue of gun control is, of course, not simple. But the blanket denial of gun rights previously given to ex-offenders is simply not acceptable in law or fact. And, in "fact," the States professed "reasoning" for that denial is total State jabberwocky.

Both the prosecutors for St. Louis and Kansas City each only cite a nebulous "statistic" to support their position that a prior convicted felon is somehow more likely to commit gun crime simply because he or she is an ex-offender. However, their examples are skewed, reminding Missourians of the Mark Twain's quote: *"There are lies, damned lies, and statistics."* Mark Twain, *My Autobiography*, North American Review, 1906. For, in truth, law and fact, the State conveniently neglects to note that, with each and every conviction there is an arrest and, as the State knows, more likely than not, it is an arrest which is the statistically more relevant and impactful part of the criminal process. The forceful and humiliating and shameful public arrest and placing of a human being in filthy, vomitus municipal jails or holdover cages is certainly more shocking, abusive, degrading and memorable than later an appearance in a clean courtroom for a few minutes before a sentencing court with only three (3) other (State, defense counsel and court reporter) people usually present.

And why do the two (2) State prosecutors not want to refer to arrests (or continued arrests) as a critical precipitant(s) or prerequisite to further criminality? Because it opens the door to the truth that the mass arrest and mass incarceration of Blacks by law

enforcement in Missouri continues despite the fact that crime is lower than it has been since statistics were first kept in 1973. Reported car stops police statistics alone, as recently disclosed by our Attorney General is at a rate for Blacks that is 75% more than the rate for Whites and substantially more of those Blacks stopped are arrested at that car stop. See "Forward Through Ferguson: A Path Toward Racial Equality," a Printed Companion to forwardthroughferguson.org. And, of course, as our state's chief law enforcement officer, the Attorney General, nonetheless finds these (his own) statistics conveniently "unexplainable." Missouri Attorney General, *2014 Vehicle Stops, Executive Summary and Analysis*. Upon inquiry and follow up with the Missouri Department of Corrections, their Annual Report 2014 shows that Missouri imprisons at a rate which is 10th in the nation (literally the "Closed Gateway to the West") and that the imprisonment rate for Blacks is over three times (3X) their population rate. To say the least, these high levels of arrests and incarcerations create a shadow of criminality over all Missouri Blacks. Perhaps the difference is best explained by an explanation of the same scenario from two (2) different viewpoints: When White people drive legally and within the speed limit and pass a single marked police car on the side of the road, they always take their right foot off the accelerator because they do not want to be stopped or take their time to unnecessarily interact with possible rude law enforcement officer and maybe receive a ticket. But when Black people drive by law enforcement in the same situation, they know they are going to be more likely stopped no matter what and more likely than not to be ordered out of their car and searched and put to the curb and have their car searched and, if lucky, be ticketed and hopefully not arrested. Is all this really "unexplainable?"

Do fragmentary so-called statistics presented to This Court by the prosecutors explain this? Blacks have been caught in speed traps for years…speed traps going nowhere. State Jabberwocky.

Insulting too is the State's jabberwocky by the Appellant and his cohorts that somehow ex-felons cause violence. However, of some over forty-eight predictors of convictions for violence (family, socioeconomic position, academic attainment and personality – everything from low social class to low IG to impulsivity), only two (2) predictors were related to violence independent of all other risk factors: A low resting heart rate and poor concentration. Raine, Andrew, *The Anatomy of Violence,* Vintage Books, NY 2014. Other influences have included early-age ingestion of lead, fetal alcohol syndrome, homicides in the neighborhood, magnesium depletion, epigenetics, physical and/or sexual abuse, deprivation in childhood, poor mothers, poverty and poor nutrition but NOT prior felonies. In truth, it seems that recidivate violence right now is similar to cancer…it seems to have many different undefined causes and sources that encompass both "soft" social science and the emerging field of neurobiology or neurocriminology. Rather than the State's short-minded misdirection and blame upon a certain and singular selective class of people by statistics manipulated by statisticians (or lawyers), they should admit that the myriad of predictive causes of violence are not identifiable and do not include a label of non-dangerous or non-violent felons. State jabberwocky.

It is fortunate that last year over 600,000 citizens, for a forever untold number of different reasons, chose to amend Article I, Section 23 of our current Missouri Constitution and its expression of our Right to Bear Arms:

Missouri Constitution Article I, Section 23 [2014] (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."**,

But this constitutional amendment is fortunate ONLY if we finally openly and honestly and fully consider the historical and racial truth that the right to bear arms and gun control in Missouri has always been, and is, used, out of fear and anger and for racial protection and racial control. This Respondent's Brief, on purpose, has bypassed case law (with the exception of the *Dred Scott* decision) for two reasons: First, because of the confidence that the Respondent's amici curiae as well as the excellent Respondent's Brief

in the companion case of *State v. Robinson,* SC94936, adequately addresses those academic legal issues presented by legal precedent and second, and most important to the Respondent and his counsel, the issue is really as simple as the "strict scrutiny." The answer to the initial question presented on Page 1 in this brief is that, as long as the State continues to purposefully ignore the shameful racism in the history of our state and in the history of what is now Article I Section 23, it knows that the *status quo* of historical racism will continue, no court will disturb it and Whties will always be skeptical and defensive toward Blacks having guns at all.

Right or wrong, last summer a White member of a local militia shot and killed an unarmed Black man in an architecturally segregated and economically deprived Black community in St. Louis. Right or wrong, Blacks chose to have an assemblage. That assemblage was met with hundreds of well-paid local and state militia who used dogs and chemical weapons to quell all perceived rebellion and sedition. No effort was made to secure or protect surrounding Black property but only White property (some say on purpose). And what were the Blacks also complaining about? Being constantly and rudely stopped wherever they are in their own community and asked for their reason for travel. And who were stopping them? Local patrols, often in civilian or pseudo-military clothes who sneak up on them in undercover capacities on roads or at their front door. As a State, we are going backwards in racial history. Blacks are disproportionately ticketed and arrested, not as constituents of our communities to be protected but as potential offenders and sources of revenue. While there should be no different justification under the law for a greater incarceration of Blacks now than 1820, more Blacks are at more

DAILY peril of that arrest and incarceration by state authorized militia now than ever before. And the State purposely then just stands nearby with its silent racial dog whistle waiting for more warrant applications. We remain the "Gateway to the West" for regressive racism. The assemblage in Ferguson did upset this *status quo* and ostensible progress has been made in an effort to begin a process of reforming our racial thoughts and reflexes. But we must pay specific attention to the fact that gun control affects Blacks differently than it affects the White hegemony and that BLACKS HAVE THE RIGHT, and should be given the DIGNITY to be able to protect their own community. The purposeful and self-righteous, unequal, unreasonable and woefully unsubstantiated wholesale lifetime elimination of prior non-dangerous felons and others from legal protection of themselves and their families and cottages is racial.

> "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country. A calm and dispassionate recognition of the rights of the accused against the state, and even of convicted criminals against the state, a constant hear-searching by all charged with the duty of punishment, a design and eagerness to rehabilitate in the word of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man these are the symbols which in the treatment of crime and criminals mark

and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it."

~Winston Churchill, House of Commons speech,
given while Home Secretary, July 20, 1910

CONCLUSION

Section 571.070.1 (2000) should be revisited constitutionally, scrutinized and condemned….with a loud whistle. When it is prejudice vs. protection the constitution should discard the prejudice and provide protection guaranteed for all, irrespective of race, all pursuant to the provisions of Sections 1.120, 1.140 and 1.150 RSMo and with such other and further orders and relief as This Court may deem meet and proper.

CERTIFICATE 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 4,677 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2013 software;
2. That a copy of this brief was sent through the Missouri Court's e-filing system on this October 1, 2015 to all parties;
3. That the electronic file has been scanned and found to be virus-free.

/s/ Nick A. Zotos