IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Appellant,	)	
	)	
vs.	)	SC94989
	)	
STEVE LOMAX,	)	
	)	
Respondent.	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS,
TWENTY-SECOND JUDICIAL CIRCUIT,
DIVISION THIRTEEN,
THE HONORABLE STEVEN R. OHMER, JUDGE

RESPONDENT'S BRIEF

Marissa Ulman
Missouri Bar No. 66523
Office of the State Public Defender
1114 Market Street, Suite 602
Saint Louis, Missouri 63101
Phone: (314) 340-7625
Fax: (314) 340-7595
Email: Marissa.Ulman@mspd.mo.gov

Attorney for Respondent

INDEX

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

"The Missouri Supreme Court has exclusive appellate jurisdiction in cases involving the validity of a statute or provision of the constitution of this state." *Damon v. City of Kansas City*, 419 S.W.3d 162, 174 (Mo. App. 2013). In this case, Respondent's charge for unlawful possession of a firearm was struck down by the circuit court because that court found RSMo § 571.070 to be unconstitutional. Therefore, jurisdiction for the appeal to determine the constitutionality of this statute lies with the Missouri Supreme Court.

STATEMENT OF FACTS

On June 12, 2014, officers executed a search warrant on 2715 James Cool Papa Bell in the City of Saint Louis, where Respondent, Steve Lomax, was living at the time. (L.F. 26). As a result of the search warrant, officers located a handgun in the basement of the house under a couch cushion in the basement. (L.F. 26). They also located drugs and drug paraphernalia. (L.F. 10).

An indictment was filed on August 8, 2014, charging Respondent with unlawful possession of a firearm under RSMo §571.070 as well as three counts of possession of a controlled substance and one count of unlawful use of drug paraphernalia. (L.F. 6, 9-10). Specifically, the indictment stated that Respondent "knowingly possessed a 9mm semi-automatic pistol" and previously "was convicted of the felony of stealing." (L.F. 9).

Respondent was, at the time of the filing of the indictment, 52 years old. (L.F. 9). He had felony convictions for drug crimes, stealing, and possessing firearms. While Respondent has a long history of criminality, he does not have any violent felonies. (L.F. 16). His convictions consist of drug crimes, a stealing case, and a felon in possession case. (L.F. 16). Nothing in the charges where Respondent was previously convicted allege that he engaged in violence or dangerous activities. (L.F. 16).

On March 26, 2015, Respondent filed a motion to dismiss the unlawful possession of a firearm charge. (L.F. 2, 13). The motion was heard and granted on the same day by Judge Steven Ohmer. (L.F. 24).

POINT RELIED ON I

The trial court did not err in dismissing Count I of the information, the felon in possession of a firearm charge, against Respondent, because the trial court correctly held that Missouri Revised Statute § 571.070(1) is unconstitutional on its face and as applied to Respondent because Respondent is not a convicted violent felon as is required under Article I, § 23 of the Missouri Constitution.

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006)

Lueckenotte v. Lueckenotte, 34 S.W.3d 387 (Mo. Banc 2001)

Mo. Const. Art. I, § 23

RSMo § 571.070

POINT RELIED ON II

The trial court did not err in dismissing Count I of the information, the felon in possession of a firearm charge, against Respondent, because Missouri Revised Statute §571.070.1 is unconstitutional as applied to Respondent in that the Second Amendment to the United States Constitution requires that any limitations on the right to bear arms be subject to strict scrutiny analysis and §571.070.1 is overbroad and not narrowly tailored to serve a compelling government interest.

D.C. v. Heller, 554 U.S. 570 (2008)

McDonald v. City of Chicago, 561 U.S. 742 (2010)

U.S. Const. Amend. II

RSMo § 571.070

ARGUMENT

POINT RELIED ON I

The trial court did not err in dismissing Count I of the information, the felon in possession of a firearm charge, against Respondent, because the trial court correctly held that Missouri Revised Statute § 571.070(1) is unconstitutional on its face and as applied to Respondent because Respondent is not a convicted violent felon as is required under Article I, § 23 of the Missouri Constitution.

A. Respondent is not a violent felon.

On August 5, 2014, the citizens of Missouri voted to amend the Missouri Constitution. Prior to the passage of the amendment, Article I, § 23 stated, "That the right of every citizen to keep and bear arms, in defense of his home, person 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."

After the amendment, the same section stated:

> 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. 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…

Mo. Const. Art. I, § 23

In this amendment, the legislature clearly created a divide between convicted violent felons and all other citizens. Thus, before any tests can be applied to determine whether RSMo § 571.070 is constitutional, this Court must first decide whether Respondent is a convicted violent felon.

Respondent is not a violent felon. He is currently 53 years old. He has convictions for possession of a controlled substance with intent to distribute, a drug violation for sale, distribution of a controlled substance near schools, felon in possession of a firearm, possession of a controlled substance, and stealing over $500. None of these charges requires any kind of violent behavior. Furthermore, Respondent was caught possessing a firearm in 1999, and was caught in possession of a firearm again in 2014. Despite the fact that it is clear that Respondent has possessed firearms in at least two points of his life, he has no violent felony convictions, and no allegation has been made from the state that he has ever been arrested or suspected of committing a violent gun crime.

The trial court, by not issuing an opinion, found that Respondent was not a violent felon. In Respondent's motion to dismiss, he states, "Mr. Lomax has no violent felonies. He has convictions for drug crimes, stealing, and possessing firearms in the poast.

Nothing about this criminal history is violent." (L.F. 16) In dismissing Respondent's felon in possession of a firearm charge, the circuit court only wrote, "Defendant's motion to dismiss count I has been heard. This motion has been sustained." (L.F. 24) No further analysis or rationale is provided by the court. "If a trial court fails to state a basis for its dismissal, this Court presumes the dismissal was based on the grounds stated in the motion to dismiss." *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. Banc 2001). Therefore, the trial court found that Respondent is not a violent felon. Because Respondent is a non-violent felon, strict scrutiny applies under the amended version of Article I, § 23.

B. Even though this Court found that RSMo § 571.070 did pass strict scrutiny in *Merritt* and *McCoy*, those decisions are not controlling here because they were determined before the amendment to Article I, § 23.

The amendment to Article I, § 23 made clear the fact that strict scrutiny would be applied in cases where a law restricting the rights of citizens of Missouri to bear arms was challenged. However, this right was previously determined to be fundamental in *McDonald*. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Therefore, because the right to bear arms is a fundamental right, this Court would have applied strict scrutiny prior to the amendment, had a challenge been made to RSMo §571.070 after *McDonald*, but prior to the amendment. This Court established this in *Dotson*, when it stated:

> "Even though [the amendment] set out strict scrutiny as the standard, that standard would already have been applicable to cases where the legislation was challenged based on article I,

> section 23 of the Missouri Constitution after *McDonald v. Chicago*. Although the Supreme Court of the United States did not announce a level of judicial scrutiny in *Heller*, it held in *McDonald* that the right to bear arms is a fundamental right that applies to the states. Because this Court reviews laws affecting fundamental rights under the strict scrutiny standard, strict scrutiny would have applied under the Missouri constitution had a challenge been made."

Dotson v. Kander, 464 S.W.3d 190, 197 (Mo. 2015).

Furthermore, *Dotson v. Kander* was a challenge to the sufficiency and fairness of the ballot title that was voted upon and created the amendment to Article I, § 23. *Id*. at 190. This Court found, "Although the summary does not include every change in the proposal, these omissions do not render the ballot summary insufficient or unfair as they were not central features of the amendment." *Id*. at 196. Furthermore, "If the constitutional amendment had *changed* the level of scrutiny under article I, section 23, the Court might have considered the ballot summary at issue in *Dotson* unfair or insufficient." *Merritt v. State*, 2015 WL 4929765, at *4 (Mo. Aug. 18, 2015).

This Court had a chance to apply strict scrutiny when Missouri's felon disarmament statute was challenged in *Merritt* and *McCoy*. This Court found that the amended version of Article I, § 23 did not apply in those cases, but that strict scrutiny applied based on the *McDonald* finding that the right to bear arms is a fundamental right.

C. The amended version of Article I, § 23 applies to Respondent.

The present case differs from *Merritt* and *McCoy* because the amendment does apply. In *Merritt* and *McCoy*, this Court found that it "gives only prospective application to a constitutional amendment unless it finds 'a contrary intent that is spelled out in clear, explicit and unequivocal detail so that retrospective application is called for "beyond [] a [] reasonable question."'" *State v. McCoy*, 2015 WL 4930615, at *2 (Mo. Aug. 18, 2015) (quoting *State ex rel. Hall v. Vaughn*, 483 S.W.2d 396, 398-99 (Mo. banc 1972)); *see also Merritt*, 2015 WL 4929765, at *3.

Both the *Merritt* case and the *McCoy* case were pending appeal during the passage of the amendment and through the effective date of the amendment. In *Merritt*, the State appealed to the Missouri Court of Appeals, which then transferred the case to this Court. 2015 WL 4929765, at *1. After transfer, the amendment went into effect. *Id*. In *McCoy*, while the appeal was pending in the Missouri Court of Appeals, the amendment went into effect. 2015 WL 4930615, at *3. Both of these cases were finally adjudicated by the circuit court and were currently pending in appellate courts prior to the passage or effective date of the amendment to Article I, §23. Thus when each case was reviewed in their respective circuit courts, the amendment had not been passed, and the trial courts that dismissed the felon-in-possession charges in *Merritt* and refused to do so in *McCoy* were applying the pre-amendment strict scrutiny test to determine the validity of RSMo § 571.070.

In contrast, Respondent's case was pending in circuit court during the passage of the amendment and through the effective date, September 4, 2014. Respondent's case

was not finally determined until March 26, 2015. Therefore, when the circuit court in this case dismissed his felon in possession of a firearm charge, the amended version of Article I, § 23 was effective. While the trial court did not specifically state that it was applying the amended version of the Missouri Constitution, as discussed above, the trial court did not provide any specific rationale or order. Therefore, under *Lueckenotte* , the rationale contained in the granted motion is assumed to be the court's holding. 34 S.W.3d at 391. Respondent's motion to dismiss quoted the amended version of Article I, § 23 as the law in effect at the time of dismissal. (L.F. 14) The trial court that dismissed Respondent's charge of unlawful possession of a firearm was, therefore, applying strict scrutiny as understood under the amended version of the Missouri Constitution. It was appropriate for the trial court to apply this standard, and it is similarly appropriate for this Court to apply that standard.

D. Because the amended version of Article I, § 23 specifically states that the constitutional provision protecting the right to bear arms does not apply to violent offenders, strict scrutiny must be applied to any restrictions on the right to bear arms as applied to non-violent offenders.

The amendment separated convicted violent felons from other convicted felons. Article I, § 23 specifically states, "Any restriction on [the right to bear arms] shall be subject to strict scrutiny," but then goes on to separate violent offenders by stating, "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 amendment

provides direction to the legislature on how the statutes concerning possession of firearms may be narrowly tailored in order to survive strict scrutiny.

This is an important distinction because when strict scrutiny was applied in *Merritt* and *McCoy* prior to the amendment of Article I, Section 23, the question was whether RSMo § 571.070 survived strict scrutiny as applied to all convicted felons. With the passage of this amendment, this Court must determine whether RSMo § 571.070 is valid as applied to non-violent felons.

E. The test for determining whether a statute passes strict scrutiny is whether that statute is narrowly tailored to achieve a compelling government interest.

The meaning of strict scrutiny should take on its traditionally understood legal meaning. When there is a legal or technical meaning to the words in a constitutional provision, that is the meaning that those words must be given. *State v. Honeycutt*, 421 S.W.3d 410, 415 (Mo. 2013). This Court, when previously applying strict scrutiny, has found that it means that the statute being challenged must be necessary to accomplish a compelling state interest and is narrowly tailored to accomplish that purpose. *Doe v. Phillips*, 194 S.W.3d 833, 846 (Mo. banc 2006).

In order to pass strict scrutiny as applied to all non-violent offenders, the government must prove that they have a compelling interest in preventing violent gun crimes and that RSMo § 571.070 is narrowly tailored to achieve that goal as applied to non-violent offenders. This statute is unable to pass strict scrutiny review because it is not narrowly tailored. A complete lifetime ban on bearing arms for non-violent offenders is not narrowly tailored to prevent violent gun crime.

F. RSMo § 571.070 does not pass strict scrutiny because it is not narrowly tailored to achieve the government's goal of public safety.

Appellant states, "The State has a compelling interest in preventing future crime and protecting the public…" (See Appellant's Brief Page 15). However, "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

In order to be narrowly tailored, a statute must be more than merely related to the goal that the government is attempting to achieve. The statute must create circumstances that will directly achieve the government's stated goal. RSMo § 571.070.1 states that all persons who have been previously been convicted of a felony may not carry firearms. This is much too broad and is not narrowly tailored to promote the compelling government interest of promoting public safety and preventing crime. This is problematic because the statute prohibits all felons – regardless of their charge or their criminal history – from possessing firearms.

There are, in particular, some circumstances in which one person receives a felony conviction and a very similarly situated person receives a misdemeanor. Creating a ban on bearing firearms for those with felony convictions that are very similarly situated to those with misdemeanor convictions leads to arbitrary distinctions between those who are allowed to bear arms and those that are not. For example, under RSMo §570.040, "Every person who has previously pled guilty or been found guilty of two stealing-related offenses committed on two separate occasions where such offenses occurred within ten

years of the date of occurrence of the present offense and who subsequently pleads guilty or is found guilty of a stealing-related offense is guilty of a class D felony…" (2009). Therefore a person who has been found guilty of two misdemeanor stealing crimes within ten years, and is convicted of another stealing crime within those ten years faces a lifetime firearms ban. However, a person who only has two misdemeanor stealing crimes will not face that same ban. Furthermore, a person who commits two misdemeanor stealing crimes within a ten year period, but in the eleventh year commits a third misdemeanor stealing will also not be facing the ban. Surely the government is not more concerned about a person who commits three stealing offenses within ten years than it is about a person who commits only two stealing offenses within ten years, or a person who commits three stealing offenses in eleven years. Such distinctions are arbitrary, and therefore a statute which makes these distinctions, as RSMo § 571.070 does, is not narrowly tailored.

As another example, RSMo § 568.040 criminalizes the non-payment of child support. If the "total arrearage is in excess of twelve monthly payments due under any order of support issued by a court," then it is a class D felony. (2011). Any less than such an arrearage is a misdemeanor. Again, the government must not be concerned that those who do not pay their child support are more likely to commit violent gun crimes. Even if it is, the difference of a dollar in arrearages can create the difference between a misdemeanor and a felony, a distinction that is, again, arbitrary. Certainly that dollar cannot create more of a risk that the person will commit violent gun crimes.

Appellant contends that the ban on all felons from possessing firearms contained in Missouri Revised Statute § 571.070 is narrowly tailored. As proof, Appellant relies in part on a 2004 study by the Department of Justice that found among "non-violent" releases, about one in five were rearrested for a violent crime within three years of discharge. U.S. Dept. of Justice, Bureau of Justice Statistics, *Profile of Nonviolent Offenders Exiting State Prisons*, 2, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf (2004). However, Appellant ignores the finding contained in the study that among nonviolent releases, approximately one third had a history of arrests for violent crimes and one in five had a self-reported history of convictions for violent crimes. *Id.* at 1. Out of the "nonviolent" releases that were a part of this study, 22% had a prior violent conviction – which is particularly significant because only 20% were rearrested for a violent crime within three years. *Id.* at 2. Thus, those 22% would not be categorized as non-violent felons under Article I, § 23. Furthermore, the study only measures arrests for violent crimes. An arrest for a crime does not mean that that person was charged, or found guilty, or committed the offense. This study also does not contain recidivism numbers for individuals who were not committed to prison as a result of their non-violent felony offense, which would presumably be lower than those who were sentenced to prison.

Courts dealing with challenges to felon disarmament have consistently required the government to make a showing that the statute being challenged is related to the government's objective. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("The government has offered numerous plausible *reasons* why the disarmament of

domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between § 922(g)(9) and an important government goal.") As the only study that the State has cited for the contention that RSMo § 571.070 is narrowly tailored does not even distinguish between violent and non-violent offenders, it provides no proof that the statute is narrowly tailored as applied to non-violent offenders.

Appellant also states that the statute is narrowly tailored because not all persons who plead or are found guilty of crimes are convicted felons. Rather, some of those persons are given suspended impositions of sentence. A suspended imposition of sentence is not a felony conviction unless it is later revoked. *Hoskins v. State*, 329 S.W.3d 695, n.3 (Mo. banc 2010). However, such a distinction is arbitrary and unrelated to the propensity of a person to commit future violent gun crimes. The sentence (or suspended imposition thereof) that a person receives is strongly related to whether that person decided to plead guilty or go to trial, who the prosecutor was on the case, or which judge that person appeared in front of for sentencing. This is akin to stating that only those persons who have served time in prison are prohibited from bearing firearms. Such a restriction does add tailoring to the statute, but the statute still is not narrowly tailored to achieve the government's goal. This narrow tailoring is unrelated to the goal and provides slim to no causal relationship. Thus, the fact that those persons with suspended impositions of sentence are excluded from the purview of RSMo § 571.070 does not mean that the statute is sufficiently narrowly tailored to pass strict scrutiny.

In providing an example of a felon disarmament law that passed strict scrutiny, Appellant cites *State v. Eberhardt*, a Louisiana Supreme Court case where the Court determined, after an amendment to the Louisiana Constitution, that felon disarmament is narrowly tailored to achieve a compelling government interest. 145 So.3d 377 (La. 2014). The Court in *Eberhardt* stated:

> We conclude that LSA-R.S. 14:95.1 serves a compelling governmental interest that has long been jurisprudentially recognized and is grounded in the legislature's intent to protect the safety of the general public from felons convicted of specified serious crimes, who have demonstrated a dangerous potential threat of further or future criminal activity…Further, the law is narrowly tailored in its application to the possession of firearms or the carrying of concealed weapons for a period of only ten years from the date of completion of sentence, probation, parole, or suspension of sentence, and to only those convicted of the enumerated felonies determined by the legislature to be offenses having the actual or potential danger of harm to other members of the general public. Under these circumstances, we find "a long history, a substantial consensus, and simple common sense" to be sufficient evidence for even a strict scrutiny review.

Id. at 385 (citations omitted)

Thus, unlike RSMo § 571.070, the right to bear arms in Louisiana is restricted only to felons convicted of certain crimes. *Id.* at 381. The crimes included burglary, felony illegal use of weapons, manufacture of bombs and incendiary devices, possession of a firearm while in the possession of controlled substances, any felony violation of controlled substance law, or any crime which is defined as a sex offense. *Id.* These are crimes that the Louisiana legislature determined increased the likelihood of future violent gun crimes. Furthermore, the Louisiana statute specified that its ban on possessing firearms did not apply to people who were convicted of one of these crimes more than ten years ago. *Id.* at 382. For these reasons, RSMo § 571.070 cannot be equated to the Louisiana statute because it does not contain restrictions similar to those that the Louisiana law contains that make it narrowly tailored. Instead, Missouri's statute results in a blanket prohibition for any individual who has ever been convicted of any felony no matter how long ago that felony was committed, and no matter what kind of felony was committed.

Prior to 2008, RSMo § 571.070 had similar requirements to the Louisiana statute, providing that only those persons who pled guilty to or were convicted of "dangerous felonies" were barred from possessing firearms. Mo. Rev. State. § 571.070 (2000). There was a specific list of dangerous felonies which included, arson in the first degree, assault in the first degree, attempted forcible rape if physical injury resulted, 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 was a child less than twelve at the time of the offense, statutory sodomy in the first degree when the victim was a child less than twelve at the time of the offense, abuse of a child, and child kidnapping. Mo. Rev. Stat. § 556.061 (2006).

In 2008, the legislature changed RSMo § 571.070. This version, the current version, expands the prohibition on firearm possession to all convicted felons. Thus, RSMo § 571.070 became less narrowly tailored in that it began including all of these persons. However, at the same time, the legislature excluded all persons who had pled guilty to, but not been convicted of a felony – including dangerous or violent felonies. The legislature, in one act, managed to be over-inclusive by applying the ban to people that were convicted of non-violent or non-dangerous felonies and under-inclusive by not applying the ban to people who pled guilty to or were found guilty of violent or dangerous felonies but were not convicted.

Thus, RSMo § 571.070's total lifetime ban on possessing firearms does not pass strict scrutiny as applied to non-violent felons. The government does have a compelling interest in public safety, but RSMo § 571.070 is not narrowly tailored to achieve that goal.

As a result, the trial court's dismissal of Count I of the information against Respondent was proper as applied to Respondent in that Respondent is not a convicted violent felon as is required under Article I, § 23 of the Missouri Constitution.

POINT RELIED ON II

The trial court did not err in dismissing Count I of the information, the felon in possession of a firearm charge, against Respondent, because Missouri Revised Statute §571.070.1 is unconstitutional as applied to Respondent in that the Second Amendment to the United States Constitution requires that any limitations on the right to bear arms be subject to strict scrutiny analysis and §571.070.1 is overbroad and not narrowly tailored to serve a compelling government interest.

Respondent's request to the trial court to dismiss the charge of felon in possession of a firearm alleged, inter alia, that §571.070 was unconstitutional under the Second Amendment to the United States Constitution. (L.F. 13) The Second Amendment's protection of the right to keep and bear arms is considered a fundamental right necessary to our system of ordered liberty, as the United States Supreme Court stated in *McDonald*. "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. Fundamental rights included in the Bill of Rights apply not only to the Federal Government, but also to the States. *Id*. at 791. ("… a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States. *See Duncan*, 391 U.S., at 149, and n. 14, 88 S.Ct. 1444. We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.")

The Second Amendment right recognized in *Heller* is the right of law-abiding, responsible citizens to use arms in defense of hearth and home. *D.C. v. Heller*, 554 U.S. 570, 635, (2008). Any statute impinging upon that right must be evaluated to determine if it is constitutional.

RSMo §571.070.1 provides:

> " 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."

The restrictions placed upon the possession of a firearm in RSMo §571.070.1(1), as applied to felons, are overbroad and do not withstand the strict scrutiny analysis necessary when state legislation impinges upon a fundamental right. "Courts undertake a two-part analysis to determine the constitutionality of a statute under either the state or federal equal protection clause. The first step is to determine whether the statute implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution. *Etling v. Westport Heating & Cooling Services., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003); accord *Kadrmas v. Dickinson Public Schools*, 487

U.S. 450, 457–58, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). 'If so, the classification is subject to strict scrutiny.'" *Weinschenk v. State*, 203 S.W.3d 201, 210-11 (Mo. 2006).

Under strict scrutiny analysis the statute being challenged must be necessary to accomplish a compelling state interest and must be narrowly tailored to accomplish that purpose. *Doe*, 194 S.W.3d at 846. The state has the burden of proving that those legislative restrictions on a fundamental right are narrowly tailored measures that further compelling state interests. *Johnson v. California*, 543 U.S. 499, 505 (2005).

Missouri's felon in possession of a firearm law applies to all persons convicted of a felony. It does not exempt or exclude persons based upon the fact that the felony conviction did not involve a firearm or any type of violence, the date of the conviction or the felon's rehabilitation since the conviction. The statute acknowledges no instance in which a convicted felon may need to possess a firearm, such as defense of his home, person, family or property. The statute does not differentiate persons who were convicted of a felony in the past and are now law abiding, responsible citizens. The felon in possession of a firearm law, as applied to persons who are mentally incompetent, on the other hand, does allow for rehabilitation, as it requires a current finding of that mental incompetence. Once that current finding of mental incompetence has elapsed, the right to possess a firearm returns.

Appellant directs the Court to Louisiana's felon in possession of firearms statute as an example of a statute that has withstood strict scrutiny and argues that Missouri's statute falls within the same classification. The Louisiana statute, however, was found to be narrowly tailored in that it defined the class of violent felons who would be barred from

possessing firearms under the law. *Eberhardt*, 145 So.3d 377. The Court in *Eberhardt* held the following:

> We conclude that LSA-R.S. 14:95.1 serves a compelling governmental interest that has long been jurisprudentially recognized and is grounded in the legislature's intent to protect the safety of the general public from felons convicted of specified serious crimes, who have demonstrated a dangerous potential threat of further or future criminal activity…. Further, the law is narrowly tailored in its application to the possession of firearms or the carrying of concealed weapons for a period of only ten years from the date of completion of sentence, probation, parole, or suspension of sentence, and to only those convicted of the enumerated felonies determined by the legislature to be offenses having the actual or potential danger of harm to other members of the general public. Under these circumstances, we find "a long history, a substantial consensus, and simple common sense" to be sufficient evidence for even a strict scrutiny review.

Id. at 385 (citations omitted)

The Louisiana law in question makes it unlawful for people who have been convicted of one of several crimes deemed violent to possess a firearm. *Id.* at 381. The

Louisiana statute specifies that its ban on possessing firearms does not apply to people who have been convicted of any of the enumerated offenses more than ten years ago. *Id.* at 382.

The Louisiana statute in question is a stark contrast to RSMo § 571.070.1, which does not tailor the statute to only certain felony convictions which cause concern for future dangerousness. Nor does the Missouri statute tailor a time period for the felony conviction as the Louisiana statute does.

The studies, newspaper articles, and websites cited by Appellant in his argument that §571.070.1 further a compelling state interest do not support the position that blanket prohibitions on felons possessing firearms are causally or closely connected to a reduction in future crime or an increase in public safety.

Missouri's legislative restriction on the fundamental right to keep and bear arms is not a narrowly tailored measure that furthers a compelling state interest, and therefore, does not survive a strict scrutiny analysis.

As a result, the trial court's dismissal of Count I of the information against Respondent was proper as applied to Respondent in that §571.070.1 violates Respondent's right to bear arms under the Second Amendment to the United States Constitution.

CONCLUSION

Respondent, based on his arguments in Point I and Point II of his Respondent's Brief respectfully requests that this Court affirm the order and judgment of the St. Louis City Circuit Court.

Respectfully submitted,

/s/ Marissa Ulman
Marissa Ulman
Missouri Bar No. 66523
Office of the State Public Defender
1114 Market Street, Suite 602
Saint Louis, Missouri 63101
Phone: (314) 340-7625
Fax: (314) 340-7595
Email: Marissa.Ulman@mspd.mo.gov

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, I hereby certify that on this 28th day of September, 2015, a true and correct copy of the foregoing brief was served via the e-filing system to the Office of the Circuit Attorney at harwinv@stlouiscao.org and levinsona@stlouiscao.org. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Missouri Supreme Court Rule 55.03 and that it complies with the page limitations of Missouri Supreme Court Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, uses Times New Roman 13 point font. The word-processing software identified that this brief contains 5,730 words, including the cover page, signature block, and certificates of service and compliance.

/s/ Marissa Ulman
Marissa Ulman
Missouri Bar No. 66523
Office of the State Public Defender
1114 Market Street, Suite 602
Saint Louis, Missouri 63101
Phone: (314) 340-7625
Fax: (314) 340-7595
Email: Marissa.Ulman@mspd.mo.gov