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JURISDICTIONAL STATEMENT

The issue in this case is whether House Bills 349, 120, 136 and 328—repealing §571.030, R.S.Mo. and enacting three new statutes in lieu thereof, § §50.535,571.030, and 571.094—violate the Missouri Constitution. The Trial Court below held that the Act does violate the Constitution, specifically, Article I, Section 23. Appellants have appealed that Judgment. The Trial Court also held that the Act does not violate the Constitution in other respects, specifically Article I, Section I; Article X, Sections 16, 22 and 23; and is not constitutionally void for vagueness. Respondents have cross-appealed these judgments. Other non-constitutional issues are presented by both sides to the Appeal. Because this case involves the constitutional validity of the statutes of this State, this Court has exclusive appellate jurisdiction. Mo. Const. Art. V, §3.

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STATEMENT OF FACTS[1]

The following facts supplement statements of fact submitted by the State and the Intervenor.

A. Significant Changes Made By the Act in Missouri Law Not Previously Mentioned.

The Act (A25-45) further reference to Section numbers in Act) repeals and replaces, rather than amends, the existing criminal statute found in Section 571.030, RSMo. (A51-53) The Act also creates an entirely new statutory scheme to regulate the

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[1]References used in this Brief for clarity and brevity are:

1. Respondents collectively will be referred to as "Brooks, et al."
2. Appellants, State of Missouri and its Attorney General, will be referred to collectively as "State."
3. Intervernor, Bull's Eye, LLC, will be referred to collectively as "Intervenor."
4. *Amicus curiae* National Rifle Association of America, Inc. will be referred to as "Amicus."
5. James Murphy, Sheriff of the City of St. Louis, will be referred to as "Murphy."
6. House Bills 349, 120, 136 and 328, 92nd General Assembly, 2003-"The Conceal and Carry Act," will be referred to herein as "Act."

concealed carry of firearms generally by citizens in Missouri. The Act makes significant changes in Missouri gun law by decriminalizing not only concealed carry of firearms by permit holders, but also the possession, carrying and use of firearms and other lethal weapons by anyone, even without a permit and training.

1. New Section 571.030.4 legalizes permit holders to carry concealed firearms "or other weapons readily capable of lethal use."

Section 571.030.4 invalidates the current criminal prohibition in Section 571.030.1(1) for any person who has a valid concealed carry permit under Missouri law or is permitted to carry concealed firearms by another state, which allows them to conceal carry of firearms and "other weapons readily capable of lethal use."

Section 571.094.20, which limits when and where a permit holder can carry, only applies to "concealed firearms." There are no criminal penalties for permit holders carrying other lethal weapons anywhere. The 17 separate prohibitions found under subsection 20 do not apply to permit holders carrying concealed lethal weapons, other than firearms. Under the Act, a permit holder can carry a concealed knife, black jack, or even a pipe bomb or hand grenade into a school, a church, or election precinct, a government office building, a bar or restaurant, a sports arena, a child care facility, a place of employment or any other of the listed locations, without criminal prohibition or sanction. Only permit holders carrying

"concealed firearms" are subject to the statutory scheme regulating concealed carry found in Section 571.094.

2. New Section 571.030.4 also legalizes permit holders to carry exposed lethal weapons, including firearms, into schools and churches.

New Section 571.030.4 invalidates the current criminal prohibitions in Section 571.031.1(8) and (10) for permit holders, which allows them to carry "firearms or any other weapon readily capable of lethal use" into churches, election precincts, government office buildings, schools, school buses and school activities.

Section 571.094.20 only restricts permit holders carrying of "concealed firearms." A permit holder can carry a non-concealed, i.e. exposed firearm into schools, churches, election precincts, government office buildings, schools, school buses and school activities. The Act provides no criminal prohibitions on permit holders carrying "exposed" weapons, firearms or otherwise.

3. The new part of Section 571.030.3 legalizes anyone, even without a permit, who is 21 years or older, to carry concealed firearms in their vehicle.

The new part of Section 571.030.3 invalidates the current criminal prohibition in Section 571.030.1(1), thereby allowing any person, 21 years of age or older, to transport a concealable firearm in the passenger compartment of a motor vehicle, including on or about his person, so long as such concealed firearm is otherwise lawfully possessed. No permit or training is required to carry a concealed firearm under this subsection, so the 17 limitations in Section 571.094.20 do not apply,

4. The new part of Section 571.030.3 legalizes anyone, regardless of age, or whether they have a permit to carry concealed weapons anywhere they have possession, authority or control over the premises.

The new part of Section 571.030.3 invalidates the current criminal prohibition in Section 571.030.1(1) thereby allowing anyone, of any age, to possess a concealed weapon upon any premises over which they have possession, authority or control. No permit or training is required to carry a concealed firearm under this subsection, so the 17 limitations in Section 571.094.20 do not apply.

5. New Section 571.030.5 legalizes anyone to possess, carry and/or discharge firearms in ways previously prohibited, if engaged in a lawful act of defense.

Section 571.030.5 invalidates the current criminal prohibitions in Section 571.030.1(3), (4), (5), (6), (7), (8), (9) and (10) for anyone, permit or not and regardless of age, who is engaged in a lawful act of defense pursuant to Section 563.031 RSMo. Section 563.031.1 RSMo. authorizes people to use physical force if they reasonably believe such force is necessary to defend against the use of unlawful force against them, whether imminent or not. Deadly force may only be used when people reasonably believe it is necessary to protect against specific serious threats set forth in Section 563.031.2. No permit is required to carry a firearm under this subsection, so the 17 limitations in Section 571.094.20 do not apply.

(a) Intoxicated people can possess and discharge firearms.

The inapplicability of Section 571.030.1(5) makes it no longer a criminal offense for an intoxicated person to possess or discharge a firearm or projectile weapon if they are engaged in a lawful act of defense pursuant to Section 563.031, RSMo., Section 563.031, RSMo., requires a person, in this case intoxicated, to form reasonable beliefs as to when force, including deadly force, is necessary.

(b) People can shoot at or from places previously illegal.

The inapplicability of Section 571.030.1(3), (4), (6), (7), and (9) makes it no longer a criminal offense for anyone engaged in a lawful act of defense to:

(3) Discharge or shoot a firearm into a dwelling house, a railroad train, boat, aircraft, or motor vehicle as defined in Section 302.010, RS Mo., or any building or structure used for the assembling of people;

(4) Exhibit, in the presence of one or more persons, any weapon readily capable of lethal use in an angry or threatening manner;

(6) Discharge a firearm within 100 yards of any occupied schoolhouse, courthouse, or church building;

(7) Discharge or shoot a firearm at a mark, at any object, or at random, on, along or across a public highway or discharge or shoot a firearm into any outbuilding; and

(9) Discharge or shoot a firearm at or from a motor vehicle as defined in Section 301.010, RSMo., discharge or shoot a firearm at any person, or at any other motor vehicle, or at any building or inhabitable structure.

(c) People can take firearms or other lethal weapons into schools and churches.

The inapplicability of Section 537.030.1 (8) and (10) makes it no longer a criminal offense for anyone engaged in a lawful act of defense to carry an exposed firearm or any other weapon readily capable of lethal use into or onto any: church or place where people have assembled for worship; election precinct on any election day; building owned or occupied by any agency of the federal government, state government or political subdivision thereof; school; school bus; or the premises of any function or activity sponsored or sanctioned by school officials or the district school board.

6. New Section 571.094 numbering over 17 pages, creates a statutory scheme which regulates only permit holders and only when they carry "concealed firearms."

(a) Section 571.094.1 states the sheriff "shall" issue a certificate of qualification for a concealed carry endorsement meaning there is no discretion if the applicant qualifies.

(b) Sections 571.094.10 and 11 charge non-refundable fees not to exceed $100 to process the initial concealed carry application and not to exceed $50 to renew a concealed carry permit, which all must be paid into the general treasury of the county to the credit of the sheriff's revolving fund.

(c) Section 571.094.20 establishes 17 locations in which only permit holders are not authorized to carry "concealed firearms." These prohibitions do not apply to exposed firearms or any other lethal weapon, either concealed or exposed, previously proscribed by Section 571.030.1. Consequently, permit holders can now carry exposed firearms or any other weapon readily capable of lethal use, either concealed or exposed, into any of the 17 locations proscribed by Section 571.094.20 for concealed firearms. Nor does Section 571.094.20 apply to non-permit holders and therefore they are not subject to the 17 limitations therein.

(d) Some of the places in which permit holders are not authorized to carry "concealed firearms" in Section 571.094.20 include:

(4) any courthouse solely occupied by the circuit, appellate or supreme court… subject to Supreme Court rule,…;

(5) any meeting of the General Assembly or local government, excluding members of those bodies;

(6) any governmental building in which the carrying of concealed firearms is prohibited or limited, except that a violation cannot be a criminal penalty;

(7) any bona fide restaurant, open to the general public, having dining facilities for not less than 50 persons, and that receives less than 51% of its gross annual income from the dining facilities, by the sale of food;

(15) any private property whose owner has posted conspicuous signs stating that the premises is off limits to concealed firearms and any private business enterprise if the owner, lessor or manager prohibits concealed carry, provided that if the premises is open to the public signs shall also be posted; and

(16) any sports arena or stadium with a seating capacity of 5,000 or more.

(e) Section 571.094.21 states that it shall not be a crime for any permit holder to carry a concealed firearm into these 17 prohibited locations and only

subjects the person to denial to or removal from the premises. If a peace officer is summoned because a permit holder refuses to leave the premises he may issue escalating citations for fines to a maximum of $500 and the concealed carry permit may be revoked.

7. Section 50.535 Establishes Requirements for Receipt and Payment of Funds.

(a) Section 50.535.1 creates a county sheriff's revolving fund into which application fees are deposited and expended at the discretion of the county sheriff or his designees. This Section requires that the fee collected shall "be deposited into…the revolving fund…"

(b) Subsection 50.535.2 limits use of the revolving fund only to law enforcement agencies for the purchase of equipment and to provide training. Unexpended application fees shall accumulate in the fund from year to year and the county is not required to approve expenditures from the fund nor is a prior audit or an encumbrance required before any expenditure is made.

(c) Subsection 50.535.3 permits the Sheriff of first class counties to designate police chiefs to accept and process applications, but requires reimbursement of their reasonable expenses for doing so.

B. Resume Of Testimony of Witnesses

The testimony in the case all relates to the Hancock Amendment issues and was elicited from Captain Phillip Moran, Commander of Staff Services Division, Jackson

County Sheriff's Department (TR 13); Jack L. Merritt, Sheriff of Greene County (TR 46); John Page, Sheriff of Camden County (TR 53); and John Dwight Jordan, Sheriff of Cape Girardeau. (TR 75)

1. Captain Phillip Moran

Captain Moran, an employee of the Jackson County Sheriff's Department for 23 years, was given the assignment of overseeing the Act. (TR 13-14) The concern of the Jackson County Sheriff was staffing to process applications under the Act. (TR 14-15) A request had been made to the Jackson County Legislature for $150,000 to hire 2 deputies and 3 clerical staff to comply with the Act's requirements. (TR 14-15) In addition to additional personnel costs, the State would charge Jackson County $38 per fingerprint analysis. (TR 17-18) Under the Act, the Sheriff's office could have civil liability if it improperly denied or issued a permit, which would result in attorney fees and costs. (TR 20) Jackson County estimated 5,000 to 6,000 applications for concealed carry permits would be made the first year. (TR 21-23) The Act requires many new or increased activities or services which do not involve purchasing equipment or providing training and were not funded by the State of Missouri. (TR 25-30) The $360,000 in application fees Jackson County anticipates receiving well exceeds the anticipated payroll costs for the Act. (TR 37) The $360,000 fee income cannot be spent for anything but training and equipment in Jackson County, according to the county counselor's office. (TR 40) In response to questioning from the Court, Captain Moran testified that the Jackson County Sheriff would only have access to unused funds in his revolving account

for purposes of training and equipment. (TR 44-45) The Jackson County Sheriff will collect $62 and require a check payable to the Missouri Highway Patrol in the amount of $38 for the fingerprint analysis. (TR 74)

2. Sheriff Jack L. Merritt

The plan for Greene County, according to Sheriff Merritt, was to hire one part-time employee for approximately 1,000 hours per year, an additional cost of $9,000 to $10,000 annually, to comply with the Act. (TR 46-47) The person hired would provide the additional services and activities required under the Act , but without funding from the State. (TR 47) Sheriff Merritt will also incur an additional $38 fingerprint analyis cost which he plans to pay out of his discretionary fund. (TR 48-50) That pre-existing fund consists of civil fees money paid to the Sheriff, such as for service of a subpoena. (TR 48) Sheriff Merrit testified that he will have more money in his “equipment” fund as a result of application fees than the concealed carry expenses he will incur, so that he will be able to afford more training and equipment than before the Act. (TR 48-49) Sheriff Merritt will use the application fees in his revolving fund to acquire equipment having nothing to do with the Act. (TR 49)

Sheriff Merritt later testified that it was his understanding that the discretionary funds he controls could be spent to cover any expenses under the Act that could not be paid by application fees. (TR 103) Sheriff Merritt would use his revolving fund to buy equipment unrelated to the Act which would free up his discretionary fund to pay for expenses related to the Act, including a part-time employee and overtime. (TR 104-105)

Sheriff Merritt intends to shift money from his discretionary account to pay for the application process, including fingerprint analyses. (TR 106) He plans to shift money from the revolving fund established by the Act to pay for equipment and training that have nothing to do with concealed carry. (TR 106) He anticipates receiving more money from application fees than it would take to pay for implementing the Act, resulting in a "profit" he defines as having more money than in the past. (TR 106-107) The county commissioners of Greene County are aware of, but have not approved the establishment of Sheriff Merritt's discretionary fund. (TR 107) The State asked Sheriff Merritt to testify (TR 107)

3. Sheriff John Page

The Sheriff of Camden County would utilize existing personnel on an overtime schedule to accommodate persons applying for a permit. (R. 60-62) Sheriff Page will charge $62 for a permit and have the applicant write a $38 check to the State of Missouri. (TR 62) The existing law does not require background checks or fingerprint analyses for concealed carry permits. (TR 63) While these activities are not new, they would increase the activity level of the Sheriff's office. (TR 63) Sheriff Page identified many increased activities his office will be required to perform under the Act which will take more time than he estimated originally. (TR 64-71)

4. Sheriff John Dwight Jordan

Sheriff Jordan testified that the fee received for processing concealed carry applications will be greater than the expenses incurred for processing them. (TR 85) He

admitted that the $38 fingerprint analysis fee paid to the State does not involve training or equipment. (TR 87) Cape Girardeau County will charge the full $100 application fee. (TR 85) Sheriff Jordan testified that under the Act, the $100 fee can be spent for equipment and training. (TR 86-88) The Sheriff can be sued for an arbitrary and capricious denial of a permit, which will require incurring attorney fees and costs in defense and if the case is lost, the Sheriff will have to pay for the other sides' attorney fees. (TR 90-92). The Sheriff can also be liable for damages to someone injured by a permit holder if he acted in bad faith in granting the permit, which may or may not be covered by insurance. (TR 92-93) There is risk or exposure whether you grant or deny a permit that is not paid for by the Act. (TR 93)

C. Additional Responses To State's Statement Of Facts

The Amended Verified Petition which added Murphy as a Defendant states the same causes of action against him as it does against the State. (LF 41-57) The State's answer alleges that Brooks, et al. failed to state a cause of action, (LF 148-201), but Murphy's answer does not make this affirmative defense. (LF 116-118) The State did not offer any evidence in support of its Motion to Transfer Venue. The county sheriff is charged with the responsibility for administering the statutory scheme created by Section 571.094 and funding it to the extent permitted in Section 50.535.

In its November 7, 2003 Judgment the Trial Court found that the Act violates Article I, Section 23 of the Missouri Constitution without limiting its findings to the last clause of that provision. The Trial Court relied on the 1875 Constitutional Debates in

reaching its Judgment (LF 392-393; A18-19) The following remarks from the 1875 Constitutional Convention Debates by Judge Gantt were not included in State's brief:

> Then this provision goes on and declares, that the [8, 33] right of every citizen to bear arms in support of his house, his person, and his property, when these are unlawfully threatened, shall never be questioned…There will be no difference of opinion I think upon that subject; but then the declaration is distinctly made, Mr. President, that nothing contained in this provision shall be construed to sanction or justify the wearing of concealed weapons… The wearing of concealed weapons is a practice which I presume meets with the general reprobation of all thinking men. It is a practice which cannot be too severely condemned. It is a practice which is fraught with the most incalculable evil.
>
> The Committee desired me to say in reference to this provision that they gave no sanction to the idea which is sometimes entertained, not however by our Supreme Court, that the right to bear arms shall not [sic] include the right to carry a pistol in the pocket or a bowie knife under the belt. (A48-50)

There is no evidence in the record or otherwise that Governor Holden did not rely on constitutional grounds to veto the Act, nor is there any evidence before the Court of what he said or did not say in support of the veto. Consequently, Brooks, et al. requests that reference to the Governor's veto message (State's brief at 46) be stricken and otherwise not considered by this Court on appeal.

D. Additional Responses To Intervenor's Statement Of Facts

Prior to this Act, only government officials or others empowered to act as such were authorized to carry concealed weapons pursuant to the State's police power. (A51-53) The Act extends the right to carry concealed weapons beyond state officials to all citizens, upon the satisfaction of certain pre-requisites described therein. (A25-45)

At the hearing on the permanent injunction, Brooks, et al. argued that the Act violated the Missouri Constitution in a number of ways in addition to the prohibition on concealed carry found in the last clause in Article I, Section 23.

On November 20, 2003, Brooks, et al. filed their Motion for New Trial, or in the Alternative to Amend Judgment. (LF 435-454) On November 19, 2003 this Court ordered an expedited briefing and argument schedule which set the date for filing this brief on or before December 19, 2003. A hearing on the post-trial Motion of Brooks, et al. was set for the preceding day, December 18, 2003. (LF 473-474) At that hearing Judge Ohmer denied Brooks, et al. Verified Motion to Amend Pleadings (Post Judgment) and Motion for New Trial, or In The Alternative, To Amend Judgment. (LF 475)

E. General Matters

At the outset of this case, Brooks, et al. focused the issues by establishing certain parameters for trial and appeal of this matter. First, Brooks, et al. stated that this lawsuit was filed to preserve their constitutional rights to be free of concealed weapons in Missouri. (TR 34-39) Second, they stated that there is no constitutional right to bear concealed weapons in the State of Missouri, and no party has contested that position.

(TR 112) Third, Brooks, et al. stated that the Second Amendment of the United States Constitution is not relevant to any issue in this case, and no party has contested that position. (TR 43) Fourth, Brooks, et al. limited their claims to violations of the Missouri Constitution thereby avoiding any federal constitutional issues. (TR 38-39) Finally, Brooks, et al. made it clear at the outset that this is not a pro-gun or an anti-gun case, but instead the case turns solely on Missouri constitutional issues. (TR 37-38)

POINTS RELIED ON

I. THE TRIAL COURT JUDGMENT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND PERMANENTLY ENJOINING ITS ENFORCEMENT MUST BE AFFIRMED BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 23 IN THAT THE LANGUAGE AND INTENT OF SECTION 23 RESERVES TO CITIZENS LIMITED RIGHTS TO KEEP AND BEAR ARMS AND PROHIBITS THE WEARING OF CONCEALED WEAPONS.

State ex rel. Heimberger v. Board of Curators of University of Missouri et al. 188 S.W. 128 (Mo. banc 1916)

Rathjen et al.v. Regorganized School District R-II of Shelby County, 284 S.W.2d 516 (Mo. banc 1955)

Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996)

State ex rel. Holekamp v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo. banc 1960)

Mo. Const. Art. I, §23

II. THE TRIAL COURT DID NOT ERR IN DENYING STATE'S MOTION TO TRANSFER VENUE BECAUSE VENUE WAS PROPER IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS IN THAT BROOKS, ET AL. JOINDER OF THE SHERIFF OF THE CITY OF ST. LOUIS WAS NECESSARY AND/OR PERMISSIVE, BUT NOT PRETENSIVE.

State ex rel. Donnell v. Searcy, 152 S.W. 2d 8 (Mo. banc 1941)

Preisler v. Doherty, 265 S.W.2d 404 (Mo. banc 1954)

Committee for Educ. Equality v. State, 878 S.W.2d 446 (Mo. banc 1994)

State ex rel. Missouri Dept. of Natural Resources v. Roper, 824 S.W.2d 901 (Mo. banc 1992)

Rule 52.04, Missouri Rules of Civil Procedure

Rule 52.05, Missouri Rules of Civil Procedure

III. BROOKS, ET AL. ARE NOT ENTITLED TO COSTS TAXED TO THE STATE PURSUANT TO A JUDGMENT IN THEIR FAVOR FINDING ONLY A VIOLATION OF ARTICLE I, SECTION 23 OF THE MISSOURI CONSTITUTION, BUT UPON A FINDING THAT THE CONCEAL AND CARRY ACT VIOLATES THE HANCOCK AMENDMENT, THE COURT CAN TAX COSTS AGAINST THE STATE PURSUANT TO ARTICLE X, SECTION 23 OF THE MISSOURI CONSTITUTION.

Mo. Const., Art. X, §23

IV. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 21 OF THE MISSOURI CONSTITUTION IN THAT, ON ITS FACE, THE ACT PREVENTS FUNDING OF THE ADDITIONAL COSTS CAUSED BY THE NEW OR INCREASED LOCAL ACTIVITIES OR SERVICES IT MANDATES, OTHER THAN TRAINING AND EQUIPMENT.

Miller v. Department of Revenue 719 S.W.2d 787 (Mo. banc 1986)

City of Jefferson v. Missouri Department of Natural Resources, 916 S.W. 2d 794 (Mo. banc 1996)

Boone County Court v. State of Missouri, 631 S.W.2d (Mo. banc 1982)

Larson v. City of Sullivan, 92 S.W. 3d 128 (Mo. App. 2003)

Mo. Const. Art. X §16

Mo. Const. Art. X §21

V. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 22 OF THE MISSOURI CONSTITUTION IN THAT, AS APPLIED, THE PERMIT FEES USED FOR PURPOSES OUTSIDE THE ACT CONSTITUTE A GENERAL REVENUE TAX NOT APPROVED BY THE VOTERS.

Zahner v. City of Perryville, 813 S.W.2d 855 (Mo. banc 1991)

Rolla 31 School District v. State, 837 S.W.2d 1 (Mo. banc 1992

Keller v. Marion County Ambulance Dist., 820 S.W.2d 301 (Mo. banc 1991)

St. Louis County v. Hanne, 761 S.W.2d 697 (Mo. App. 1988)

Mo. Const. Art. X, §16

Mo. Const. Art. X, §22

VI. THE TRIAL COURT ERRED IN NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT IS VOID FOR VAGUENESS IN THAT THE ACT FAILS TO PROVIDE ADEQUATE OTICE OF THE PROHIBITED CONDUCT AND SET STANDARDS FOR ITS FAIR ENFORCEMENT.

City of Chicago v. Morales, 527 U.S. 41 (1999)

State v. Lee Mechanical Contractors, Inc., 938 S.W. 2d 269,(Mo. banc 1997)

State v. Barnes, 942 S.W. 2d 362 (Mo. banc 1997)

State v. Young, 695 S.W. 2d 882 (Mo. banc 1985)

VII. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 1 OF THE MISSOURI CONSTITUTION IN THAT THE ACT USURPS THE PEOPLE'S WILL AS EXPRESSED BY THE DEFEAT OF PROPOSITION B IN 1999.

State ex rel. Drain v. Becker, 240 S.W.229 (Mo. banc 1922)

Rutledge v. First Presbyterian Church of Stockton, 212 S.W. 859 (Mo. 1919)

Mo. Const. Art. I, §1

Mo. Const. Art. III, § §49-53

VIII. THE TRIAL COURT ERRED BY DENYING BROOKS ET AL. PRE- AND POST-JUDGMENT MOTIONS TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE BECAUSE RULE 55.33 CONTEMPLATES SUCH AN AMENDMENT IN THAT THE TESTIMONY OF STATE'S WITNESSES RAISED NEW HANCOCK VIOLATIONS.

Rule 55.33(b), Missouri Rules of Civil Procedure

ARGUMENT

Initial Appeal

I. THE TRIAL COURT JUDGMENT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND PERMANENTLY ENJOINING ITS ENFORCEMENT MUST BE AFFIRMED BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 23 IN THAT THE LANGUAGE AND INTENT OF SECTION 23 RESERVES TO CITIZENS LIMITED RIGHTS TO KEEP AND BEAR ARMS AND PROHIBITS THE WEARING OF CONCEALED WEAPONS.

A. The Meaning Of Article I, Section 23 Is Plain.

In the context of this case, Section 23 of Missouri's Bill of Rights states no more– and no less–than that citizens have the right to keep and bear arms in defense of their homes, their persons, and their property, except that they shall not wear concealed weapons.[2] The State, Intervenor and Amicus are apparently of the view that the last clause of Article I, Section 23 should be interpreted to mean that the words "but this shall not

[2] Section 23 reads: "That the right of very 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." Mo. Const. 1945, Art. 1, §23

justify the wearing of concealed weapons" actually means "the wearing of concealed weapons is justified if the General Assembly says so."[3]

State offers the Court no actual interpretation of the meaning of Article I, Section 23 as a whole. The meaning offered by Intervenor is "the right of every citizen to keep and bear arms does not alone provide sufficient lawful reason for wearing a concealed weapon." (Intervenor's brief at 12). The interpretation offered by Brooks, et al. above is consistent with Trial Court ruling and is clear, concise and apparent on the face of the constitutional provision. The interpretation offered by Intervenor can best be described as "forced or unnatural," within the context of State ex rel. Heimberger v. Board of Curators of University of Missouri, et al., 188 S.W. 128, 130 (Mo. banc 1916), which holds:

> "The framers of the Constitution and the people who adopted it 'must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to

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[3]The State argues further that "the only reasonable interpretation of the concluding phrase . . . is that the framers sought to ensure that the General Assembly's authority to regulate concealed weapons would not be frustrated by an overly broad interpretation of the right to bear arms." (State's brief at 27) Again, "shall not justify" in the State's view apparently means "justified if the General Assembly wants it that way."

see it universally accepted without questions; but the attempt is made so often by interested subtlety and ingenious refinement to induce courts to force from these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim."

The proscription in the last clause of Section 23 against the wearing of concealed weapons is a limitation on the right of citizens to keep and bear arms for defensive purposes.[4] It is apparently the State's position that such a proscription or limitation is not permitted in interpreting our Constitution. Proscriptions of this nature are, however, common among the Constitutional amendments.

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[4] Contrary to the assertions of State, Section 23 does not prohibit police or other agents of the state from carrying concealed weapons because it does not speak to the powers of the state, but rather is part of a Bill of Rights addressed to citizens at large--citizens in their capacity simply as citizens. The Bill of Rights is not addressed to persons who, though they may also be citizens, are acting in roles of authority regarding the public safety or in the capacity of agents of the state. §571.030, RSMo., which will remain in effect in the absence of the Act, authorizes the use of concealed weapons by peace officers and persons acting in limited other specified roles. The Judgment Order of the Trial Court recognized exceptions for authorizing concealed weapons in limited circumstances through the exercise of the inherent power and police power of the General Assembly, citing State v. Gentry, 242 S.W. 398, 399 (Mo. 1922).

A review of the Bill of Rights in its entirety reveals that many of the sections in Article I include limitations, all of which add significant meaning to these sections and none of which is read implicitly to authorize the General Assembly to take the opposing action. They are:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience;... **but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others."** Section 5

> "That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any [religious leader]; **but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."** Section 6.

> "That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information...**but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."** Section 17.

> "That no person shall be compelled to testify against himself

in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; **but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."** Section 19.

"That all persons shall be bailable by sufficient sureties, **except for capital offenses, when the proof is evident or the presumption great."** Section 20

"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."** Section 23.

"That private property shall not be taken for private use with our without compensation, unless by consent of the owner, **except for private ways of necessity and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law...."** Section 28.

"That treason against the state can consist only in levying war against it, or in adhering to its enemies, giving them aid and comfort; that no person can be convicted of treason, **unless on the testimony of two witnesses to the same overt act, or on his confession in open court;**...."

Section 30. (emphasis added to all provisions)

All of these limitations speak plainly and are to be accorded appropriate constitutional deference. State ex rel. Upchurch v. Blunt, 810 S.W.2d 515, 516 (Mo. banc 1991) ("The selection of words as arranged by the drafters is indicative of the significance of the words employed."); Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. banc 1982) ("In determining the meaning of a constitutional provision the Court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted.")

To assert that any of these limiting clauses implicitly authorizes the General Assembly to adopt legislation that is directly contrary to the plain meaning of the provision begs credibility. State mischaracterizes the essence of Section 23 and indulges in speculation as to why the word "prohibit" was not used. (State's brief at 35.) This speculation is unnecessary and inappropriate; it is the words that were used that matter. "In considering this question, we must not forget that it is a *constitution* we are expounding." McCulloch v. Maryland, 17 U.S. 316, 407 (1819) (emphasis in original).

B. Article I, Section 23 Is Devoid Of Language Conferring Authority On The General Assembly.

State asserts that the plain language of Section 23 "recognizes and preserves the General Assembly's authority to regulate concealed weapons." (State's brief at 31.) To the contrary, no language of authorization can be found in Section 23.

Throughout Article I, the framers specifically invited the legislature to further develop the provisions of given sections. Other sections of Article I provide as follows:

> "That no person shall be imprisoned for debt, **except for - - - penalties imposed by law."** Section 11.
>
> "That no person shall be compelled to testify against himself,,,nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury...but...if judgment...be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, **or according to the law**." Section 19.
>
> "That the right of trial by jury as heretofore enjoyed shall remain inviolate; provided that a jury for the trial of ...cases in courts not of record may consist of less than twelve citizens **as may be prescribed by law**..." Section 22(a).
>
> "That the military shall be always in strict subordination to the civil power; that no soldier shall be quartered in any house without the consent

of the owner in time of peace, nor in time of war, **except as prescribed by law."** Section 24.

"That private property shall not be taken for private use with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, **in the manner prescribed by law - - -** . Section 28

"Crime victims, **as defined by law**, shall have the following rights, **as defined by law**: [listing of rights including the right to be present at criminal justice proceedings and rights of information, restitution, protection, etc.]...**The general assembly shall have power to enforce this section by appropriate legislation."** Section 32 (emphasis added to all provisions)

Clearly, the framers of these constitutional provisions, all within the Bill of Rights, knew how to recognize and preserve legislative authority and often invited the General Assembly to develop certain provisions more fully.[5] It is indisputable that Section 23 contains no such authorization or invitation. The last clause of Section 23 is a prohibition on concealed weapons which stands on its own. Section 23 preserves no authority to the General Assembly.

Moreover, the State, Intervenor and Amicus require page upon page of expansive supposition and "ingenious refinement" to support their "plain language" assertion. Heimberger, supra. If the few lines of Section 23 so plainly stated what they assert, such linguistic ingenuity would not be necessary. "It is the duty of the court, in construing the

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[5] The Trial Court analyzed a multitude of constitutional provisions from 14 other states respecting the right to bear arms. (Amicus' brief at 35-44; LF 385-388) The State, Intervenor and Amicus apparently rely upon these other state constitutions in order to argue that Missouri should line up with those other states. However, the great majority of other states' constitutions, on their face, specifically call for legislative action. Of the 14 state constitutions referred to by Amicus, 10 defer to legislative authority within the very clause discussing concealed carry. Missouri does not. If the people of Missouri had wanted to authorize the General Assembly to legislate in this area, they would have said so like other states did, rather than enacting a prohibition that does not even mention the General Assembly.

constitution, to give effect to an express provision rather than an implication." Rathjen et al v. Reorganized School District R-II of Shelby County, 284 S.W.2d 516, 522 (Mo. banc 1955). Section 23 invites no legislative action. Arguments to the contrary constitute wishful thinking and must be dismissed because they are based on nothing more than mere implications.

C. The Legislative Authority Of The General Assembly, Though Plenary, Must Be Exercised In Accordance With The Constitution.

In support of the proposition that the legislative power of the General Assembly is "plenary and residual," State cites State ex inf. Dalton ex rel Holekamp v. Holekamp Lumber Co., 340 S.W.2d 678 (Mo. banc 1960). (State's brief at 29) State deleted any reference to the preceding clause in the sentence containing the quoted language. That clause is significant:

> **"It is a well-settled principle of constitutional law that our state constitution is not a grant, but a restriction or limitation on the legislative powers;** therefore the General Assembly has all legislative powers not denied it by the constitution." Id at 681. (emphasis added)

The legislative power of the General Assembly can only be exercised to the extent permitted under the limitations specifically set forth in Section 23.

The State's contention, in the first sentence of its brief, that "**[n]othing** in the Missouri constitution limits the General Assembly's authority to regulate the carrying of concealed weapons" (emphasis added) (State's Brief at 26) illustrates the legal mischief

inherent in State's position. Even the authority cited by State, Holekamp, supra, characterizes the General Assembly's powers in the constitutional context as nothing near what the State would have this Court believe. Moreover, the State's position is without case law support, as shown by the analysis of State's cited cases in Section D, infra.

Similarly, Intervenor premises much of its argument on the contention that the trial Court erroneously interpreted Section 23 in the *context of the Constitution*. (emphasis in original) (Intervenor's brief at 11) Intervenor's argument is misplaced. Constitutional language is to be read in the light of the whole instrument of which it is a part. State ex rel. Heimberger v. Board of Curators of University of Missouri et al., 188 S.W. 128, at 132 (Mo. banc 1916). That is what the trial court said and did. In arriving at intent and purpose, the construction of a constitutional provision should be broad and liberal. Rathjen, 254 S.W.2d at 530.

In Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996), this Court considered specifically whether certain legislative action exceeded constitutional authority. The issue in Thompson was whether Article III, Section 35 of the Constitution, which creates a permanent joint committee on legislative research "to perform the duties, advisory to the general assembly, assigned to it by law," permits the General Assembly to assign to such committee the responsibility for preparing fiscal note summaries for questions to be presented to voters. Though the Court "assume[d]. . . for [the purposes of the case] that the legislature's authority is as broad *as the Committee hopes it is,*" Id. at 394 (emphasis added), the Court found that the Committee's reading of

Section 35 to permit it to perform any duties assigned by law was overly broad because it ignored the limitation stated in Section 35 that the duties of the committee were to be advisory in nature. The Court stated:

> The general assembly has no power - plenary or otherwise - to adopt a statute that increases the duties of the Committee beyond those expressly authorized by article III, section 35. To hold otherwise would permit the legislature to amend the constitution with a statute. Id. at 395.

The Act is unconstitutional because in purporting to "regulate" the wearing of concealed weapons by creating a statutory scheme to permit concealed carry, the General Assembly is actually ignoring the prohibition of Section 23 against wearing concealed weapons. The Act is in actuality an attempt to amend the constitution by legislative fiat. The last words of Article I, Section 23--"but this shall not justify the wearing of concealed weapons"--must be read in context and given their full due. In constitutional provisions, "crucial words must be viewed in context, and courts must assume that words were used purposefully." State ex rel. Upchurch v. Blunt, 810 S.W.2d 515 at 516 (Mo. banc 1991), citing Boone County Court v. State, 631 S. W. 2d 321, 324 (Mo. banc 1982). As Judge Ohmer stated:

> the words 'but this shall not justify the wearing of concealed weapons' constitute a direct limitation on the inherent power of the legislature to regulate the manner, time and place of the citizens' right to bear arms. While the inherent power and police power of the legislature through Article III, Section I of the Missouri

Constitution allows the regulation of the right to bear arms, this must be done under the limitation of Article I, Section 23 of the Missouri Constitution. To read the Constitutional provision and to find otherwise would make the words of the second clause of Article I, Section 23 a nullity. (Circuit Court opinion at 18; LF 393)

D. Historically, The General Assembly Has Acted In Accordance With The Constitution To Regulate Weapons, And The Courts Have Upheld Such Action.

As noted by Judge Ohmer, "courts have recognized the power of the legislature to regulate the time, place and manner of bearing firearms and [have] certainly upheld the banning of concealed weapons pursuant to Article I, Section 23. . . ." (LF 390; A 16) But historical legislative regulation consistent with the Constitution is the opposite of the Act, which disregards the limitations set forth in Section 23.

Moreover, the decisions asserted by State to have "acknowledged the authority of the legislature to regulate concealed weapons" (State's brief at 41-44), in fact universally uphold the legislature's *prohibition* of the carrying of concealed weapons consistent with Section 23. State, Intervenor, and Amicus can only cite these cases in support of their position by invoking an expanded meaning of the word "regulate"—one that is indifferent to whether guns are forbidden or allowed—in which to *permit* concealed weapons is no different than to *prohibit* them.

The cases cited by State (State's Brief at 41-42), in fact support the position of Brooks, et al., who would hardly ask this Court to "ignore" these cases as the State assests. The relevant statements from each case are as follows:

State v. Wilforth, 74 Mo. 528, 529 (Mo. 1881): "[W]e must hold the act in question to be valid and binding, and as intending only to interdict the carrying of weapons concealed."

State v. Shelby, 2 S.W. 468, 469 (Mo. 1886): "The right of the legislature to prohibit the wearing of concealed weapon's is now generally conceded. Indeed, our constitution in express terms says that it is not intended thereby to justify the practice of wearing concealed weapons. The statute is designed to promote personal security, and to check and put down lawlessness, and is thus in perfect harmony with the constitution."

State v. Keet, 190 S.W. 573, 574 (Mo. 1916): "[T]he intention is that the Legislature shall have the power to destroy such practice [of wearing concealed weapons] or custom by prohibiting the wearing of concealed weapons by any individual, *even the wearing of them temporarily and for self-defense*." (emphasis added) In this case, the Missouri Supreme Court reinforced the intent of the 1875 Constitutional Convention, by referring to the practice of carrying weapons concealed as a "comparatively new evil" "indulged in mainly by the enemies of social order.") Id. at 576.

State v. White, 253 S.W. 724, 726 (Mo. 1923): "That part of the same section making it a crime to carry concealed weapons has been fully sustained." (The challenge in White was against the portion of a statute making it a crime to "exhibit [a dangerous or

deadly weapon] in a rude, angry or threatening manner" without allowing an exception for doing so in defense of one's home; the court found that the subject acts occurred "at some distance from the defendant's home," and thus did not constitute defense of it.) Id. at 727.

Finally, City of Cape Girardeau v. Joyce, 884 S.W.2d 33 (E.D. 1994),the 1994 Court of Appeals decision cited by State for its reaffirmation of the four cases listed above, affirmed a conviction for unlawful possession of a weapon that, far from being concealed, *was carried plainly visible in a holster.* In addition to the language quoted by State (State's brief at 43), the Court of Appeals in the Joyce case confirmed the limitations of Section 23, saying: "Thus, Article I, Section 23 does not purport to convey an entirely unfettered right to bear arms at any time under any circumstances, but expressly limits the right to the defense of home, person or property." 884 S.W.2d at 34.

The General Assembly has enacted numerous laws banning concealed weapons. As noted by State, it has even included exceptions for authorizing concealed weapons in limited circumstances, though the most recent case cited by State for a reversal based on such an exception dates back nearly a century, to 1909. However, never before has the General Assembly enacted legislation such as that at issue in this case—legislation that, in the context of the clause "but this shall not justify the wearing of concealed weapons," enables the carrying of concealed weapons by citizens at large upon the fulfillment of certain minimal requirements. To say that the General Assembly has the power to *regulate* the time, place and manner of bearing firearms cannot mean that the

constitutional restrictions on the legislature's action are dispensed with. Holekamp, supra at 631. It is important to recall that the Constitution restricts rather than expands legislative authority. Id. State characterizes the concealed carry enactment as simply "a new exception to a long-standing criminal law." In fact, the Act is inconsistent with the entirety of Missouri case law, which recognizes prohibitions of concealed weapons as consistent with the Missouri Constitution.

E. If The Plain Language Of Section 23 Prohibiting Concealed Carry Is Not Persuasive, The Intent Of The Framers Unequivocally Shows That The Last Clause Of Section 23 Is A Prohibition On The Wearing Of Concealed Weapons.

The Trial Court specifically ruled that the intent of Article I, Section 23 was "to not justify the wearing of concealed weapons" (LF at 393; A19), and that to read the constitutional provision otherwise would make the words of the last clause of Section 23 "a nullity." Id. The logic of the Trial Court is sound, appropriate and correct.

To reach its ruling, the trial court properly consulted the Debates of the 1875 Constitutional Convention in determining the meaning of the amendments adopted there. Preisler v. Hayden, 309 S.W.2d 645 (Mo. 1958). This Court has held that it is proper to consult such proceedings in the Debates to determine the purpose and meaning of constitutional provisions, although these proceedings do not have binding force on the courts, as their persuasive effect depends upon the circumstances of each case. Metal Form Corp. v. Leachman, 599 S.W.2d 922, 926 (Mo. banc. 1980). The circumstances of

this case are that the language of the Debates is direct and singularly persuasive of a clear intent to prohibit concealed weapons by the adoption of Article I, Section 23. No other logical conclusion can be drawn from the Debates.

The Trial Court quoted at length the portions of the constitutional Debate pertinent to the issue of concealed weapons. State has only provided this Court with portions of that debate. Brooks, et al. will provide the entirety of the debate as spoken by Thomas T. Gantt. Gantt became an appellate judge and was a respected member of the St. Louis Bar.[6] He was elected to serve at the Constitutional Convention. History of the Missouri Court of Appeals, Eastern District (1876-2001).

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[6] Gantt was described as follows:

> Great as were the gifts of his mind, his moral attributes were still more striking. His whole career was distinguished by lofty conduct and a detestation of all that was mean and dishonorable. He did not seek the highest fields of ambition or cultivate any of the arts by which aspirious fame is often won, but in an unostentatious but outspoken in fearless way, his advocacy of the right, his support of reform and cleanness, and his intellect and forceful opposition to corruption and bad systems by which evil government is focused only made him of inestimable service to the City of St. Louis and the State of Missouri. Encyclopedia of the History of St. Louis

This is what Judge Gannt said at the 1875 Constitutional Convention in respect to what was the predecessor of Article I, Section 23 of the Missouri Constitution.[7]

> It is in the charter of the city of St. Louis, and I say that thing ought to be impossible; it is against the law and if some policeman is shot on the threshold by some indignant citizen, then perhaps the law will be vindicated by the court declaring that under the legislative enactment or provision or charter which authorizes this violation of the sanctity of the home of a citizen, was a usurpation and conferred no immunity to the misguided man who assumed to be governed by it**. Then this provision goes on and declares, that the [8, 33] right of every citizen to bear arms in support of his house, his person, and his property, when these are unlawfully threatened, shall never be questioned,** and that he shall also have the right to bear arms when he is summoned legally or under authority of law to aid the civil processes or to defend the State. **There will be no difference of opinion I think upon that subject; but then the declaration is distinctly made, Mr. President, that nothing contained in this provision shall**

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[7] The Language of the Article II, Section 17 adopted in 1875 reads as follows: "That the right of no citizen to keep and bear arms in defense of his home. Person and property, or in aid of the civil power when thereto legally summoned, shall be called in questions; but nothing herein contained is intended to justify the practice of wearing concealed weapons." Mo. Const. Art.II, §17 (1875) (A46)

> **be construed to sanction or justify the wearing of concealed weapons.** I need not call the attention of my brethren of the bar to the fact that in one, at least, of the states of the Union, the decision was made that a provision in the Constitution declaring that the right of any citizen to bear arms shall not be questioned, prohibited the [8, 34] Legislature from preventing the wearing of concealed weapons. **The wearing of concealed weapons is a practice which I presume meets with the general reprobation of all thinking men. It is a practice which cannot be too severely condemned. It is a practice which is fraught with the most incalculable evil. The Committee desired me to say in reference to this provision that they gave no sanction to the idea which is sometimes entertained, not however by our Supreme Court, that the right to bear arms shall not [sic] include the right to carry a pistol in the pocket or a bowie knife under the belt.** Debates of Missouri, Constitutional Convention 1875, pg. 439-440. (emphasis added) (A48-50)

These are all the words spoken by Judge Gantt on behalf of the Committee. The words he spoke in reference to the wearing of concealed weapons are the only words comprising the debate on that issue. Judge Gantt's words are unequivocal. Judge Gantt's message is

clear and distinct.[8] Judge Gantt stated that the wearing of concealed weapons was a "practice which cannot be too severely condemned." He said it was a "practice that is fraught with the most incalculable evil." These words can only mean that concealed weapons were denounced. In what reasonable manner can these words be interpreted to express an intent other than prohibiting the wearing of concealed weapons? Such weapons were a "reprobation," that is, a morally unprincipled practice for "all thinking men." The constitutional debate contains not a single statement, argument or word of rebuttal to the expressions opposing concealed weapons spoken by the man who became the first presiding judge of the St. Louis Court of Appeals.[9] The Trial Court correctly found what was clear. The intent behind this constitutional provision was "to not justify the wearing of concealed weapons." (LF 393; A19)

Further support for a finding that the last clause of Section 23 is a prohibition on the wearing of concealed weapons is found in its historical context. This Court recognizes that in construing a constitutional provision, a study of pre-existing conditions and a consideration of the "mischief to be remedied by the. . . constitutional provision" lend great aid to its proper understanding. State ex rel. City of Booneville v. Hackmann,

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[8] The transcript of Judge Gantt's spoken words contains a double negative identified by "[sic]," which was the opposite of his message and occurred simply because he had no opportunity to review and correct this transcript of his spoken words.

[9] History of Missouri Court of Appeals, Eastern District (1876-2001)

240 S.W. 135, 136 (Mo. banc 1922). What was the "general spirit of the times?" State ex rel. Russell v. State Highway Commission, 42 S.W.2d 196 (Mo. banc 1931). The conditions existing in 1875 were ripe for the prohibition of concealed weapons. On May 13, 1875, the day before the adoption of the concealed weapons language, an editorial in the Jefferson City Daily State Journal referred to the murder of the editor of another newspaper as "another instance of the evil of carrying weapons" which is a "cowardly practice." On May 14, 1875, as the Daily State Journal reported adoption of the concealed weapons language, it also carried news of the "reign of terror" by Jesse James and his gang. The May 13 editorial also stated that it was hoped that the people were "not prepared to justify the carrying of deadly weapons."

The mischief to be remedied is also illustrated by conditions during the post Civil War period. The wearing of weapons grew out of the unsettled condition after the war in Missouri where men working in their fields and youngsters riding through town were armed with pistols. Department of Missouri, Letters Received, October 25, 1866, Entry 2395, Second Lieutenant James B. Burbank.[10]

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[10] Lieutenant Burbank's report to his general formed the basis of the following passage in the 2002 book entitled *Jesse James* by T.J. Stiles, published by Alfred A. Knopf, where the author states:

In Missouri, mandatory militia service, guerrilla warfare, and aggressive postwar marketing by firearms manufacturers had saturated the population with six-shooters. In

This Court itself commented on these historical conditions and the mischief to be remedied by its language in State v. Keet, 190 S.W. 573, 574 (Mo. 1916). There it is stated:

> Less than a century ago the arms of the pioneer were carried openly, the rifle on his shoulder, his hunting knife on his belt. Since then deadly weapons have been devised small enough to be carried effectively concealed in the ordinary pocket. The practice of carrying such weapons concealed is appreciated and indulged in mainly by the enemies of social order. Our state has been one of the slowest to act in meeting this comparatively new evil, but she has finally spoken in no uncertain language.

October 1866, Lieutenant James Burbank went to investigate reports of "an armed pistol company" in St. Clair and neighboring counties. "Nearly every man I saw during my stay in these counties carried army revolvers," Burbank reported, "even men at work in their fields, and boys riding about town." He described it as "a habit which grew out of the unsettled condition of the country since the war." Unsettled indeed. Given the omnipresence of pistols, the persistence of wartime hatreds, and a fresh familiarity with death, confrontations rapidly turned lethal. "Fist and skull fighting has played out here," wrote one Missourian in May 1866. "They now do that business in a more prompt manner." [reprinted by permission of Random House]

Historically, yet another basis exists supporting a finding that the last clause of Section 23 is a prohibition. In 1874 the Missouri legislature adopted a statute prohibiting concealed firearms and other deadly weapons in certain locations.[11] Unquestionably this evidences, as part of the "spirit of the times," a need to prohibit concealed weapons. The adoption at the Constitutional Convention a year later of a constitutional prohibition in Section 23 appears duplicative one that statute at first glance. However, The inclusion of the 1874 statutory prohibition in the 1875 Constitution gave constitutional protection to the prohibition on concealed carry, thereby requiring a constitutional amendment, rather

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[11] The statute read: Section I. Whoever shall, in this state, go into any church or place where people have assembled for religious worship, or into any school-room, or into any place where people may be assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court-room during the sitting of court, or into any other public assemblage of persons met for other than militia drill or meetings, called under the militia law of this state, having concealed about his person any kind of fire-arms, bowie-knife, dirk, dagger, slung-shot, or other deadly weapon, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than ten nor more than one hundred dollars or by imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment: Provided, that this act shall not apply to any person whose duty it is to bear arms in the discharge of duties imposed by law.

than repeal of the statute, to overcome the prohibition. In 1879, yet another statute was passed further broadening the prohibition on concealed weapons to include knives or other deadly weapons.[12] The repeated passage of legislation that was consistent with the prohibition of Article I, Section 23, is strong evidence that prohibiting concealed weapons was the will of the people.

F. The Conceal And Carry Act Infringes Upon The Right To Bear Arms Reserved To The People By The First Clause Of Article I, Section 23.

As stated by the Trial Court, when a clear and strong conviction exists that an act of the legislature is incompatible with the Constitution, the act is inoperative and void, citing Bliss v. Commonwealth, 12 Ky. 90 (Ky. App. 1822) (LF 395; A21) This basic principle applies to Article I, Section 23 in its entirety, not only to its last clause. The Trial Court found that the Act was unconstitutional and void as violative of Article I, Section 23 of the Missouri Constitution. Id. Judge Ohmer did not limit his ruling to the portion of Article I, Section 23 that prohibits concealed weapons. Rather, his Judgment holds the Act is inoperable, void and unconstitutional because it is incompatible with Article I, Section 23 as a whole.

At trial, Brooks, et al., argued orally and by brief that the Act exceeded the limited right to bear arms reserved under the first clause of Article I, Section 23. (TR at 113-114; LF 291 et seq.) Both at trial and in their briefs, State, Intervenor and Amicus chose to

[12] §1274 RSMo. (1879)

limit their arguments to the last clause of Article I, Section 23. In doing so, each neglected to address the constitutionality of the Act in the entire context of Article I, Section 23. Respondents will do so here.[13]

Article I, Section 23 grants a limited right to citizens to keep and bear arms only for self defense purposes. As stated in City of Cape Girardeau v. Joyce, 884 S.W.2d 33, 34 (Mo. App. 1994):

> Thus, Article I, Section 23 does not purport to convey an entirely unfettered right to bear arms at any time under any circumstances, but **expressly limits the right to the defense of home, person or property.** (emphasis added)

Regardless of the interpretation of the "concealed weapons" Id. at 34 clause, there can be little room for doubt that the intent of Section 23 as a whole was to enact an amendment to prevent "incalculable evil" as described by Judge Gantt in the constitutional debates. Debate, supra. The first clause granted rights of self defense, i.e. methods by which citizens can safeguard themselves As Judge Gantt stated, "nothing contained in this [constitutional] provision shall be construed to sanction or justify the wearing of concealed weapons." Id. (emphasis added) Concealed weapons were the "evil" which the framers decried. This same "evil" will accrue if this Court permits this Act to become

[13]Respondents' additional arguments in support of the Trial Court judgment are offered in accordance with Rule 84.04.

law. This is so because the Act will result in untoward legal consequences, specifically decriminalization of conduct that is currently illegal, which necessarily will infringe on the safeguards of self defense afforded citizens generally by the first clause of Section 23.

The pertinent limitation under Missouri law is that the General Assembly cannot enact legislation, such as the Act, that exceeds the scope of the Constitution. The Constitution is not a grant, but rather a restriction or limitation on the legislative power. State ex inf. Dalton ex rel Holekamp v. Holekamp Lumber Co., 340 S.W.2d 628 (Mo. 1960). The Act is a legislative exercise of power which would reach far beyond the permissible bounds of Article I, Section 23, as intended by the framers. To find otherwise would permit the legislature to amend the Constitution with a statute. Thompson v. Committee on Legislative Research, 932 S.W.2d 392 (Mo. banc 1996). State acknowledges in reference to the first clause that "This provision guarantees this right against an intrusion by the General Assembly." (State's brief at 33) It is precisely such an intrusion that the Act would effectuate.

A ruling by this Court allowing this legislation to become law is tantamount to granting protected status to illegal and unconstitutional conduct. The framers' intent was to allow arms only to defend home, person or property. This enactment turns Article I, Section 23 upside down by authorizing conduct which is anything but defensive in nature. It places citizens at greater risk because the exposure to concealed weapons encroaches on the ability of citizens to find safety in the self-defense protections of Section 23.

Because the Constitution is a restriction or limitation on legislative powers, Holekamp, supra., any legislative act must comport with the rights, limited as they are, guaranteed to all citizens under Section 23. The rights enumerated therein cannot be diminished or infringed upon by legislative fiat. Based on the framers' clear intent to grant limited rights while avoiding incalculable evil, the Act must comply with both the first and last clauses of Article I, Section 23. It does not.

No Missouri Court has ever addressed whether the provisions of a conceal and carry law, such as this Act, are violative of the restricted right to bear arms contained in the first clause of Article I, Section 23. The Act denies to citizens their constitutional rights protected by Section 23 because it:

(1) makes sweeping changes to the gun laws of this state;

(2) decriminalizes existing criminal conduct;

(3) authorizes untrained persons without a permit to conceal weapons;

(4) expands the use of deadly force to anyone, permit holder or not.

The discussion that follows outlines many of these ill-conceived changes. This analysis illustrates the dire realities of the Act, should it be declared constitutional. The end result is that the exception swallows the rule, i.e. the Act diminishes the safety of Missouri citizens by swallowing their rights of defense guaranteed by Article I, Section 23.

1. **The Act Authorizes Permit Holders To Carry Concealed Lethal Weapons Other Than Firearms Anywhere.**

The Act is so poorly drafted that numerous anomalies exist which decriminalize the gun laws of this state. For instance, §571.030.4 legalizes permit holders to carry a concealed firearm "or any other weapon capable of lethal use." But §571.094.20, which limits when and where a permit holder can carry, only applies to *concealed firearms*. This means there are no criminal penalties for permit holders carrying "other lethal weapons" anywhere; the 17 separate prohibitions found under subsection 20 do not apply to permit holders carrying concealed lethal weapons other than firearms. In other words, a permit holder[14] could carry a bowie knife, a black jack, a hand grenade or even a pipe bomb or hand grenade into a school, a church, a government building, a bar or restaurant, a sports arena, a child care facility, a place of employment, of any of the other locations listed in subsection 20 without criminal prohibition or sanction whatsoever.

Certainly, such new concealed carry authority obliterates the intent of the constitutional amendment by exceeding the scope of the right to defend "home, person

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[14]The right to keep and bear arms is expressly reserved to "citizens." Article I, Section 23, Clause I. The Act allows persons who are not Missouri citizens to obtain permits. §571.094.2 and §494.400 RSMo. Missouri citizenship is required to be a juror, but not to obtain a gun permit. Missouri statutes make distinctions between "persons," "citizens," and "residents of this state." See, e.g., §1.205 RSMo.

and property" reserved to citizens by the first clause of Section 23. How could a citizen protect his person when faced with a permit holder who can legally carry a concealed hand grenade or pipe bomb into a church, school, sports arena or child care facility? To allow what the Act permits is to place unarmed citizens in the presence of others with lethal weapons. This can only diminish the right of self defense, not only in the 17 separate locations proscribed by this Act, but even within the citizen's home, where a permit holder may enter without disclosing he is carrying a concealed lethal weapon. In fact, under the Act, the premises owner can only summon a peace officer to force a permit holder carrying a concealed firearm to leave, but not one with a knife or a pipe bomb. Must one arm himself to retain parity?

2. The Concealed Carry Act Authorizes Permit Holders To Carry Exposed Firearms Anywhere

Similarly, §571.030.4 also voids subdivisions 8 and 10 of §571.030.1 RSMo. for permit holders. Subdivisions 8 and 10 prohibited anyone from carrying "firearms or any other weapon readily capable of lethal use" into churches, election precincts, government office buildings, schools, school buses and school activities. Again, §571.094.20 only restricts permit holders in the carrying of "concealed firearms," thereby permitting the carrying of *exposed* firearms or other lethal weapons into any of the places set forth above. How is this new authority for permit holders to carry exposed firearms into places never contemplated before compatible with Section 23's right to defend "home, person and property?"

While the legislation would arguably permit arming teachers and school administrators to attempt to protect themselves or their students, it would also allow any other permit holder to bring an exposed firearm onto school property even though they have no lawful reason for doing so. Specifically, under the Act, a permit holder could carry an exposed assault rifle into a school and literally no one has the legal right to stop him until he pulls the trigger. Again, the application of the Act to this and similar circumstances deprives a citizen of his right to defend himself because no legal means exist to prevent the permit holder from then using the assault weapon once in a school. Would the Amicus contend that this would lessen the potential for gun violence in schools? This is so because the legislation removes criminal prohibitions for carrying "exposed" weapons, provided a permit has been obtained.

3. The Concealed Carry Act Authorizes Anyone Over The Age Of 21 To Carry Concealed Weapons In A Vehicle And Elsewhere Without A Permit

§571.030.3 of the Act authorizes anyone over the age of 21, permit holder or otherwise, to transport a "concealable firearm in the passenger compartment of a motor vehicle." It also expands the right to carry concealed within one's home or business to any premise over which the person has "possession, authority or control," again without a permit. The same provision allows anyone to carry a concealed firearm regardless of age if they are "traveling in a continuous journey peacefully through this state." The

disjunctive language of subsection 3 also invalidates and decriminalizes current criminal prohibitions on concealed carry found in §571.030.1(1) RSMo. for:

(1) any person twenty-one years of age or older transporting a concealable firearm in the passenger compartment of a motor vehicle, so long as such concealable firearm otherwise lawfully possessed;

(2) upon premises over which the actor has possession, authority or control; and

(3) when traveling in a continuous journey peacefully through this state.

These exceptions *also* authorize anyone to conceal a firearm on their person in the above situations, without a permit and perhaps without any verifiable training or without any knowledge of gun safety whatsoever. Read literally, §571.030.3 of the Act authorizes anyone, permit holder or not, to *carry* a concealed weapon in a number of locations never before contemplated.

A police officer making a traffic stop must concern himself with whether anyone over the age of 21 years, permit holder or not, has hidden a loaded weapon in the vehicle or is wearing it concealed. But the phrases "concealable firearm" and "passenger compartment of a motor vehicle" are not defined by the Act. The owner of a retail establishment such as a bar or restaurant would be able to carry a concealed weapon on his premises. But the phrase "possession, authority or control" is so broad and vague that anyone who claims a legal right to be present at a certain "premises," may also have the legal right to carry a concealed weapon. For example, who "controls" a bar or restaurant

in the absence, or the presence of the owner or manager? Who has "possession" of a public sports arena?" And in what management levels does "authority" over a business premise reside?

"Control," "possession" and "authority" in these contexts are terms which are vague when applied. They can and will be seized upon by people to carry a concealed firearm who previously had no right to do so. The last portion of subsection 3 of the Act even allows non-permit holders to carry concealed weapons on school premises as long as they can claim that they are "transporting a student to and from school," whether or not they are an adult. Certainly, these exceptions, which can and will be *claimed* by anyone regardless of whether they have a concealed carry permit, far exceed the "fettered" rights granted by Article 1, Section 23. Joyce, supra.

4. The Concealed Carry Act Decriminalizes Existing Gun Laws For Anyone Who Claims A Lawful Act Of Defense, Permit or Not

The broadest exception decriminalizing the gun laws of this state is found in §571.030.5, which states that subdivisions 3 through 10 of §571.030.1 RSMo. are not applicable to persons who are "engaged in a lawful act of defense pursuant to §563.031 RSMo." On its face, this provision seems to be consistent with the first clause of Article 1, Section 23 in that it specifically mentions "defense," but the exceptions it authorizes are inconsistent with the use of deadly force under §563.031 RSMo. As a result, this authority to use deadly force granted to anyone, permit holder or not, far exceeds the rights reserved to citizens in Article 1, Section 23.

For example, subdivision 5 of §571.030.1 RSMo. states "that a person commits a crime of unlawful use of weapons if he or she knowingly possesses or discharges a firearm or projectile weapon while intoxicated." Section 563.031.2 RSMo. prohibits deadly force, such as that represented by a firearm, unless its user "reasonably believes that deadly force is necessary to protect himself or another against death, serious physical injury, rape or kidnapping or serious physical injury through robbery, burglary or arson." But how can an intoxicated individual form a "reasonable belief" justifying deadly force. This legislation arms drunks, drug addicts and the like by authorizing them to merely "possess" firearms while incapacitated and further authorizes them to decide when to use deadly force while in that condition.

The revocation of subdivision 3 by the Act based on a claim of "defense" allows anyone to "discharge or shoot a firearm into a dwelling house, railroad, train, boat, aircraft or motor vehicle as defined in subsection 302.010 RSMo., or any building or structure used for the assembling of people." Shooting into a building used for assembling people is peculiarly *offensive* in nature. If the shooter reasonably believes he is engaged in a lawful act of defense: revocation of subdivision 4 allows anyone to "exhibit[s] - - - any [firearm] in an angry or threatening manner;" revocation of subdivision 7 allows anyone "to discharge or shoot a firearm at any mark, object, at random, on or along or across a public highway or. . . into any out building;" and revocation of subdivision 9 allows anyone to "discharge or shoot a firearm at or from a motor vehicle." When is a drive-by shooting ever done in self-defense?" And if

subdivisions 8 and 10, previously discussed, are revoked for anyone claiming a "lawful act of defense," then students can bring weapons into school if they fear for their safety. For instance, a gang member could claim the right to carry a weapon because he feared attack from a rival gang so he could bring a gun into high school without criminal consequences. While §563.031.1 RSMo. requires the person concealing a firearm to reasonably believe that force is necessary to defend himself from the use of unlawful force by another--it need not be an "imminent" threat.

The Act can be construed to permit anyone who anticipates another will eventually use unlawful force against them to "carry" a firearm or other deadly weapon into or onto a church, election precinct, government office building, school, school bus or school function. This new "right," which is at best ambiguous, will certainly be invoked after the fact in defense of any criminal charge involving firearms. Unless §571.030.5 was intended to essentially rearm society with concealed weapons, as these "defense" exceptions do not require a concealed carry permit, they far exceed the rights reserved to Missouri citizens under Article 1 Section 23, intended only to permit a citizen to defend "**his** home, person or property." (emphasis added)

The provisions discussed above make it evident that the Act would render the restrictions inherent in the first clause of Article I, Section 23 meaningless, while infringing on the rights of citizens to be free of concealed weapons. The first clause of Section 23 proscribes the General Assembly's authority at *both* extremes. On the one extreme, it cannot legislatively prohibit the use of firearms to defend one's home, person

and property. But on the other extreme, the General Assembly cannot create a legislative right to bear concealed weapons that interferes with another's right to defend his home, person and property. In short, the first clause of Section 23 reserves a constitutional right to Missouri citizens to be free of the "evil" imposed by concealed carry, as threatened by the Act described above. By declaring this Act unconstitutional, the citizens of Missouri will retain the "personal security" Section 23 was intended to preserve. State v. Shelby, 2 S.W. 468, 469 (Mo. 1886).

The Debates on the 1875 Constitution illustrate, in unequivocal terms, the intention to avoid the type of conduct the Act not only allows, but sanctions. "Those who cannot remember the past are condemned to repeat it." George Santayana, Life of Reason I, Reason and Common Sense. The law favors constructions which harmonize with reason, and which tend to avoid unjust and unreasonable results. Laclede Gas Co. v. City of St. Louis, 253 S.W.2d, 832, 835 (Mo. banc 1953). Striking down the concealed carry Act as violative of Article I, Section 23 is precisely such a construction.

II. THE TRIAL COURT DID NOT ERR IN DENYING STATE'S MOTION TO TRANSFER VENUE BECAUSE VENUE WAS PROPER IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS IN THAT BROOKS, et al. JOINDER OF THE SHERIFF OF THE CITY OF ST. LOUIS WAS NECESSARY AND/OR PERMISSIVE, BUT NOT PRETENSIVE.

A. Missouri Law Clearly Permits The State To Be Sued In Any County In Which A Co-Defendant Resided.

The unanimous 1992 Missouri Supreme Court *en banc* decision in State ex rel. Missouri Dept. of Natural Resources v. Roper, 824 S.W.2d 901, (Mo. banc 1992), disposes of all legal, equitable and policy arguments alleging improper venue made by State based on the addition of the county official who would implement, supervise and enforce the Act. In Roper, this Court held that there was no constitutional or statutory requirement that such actions be brought only in the county of residence of the state agency.

There is no question under Missouri's venue law that a state official, and for the very same reason, the State itself, may be sued in any county in which a co-defendant resides or a plaintiff resides and a co-defendant may be found. §508.010.2 RSMo. The State keeps an office for the regular conduct of business in the City of St. Louis and it has offices throughout the State, with perhaps the largest concentration outside of Cole County being in the City of St. Louis. Consequently, Brooks, et al. filed their constitutional claims in the Circuit Court in the City of St. Louis where they reside and

where all Defendants could be found. This allowed many of the Plaintiffs to attend trial of this public matter, which they would have not been able to do in Cole County. Murphy is a proper party to a lawsuit filed in the jurisdiction where he lives and works, and where he would have to implement, supervise and enforce the Act if it is found to be constitutional.

B. The State Did Not Submit Any Evidence That The St. Louis City Sheriff Was Pretensively Joined And In Any Event A Valid Cause Of Action Was Stated Against All Defendants.

The State's argument appears to equate pretensive joinder with permissive joinder. In other words, the State argues that adding a permissive party after a lawsuit is filed is necessarily pretensive. If adopted, that argument would turn years of pleading practice, not to mention Missouri Rules of Civil Procedure 52.04 and 52.05, upside down. The end result would be that plaintiffs would only be allowed to join necessary parties after they have filed a lawsuit, as any permissive joinder would be deemed presumptive. Just because the local Sheriff was not initially named as a defendant does not mean that his addition later is presumptive. Would the State have made any objection if Murphy was named in the initial Petition? Despite the State's protestation to the contrary, Missouri law still allows plaintiffs to sue those parties they deem appropriate under Rule 52.05, whether they are named in the initial petition or added before the other defendants have answered.

"Pretensive joinder exists where joinder appears pretensive on the face of the pleadings *and* where no cause action exists against the joinder on defendant." (emphasis added) Lynch v. Blanke Baer and Bowey Krimbo, Inc., 901 S.W.2d 147, 153 (Mo. App. 1995). The Lynch case sets forth a conjunctive test requiring proof of both pretension on the face of the pleadings, as well as no recognized cause of action against the joined defendant. State ex rel. Breckenridge v. Sweeney, 920 S.W. 2d 901, 902 (Mo. banc 1996) If the petition fails to state a cause of action against the resident defendant or the petition does state a cause of action, but the record otherwise establishes no cause of action lies against the resident defendant venue may be pretensive. Since the State did not introduce any evidence through State to support its claim of pretensive joinder, on which it bears the burden of both proof and persuasion, the Court can look only to Plaintiffs' Amended Verified Petition. (LF 41-57) Breckenridge, 927 S.W. 2d at 902.

While the State's Answer does contain a general allegation, among other boilerplate defenses, that Brooks, et al. have failed to state a claim on which relief can be granted (LF154), Murphy does not even make this claim. (LF 116-118) More importantly, State has not preserved its claim that Brooks, et al. Amended Verified Petition fails to state a claim on which relief can be granted as that is not a point on appeal. That is because Brooks, et al. Petition does state the same causes of action jointly against all defendants and there is no basis therein or in the record in general to distinguish the claims made against Murphy. If Brooks, et al. Amended Verified Petition

states a cause of action against the State, the same allegations are valid against the local official charged with primary responsibility for the Act.

Since the lack of a recognized cause of action against the joined defendant is one of the required elements for pretensive joinder under Breckenridge and Lynch supra, State's argument must fail. In fact, in State ex rel. Malone v. Mummert III, 889 S.W. 2d 822, 824-827 (Mo. banc 1994), cited favorably by State, this Court rejected the argument that permissive joinder equates to pretensive joinder, holding that a party need not be necessary to the adjudication before he can be added after the initial petition is filed. The Malone court found that valid causes of action lay against two resident company officers and joinder was not pretensive merely because the corporate defendant was also a party or the officers may be unable to pay any judgment rendered. Id. Here, just because the State is a party does not mean venue is pretensive when Murphy is added. In fact, the presence of the local Sheriff is far more important here than the corporate officers in Malone, since it is his acts that are being enjoined directly.

C. The Sheriff Of The City Of St. Louis Is Needed For Just Adjudication.

In addition to being a proper and permissible defendant to this litigation, Murphy is also a necessary party under Rule 52.04. If the Trial Court's judgment is to have the injunctive effect intended, then the local law enforcement official the General Assembly charged with implementing, supervising and enforcing the law should also be enjoined. Certainly, this county official has an interest in the subject of the action and his absence may have impeded his ability to protect or even ascertain that interest. By adding the

local Sheriff, Brooks, et al. enabled the Trial Court to enjoin his conduct locally, removing any doubt that other sheriffs statewide could not proceed either. If this had not been done, other sheriffs could have made the argument that the injunction was not complete as it did not proscribe the conduct of a local sheriff like themselves. Other sheriffs might have even taken the position that the injunction did not bind their actions, as there was no party similarly situated before the Circuit Court of the City of St. Louis. Joinder of Murphy was needed for a just adjudication of this issue at all levels under Rule 52.04.

D. The State Has Mooted The Venue Issue By Withdrawing Its Request For A Change Of Venue.

Perhaps most telling is the State's admission that it no longer wants the case transferred to Cole County. (State's brief, at 51-52, 56-57) The Supreme Court need not address an issue for which the appealing party wishes to avoid relief. "When an event occurs that makes a decision on appeal unnecessary or makes it impossible for the appellate court to grant effectual relief, the appeal is moot and generally should be dismissed." State ex rel. Chastain v. City of Kansas City, 968 S.W.2d 232, 237 (Mo. App. 1998), citing State ex rel. Donnell v. Searcy, 152 S.W.2d 8, 10 (Mo. banc 1941) and State ex rel Hooker v. City of St. Charles, 668 S.W.2d 641, 643 (Mo. App. 1984). "We do not decide questions of law disconnected from the granting of actual relief." Id. at 237, citing Committee for Educ. Equality v. State, 878 S.W.2d 446, 454 (Mo. banc 1994). While an exception to the rule requiring dismissal of moot appeals exists, it is

narrow and in any event has not been invoked by State because it does not apply here. See Citizens for Safe Waste Management v. St. Louis County Air Pollution Control Appeal Bd, 896 S.W.2d 643, 645 (Mo. App. 1995) and State ex rel. Missouri Cable Television Assoc'n v. Missouri Pub. Serv. Comm'n, 917 S.W.2d 650, 652 (Mo. App. 1996).

By withdrawing its request for the relief a favorable ruling on the venue issue would occasion, the State has mooted this issue. "A question is moot when the question presented for decision seeks a judgment upon some matter which if judgment were rendered could not have any practical effect upon any then existing controversy." Promotional Consultations, Inc. v. Logsdon, 25 S.W.3d 501, 506 (Mo. App. 2000), citing Preisler v. Doherty, 265 S.W.2d 404, 407 (Mo. banc 1954). In Promotional Consultants, the Court found that a party who voluntarily dismissed its claim with prejudice had mooted its appeal and therefore had no prospect of relief that would have a practical effect. By voluntarily withdrawing its request for a change of venue to Cole County, the State has done the same.

III. BROOKS, et al. ARE NOT ENTITLED TO COSTS TAXED TO THE STATE PURSUANT TO A JUDGMENT IN THEIR FAVOR FINDING ONLY A VIOLATION OF ARTICLE I, SECTION 23 OF THE MISSOURI CONSTITUTION, BUT UPON A FINDING THAT THE CONCEAL AND CARRY ACT VIOLATES THE HANCOCK AMENDMENT, THE COURT CAN TAX COSTS AGAINST THE STATE PURSUANT TO ARTICLE X, SECTION 23 OF THE MISSOURI CONSTITUTION.

Brooks, et al. agrees with State that costs should not be taxed against the State based on the present trial court Judgment. The Trial Court held that the Act violated Article I, Section 23 of the Missouri Constitution and no statutory authority exists for the taxation of costs in light of State's sovereign immunity. Such immunity only applies to State and not other Defendants in the trial court. However, the Hancock Amendment to the Missouri Constitution, specifically Article X, Section 23, authorizes the taxation of costs against the State, including "reasonable attorneys' fees," if the taxpayer prevails. If a violation of the Hancock Amendment is found, then costs are appropriately taxed to the applicable unit of government, here the State. Mo. Const., Art. X, § 23.

Cross Appeal

IV. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 21 OF THE MISSOURI CONSTITUTION IN THAT, ON ITS FACE, THE ACT PREVENTS FUNDING OF THE ADDITIONAL COSTS CAUSED BY THE NEW OR INCREASED LOCAL ACTIVITIES OR SERVICES IT MANDATES, OTHER THAN TRAINING AND EQUIPMENT.

A. Unfunded Mandates Are Constitutionally Prohibited

Article X, Sections 16 et seq., commonly known as the Hancock Amendment to the Missouri Constitution, was enacted by the people of Missouri in 1980 to "rein in increases in governmental revenue and expenditures." Roberts v. McNary, 636 S.W. 2d 332, 336 (Mo. banc 1982). The intent of the Hancock Amendment was to "protect taxpayers from government's ability to increase the tax burden above that borne by the taxpayers" on the date it was approved. Fort Zumwalt Sch. Dist. v. State, 896 S.W. 2d 918, 921 (Mo. banc 1995).

Article X, Section 16 prohibits the State from "requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burdens to counties and other political subdivisions." Article X, Section 21 states "[A] new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the General Assembly or

any state agency of counties or other political subdivisions, unless the state appropriation is made and disbursed to pay the county or other political subdivision for any increased costs." Read together, these two sections prohibit the legislative practice commonly referred to as "unfunded mandates." They prevent the State from requiring counties or other political subdivisions to perform new or increased activities or services without providing a means for funding the increased costs caused by *each* mandated service or activity. Boone County Court v. State, 631 S.W. 2d 321, 326 (Mo. banc 1982).

B. The Act Only Allows Sheriffs To Use Permit Fees To Pay For The Purchase Of Equipment And To Provide Training.

While the Missouri General Assembly created an application fee in the Act, it also prohibited counties and other political subdivisions from using that fee to pay for most of the new or increased activities and services it mandated. Section 50.535.2 of the Act specifically states "This fund shall **only** be used by law enforcement agencies for the purchase of equipment and to provide training." (emphasis added) The General Assembly's use of the word "shall" in Section 50.535.2 of the Act is just as mandatory as the same language it used in Section 571.094.1, which requires that the "sheriff **shall** issue a certificate of qualification for a concealed carry endorsement." (emphasis added) On its face, the Act prohibits use of the sheriff's revolving fund established in Section 50.535.1 to pay for its implementation, beyond training and equipping personnel. In Larson v. City of Sullivan, 92 S.W.3d 128, 134 (Mo. App. 2002), the Court of Appeals indicated that if enabling legislation had contained a limitation on the use of the fee

levied, it would have enforced it. The General Assembly did place such a limitation on concealed carry application fees which the courts must enforce, thereby automatically triggering a Hancock violation.

C. The Act Does Not Allow Sheriffs To Use Permit Fees To Pay For The New And Increased Activities And Services It Mandates.

The Act plainly prohibits the expenditure of application fees to pay for the many new or increased activities and services it mandates. In numerous provisions of Section 571.094, the Missouri General Assembly sets forth a myriad of new or increased activities and services that county sheriffs or their designees "shall" perform to comply with the Act. Some of these mandates include:

571.094.5 "In order to determine the applicant's suitability for a certificate of qualification for a concealed carry endorsement, the applicant shall be fingerprinted."

"The sheriff shall request a criminal background check through the appropriate law enforcement agency"

"If no disqualifying record is identified by the fingerprint check at the state level, the fingerprints shall be forwarded to the Federal Bureau of Investigation for a national criminal history record check."

"Upon receipt of the completed background check, the sheriff shall issue a certificate of qualification for the concealed carry endorsement within three working days."

"the sheriff shall revoke any such certificate and endorsement within twenty-four hours of receipt of any background check that results in a disqualifying record, and shall notify the department of revenue."

571.094.6 "The sheriff may refuse to approve an application for a certificate of qualification for a concealed carry endorsement if he or she determines that any of the requirements specified in subsection 2 of this section have not been met, or if he or she has a substantial and demonstrable reason to believe that the applicant has rendered a false statement regarding any of the provisions of this section."

"If the applicant is found to be ineligible, the sheriff is required to deny the application, and notify the applicant in writing, stating the grounds for denial and informing the applicant of the right to submit, within thirty days, any additional documentation relating to the grounds of the denial."

"Upon receiving any additional documentation, the sheriff shall reconsider his or her decision and inform the applicant within thirty days of the result of the reconsideration."

"The applicant shall further be informed in writing of the right to appeal the denial pursuant to subsections 29, 30, 31, and 32 of this section."

571.094.8 "The sheriff shall keep a record of all applications for a certificate of qualification for a concealed carry endorsement and his or her action thereon."

"The sheriff shall report the issuance of a certificate of qualification to the Missouri uniform law enforcement system."

571.094.14 "Upon successful completion of all renewal requirements, the sheriff shall issue a certificate of qualification which contains the date such certificate was renewed."

571.094.15 "After six months, the sheriff who issued the expired certificate shall notify the director of revenue that such certificate is expired."

571.94.17 "After notification of the loss or destruction of a driver's license or nondriver's license containing a concealed carry endorsement, the sheriff shall reissue a new certificate of qualification within three working days of being notified by the concealed carry endorsement holder of its loss or destruction."

571.094.18 "If a person issued a concealed carry endorsement changes his or her name, the person to whom the endorsement was issued shall obtain a

corrected certificate of qualification for a concealed carry endorsement with a change of name from the sheriff who issued such certificate upon the sheriff's verification of the name change."

571.094.21 "The sheriff shall suspend or revoke the certificate of qualifications for a concealed carry endorsement."

571.094.26 "A firearms safety instructor shall be considered to be a qualified firearms safety instructor by any sheriff issuing a certificate of qualification for a concealed carry endorsement pursuant to this section if the instructor…" (emphasis added to all provisions)

The Missouri Highway Patrol has notified local law enforcement agencies that it will charge $38 to analyze each fingerprint card submitted by them pursuant to Section 571.094.5. (TR p. 17, l. 22--p.18, l. 6). In addition, the Act makes the local sheriff or police chief and their employers potentially liable for damages, including attorney fees and costs if they improperly deny or grant a concealed carry application. Sections 571.094.31 and 571.094.37 At trial, Brooks, et al. proved that the unique limiting language of the Act found in Sections 50.535.1 and 2 prevented counties from funding these services and activities. See trial testimony of Captain Phillip Moran (TR p. 13--46, 74) and Sheriff John Merritt (TR p. 46--52, 93-109). None of these activities, services, expenditures or risks can be funded under the Act because the General Assembly limited

expenditure of the application fees to "the purchase of equipment and to provide training." Section 50.535.2

D. The Act Mandates Many New Or Increased Activities Or Services Which Will Result In Significantly Increased Costs.

Brooks, et al. offered testimony from Captain Phillip Moran, the Jackson County Sheriff's officer responsible for complying with this law (TR p. 13, l. 13--p. 14, l. 4), that these new or increased activities or services will result in increased personnel costs of $150,000 in Jackson County alone. (TR p. 14, l. 18--p. 15, l. 14). Captain Moran also testified that Jackson County could not use the concealed carry application fees to pay the increased costs resulting from these mandated services and activities because it would violate the law on its face. (TR p. 30, l. 10--25; p. 40, l. 4--21). Captain Moran explained that is because the General Assembly, for whatever reason, limited the expenditure of the "sheriff's revolving fund" to *only* "the purchase of equipment and to provide training." (TR p. 43, l. 24--p. 46, l. 1).

Captain Moran provided uncontroverted evidence of increased costs of $150,000 in Jackson County to fund the General Assembly's mandate. In fact, the Jackson County Sheriff requested this amount from the JacksonCounty Legislature to provide these mandated activities or services since the State did not provide any funding. (TR p. 14, l. 18--p. 15, l. 14; p. 25, l. 16--p. 30, l. 5). Even the State's witnesses admitted that they will be required to perform new or increased activities or services which will result in increased time and costs to their counties. (TR p. 63, l. 11--p. 71, l. 25). The Act, as

written, violates the Hancock Amendment because it requires new or increased activities or services of counties and other political subdivisions without any way to pay for them, through application fees or any state appropriation. (TR p. 25, l. 16--p. 30, l. 9; p. 63, l. 11--p. 71, l. 25).

E. The Numerous Unfunded Mandates In The Act Violate The Hancock Amendment.

"Thus, by its plain language, a violation of Art. X, §21 exists if both (1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service." Miller v. Director of Revenue, 719 S.W.2d 787, 788-789 (Mo. banc 1986). See also Missouri Municipal League v. Brunner, 740 S.W.2d 957, 958 (Mo. banc 1987). Brooks, et al. produced substantial evidence not only of new or increased activities or services mandated by the Act, but also of increased costs required to pay for these activities or services. The litany of new or increased activities or services testified to by Captain Moran (TR p. 25, l. 16--p. 30, l. 5) will cost the Jackson County General Assembly $150,000 for additional personnel to administer the Act. Even the State's witnesses admitted increased costs, from $10,000 in Greene County (TR p. 46, l. 20--p. 47, l. 17) to the $38 fee Cape Girardeau and the other counties will have to pay the State for each fingerprint analysis. (TR p. 17, l. 22--p. 18, l. 23; p. 47, l. 18--p. 48, l. 22; p. 62, l. 5-9; p. 74 l. 5-18; p. 86 l. 8-p. 87 l. 24). The State's witnesses also admitted that a number of the

activities or services mandated by the Act were new or at least increased in relation to their prior levels. (TR p. 63, l. 11--p. 71 l. 25).

Any activity or service beyond the purchase of equipment and the provision of training that requires more than a *de minimus* cost increase constitutes a violation of Hancock Amendment. The word "any" as used in a constitutional provision is "all-comprehensive, and is equivalent to 'every'." State ex rel. Randolph County v. Walden, 206 S.W.2d 979, 983 (Mo. 1947). As the Supreme Court found in Boone County Court v. State of Missouri, 631 S.W.2d 321, 325 (Mo. banc 1982), "Read in the alternative as they are composed and broadly as required by the term 'any', 'service' refers to county governmental action performed for the benefit of its residents; 'activity' refers to the general functioning and operation of county government in performing services. 'Any activity' as applied to county functioning encompasses every increase in the level of operation in that government." The Boone County case then went on to hold that a salary increase is "an increase in the level of any activity" under Article X, Section 21 of the Missouri Constitution.

F. The Increased Costs Are Not *De Minimus* As This Court Has Found Lesser Costs Violate The Hancock Amendment.

In City of Jefferson v. Missouri Department of Natural Resources, 916 S.W. 2d 794, 796 (Mo. banc 1996), the Supreme Court held that approximately $15,000, only one-tenth of the cost Jackson County alone will incur as a result of the Act, is more than a *de minimus* expenditure. The 849 work hours projected to prepare the Jefferson City

solid waste management plan is also less than the 1,000 hours of additional personnel time projected by the Greene County Sheriff to comply with the Act. (TR p. 46, l. 20-p. 47, l. 17) This Court has already held that time, staff and money increases less than those Jackson County will experience by itself establish more than the *de minimus* increase in administrative costs which trigger a violation of the Hancock Amendment.

In its initial November 7, 2003 Judgment and Order of November 7, 2003, (LF 379), Judge Ohmer relied on County of Jefferson v. Quick Trip Corp., 912 S.W.2d 487, 491 (Mo. banc 1995) to reject all claims of Hancock violations. This case merely held that the transfer of sales tax revenue for TIF financing purposes did not mandate new activities by the county because they were to be performed and paid for entirely by the city which collected the funds. The County of Jefferson case specifically found that the county's only administrative activity of calculating the amount due and writing the checks to the city was *de minimus*. Here new or increased activities are clearly not *de minimus*. Based on the evidence presented by Brooks, et al., the Jackson County Sheriff will have to write thousands of checks to the State just to pay for the fingerprint analyses. (TR p.17, l. 22--p.18, l. 23; p. 21, l. 14--p. 23, l. 4) And this is only one small part of the activities and services mandated by the Act that will be performed not only in Jackson County, but repeatedly throughout the 114 counties in Missouri for years to come. (TR p. 19, l. 18; p. 20, l. 16; p. 25, l. 16; p. 30, l. 5; p. 63 l. 11--p. 71, l. 25; p. 89, l. 12--p. 93, l. 5).

Jackson County's costs from these new and increased activities and services are more than enough to trigger the Hancock Amendment. Extrapolating the evidence statewide, the burden placed on Missouri counties by this unfunded mandate will easily be well into the millions of dollars. Because the General Assembly failed to appropriate funds that can be used to pay for such new and increased activities and services, the Act is clearly unconstitutional.

V. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE X, SECTIONS 16 AND 22 OF THE MISSOURI CONSTITUTION IN THAT, AS APPLIED, THE PERMIT FEES USED FOR PURPOSES OUTSIDE THE ACT CONSTITUTE A GENERAL REVENUE TAX NOT APPROVED BY THE VOTERS.

A. No Taxation Without Voter Approval

The State presented the testimony of three county sheriffs who explained their own plans for applying the Act in their jurisdictions. These disparate plans clearly violate the letter of the Act in a number of ways, some of which give rise to other constitutional violations of the Hancock Amendments.[15] Article X, Section 16 states "[P]roperty taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." Article X, Section 22 prohibits "counties and other political subdivisions… from levying any tax, license or fees, not authorized by law, charters or self enforcing provisions of the Constitution…without the approval of the required

[15]Brooks et al. moved pursuant to Rule 55.33(b) to amend their Amended Verified Petition, both before and after judgment, to conform to the new issues raised by State's witnesses, but the Trial Court denied these motions. (LF 435-454, 455-460, 475) See Points Relied on VIII of this Brief.

majority of the qualified voters of that county or other political subdivision voting thereon." In other words, neither the State, nor any of its counties or other political subdivisions can levy a tax, license or fees which increases general revenue without voter approval.

B. The Four Sheriffs Who Testified Clearly Demonstrate The Incompatibility Of The Conceal and Carry Act With Of The Hancock Amendment.

Captain Moran testified that Jackson County could not and would not shuffle funds around to pay for the Act because any such subterfuge would violate the Constitution. (TR p. 43, l. 24--p. 46, l. 1). To the contrary, the sheriffs of Greene, Cape Girardeau and Camden counties came up with three different ways of shuffling funds to pay their increased costs, but these only raise new violations of either the Act or Article X, Sections 16 et seq. of the Missouri Constitution.

Jack L. Merritt, the Greene County Sheriff, testified that he anticipated an additional 1000 hours of part-time personnel costs per year for a total of approximately $10,000 in increased costs. (TR p. 46, l. 20--p. 47, l. 17). He stated that he would use his discretionary fund containing civil fees collected in other matters to pay the State's $38 charge for a fingerprint analysis and then reimburse that fund out of the money collected from concealed carry applicants. (TR p. 47, l. 18--p. 48, l. 22). The Sheriff even admitted that Greene County would make money in the process because its costs to administer the Act would be significantly less than the $100 fee he would charge for each

application. (TR p. 51, l. 21--p. 52, l. 18; p. 106 l. 5--19). In fact, it would take only 108 applications at Green County's quoted fee of $100 each to pay for the maximum anticipated annual cost in Greene County, including both personnel and equipment. (TR p. 101, 1. 11--17, p. 103, 1. 4--7)

John Page, the Camden County Sheriff stated that he intended to obtain two checks from applicants, one in the amount of $38 made payable to the State for the fingerprint analysis and the other for the remaining $62 of the $100 authorized fee which he would deposit in his "revolving fund." (TR p. 62, l. 5--9). The Cape Girardeau Sheriff, Dwight Jordan testified that he would place the entire $100 application fee in his revolving fund and pay the State $38 for each fingerprint analysis based on its monthly invoice. (TR p. 86, l. 8--p. 87, l. 24). Both of these Sheriffs also testified that the application fees they anticipated receiving were more than sufficient and would exceed the costs they would incur to comply with the Act. (TR p. 6, l. 1--6, p. 85, l. 4--23) In fact, since both of these Sheriffs did not testify to any additional cost to implement the Act, their $62 and $100 fees respectively constitute pure profit to their counties.

Jackson County will receive over $200,000 in fees above what it anticipates it will cost to fund the Act locally, even if their use was not limited to training and equipment. While according to Captain Moran, Jackson county will not use its excess funds for non-conceal carry purposes, eventually something will be done with the money accumulating in the revolving fund. (TR p. 15, l. 8--11; p. 21, l. 14--p. 22, l. 6; p. 36, 1. 10--p. 37, l. 18) Whether Jackson County eventually follows the lead of Greene County, whatever is

done with the excess fees must necessarily supplement or supplant general revenue needs.

C. The State's Own Evidence Proves Both Violations Of The Hancock Amendment And The Conceal And Carry Act Itself.

While creative, none of the counties' schemes for dealing with the limitations imposed by the General Assembly in Sections 50.535.1 and 2 passes constitutional muster and some even violate the Act itself. For instance, Cape Girardeau's plan to pay the State $38 per application for fingerprint analysis is a clear violation of Section 50.535.2, as that expenditure has nothing to do with the purchase of equipment or the provision of training. Camden County's plan to obtain two separate checks in order to process the application violates Section 571.094.10, which requires that the fee collected "**shall**" be paid to the treasury of the county to the credit of the sheriff's revolving fund." (emphasis added)

Section 50.535.1 states that all fees collected "**shall** be deposited by the county treasurer into a separate interest-bearing fund to be known as the county sheriff's revolving fund…." (emphasis added) There is no provision in the Act for the payment of two fees or their payment to two different government entities. The collection of $38, which is not deposited into a sheriff's revolving fund but instead diverted elsewhere, violates the Act on its face. It also raises the possibility that county officials could misapply concealed carry application fees, mistakenly or intentionally, in violation of the General Assembly's precise instructions.

D. Shuffling Funds In An Attempt To Comply With Both The Act And The Hancock Amendment Makes Matters Worse.

The most egregious Hancock violations will occur in Greene County which plans to shuffle funds from one account to another to avoid the General Assembly's self-imposed limitation to use the money collected only for the purchase of equipment and to provide training. First, the Greene County Sheriff's use of county revenue from other sources in his "discretionary fund" to pay for applicants' fingerprint analyses is clearly improper, whether or not this money is reimbursed. Rolla 31 School District v. State, 837 S.W.2d 1, 7 (Mo. banc 1992) prohibits using general funds, even if they are unrestricted, to fund a specific mandate without statutory authority. That is because use of the Sheriff's "discretionary fund" to pay for the Act necessarily forces the county "to raise additional tax money to pay for the program previously supported by the unrestricted funds." Id.

Second, any direct reimbursement of a sheriff's discretionary fund from application fees in the revolving fund established by Section 50.535.1 is clearly not permitted by Section 50.535.2. Third, the use of money collected from concealed carry applicants to purchase equipment or provide training having nothing to do with the Act is clearly a new tax in the guise of a fee, which was not approved by the voters. Even if the non-concealed carry training and equipment would have otherwise been purchased with the Greene County Sheriff's discretionary fund, this shubbing of accounts is still an illegal end run around the General Assembly's limitations in the Act.

Moreover, this is particularly true if Greene County actually sees a net gain in fee income as Sheriff Merritt testified it would. (TR p. 51, l. 21--p. 52, l. 18; p. 106, l. 20--p. 107, l. 20). By definition, fees collected in excess of training and equipment costs must eventually be used for purposes other than paying for the activities and services mandated by the Act. Greene County's shuffle of funds between accounts in an attempt to comply with Sections 50.535.1 and 2 results in a number of automatic violations of the Hancock Amendment as discussed below. If the other two counties which have no significant costs to pay do the same "shuffle," or simply misapply funds or mix accounts, they also will violate the law. The State's witnesses candidly and even blithely admitted they will violate the law in an attempt to make it work—a very dangerous precedent for officers sworn to uphold the law. (TR p. 86, l.8-p.88, l. 1)

E. Application Fees Used For Purposes Other Than Administering The Act Constitute A Tax Levied Without A Popular Vote.

A question may exist as to whether the concealed carry application fee is considered a "user fee" under the five-part test set forth in Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 303 (Mo. banc 1991). While Brooks, et al. contend that this application fee is a "tax, license or fees" that requires voters approval under the Hancock Amendment when these factors are applied, the thrust of their argument is different. When money collected allegedly to pay for the Act is directed to other purposes as the Greene County Sheriff said he would do (TR p. 50, l. 2--13; p. 106, l. 5--19), it clearly is no longer a *user* fee. Once the Greene County Sheriff has purchased

equipment and trained employees for purposes of the Act, any other use of application fee income becomes a "tax, license or fees" that requires voter approval under Article X, Section 22. This is even more true when the Greene County Sheriff admits that the $100 application fee he will charge will produce more revenue than his costs to pay for with the Act (TR p. 51, l. 21--p. 52, l. 18; p. 106, l. 20--p. 107, l. 20), even after he has shuffled funds in an illegal and ineffectual attempt to comply with its provisions. By using its profit from the concealed carry application fees for non-concealed carry purposes there is no longer any doubt that Greene County will be taxing its citizens without voter approval.

The same is true in Jackson County based upon the testimony of Captain Moran who admitted that the application fees collected by the Sheriff will significantly exceed the $150,000 personnel cost request made to the County Legislature. (TR p. 36, l. 10--p. 37, l. 24). While Captain Moran stated that the his Department could not and would not use these excess funds for other purposes, unlike Sheriff Merritt, there is no provision to expend accumulating revenue once the Sheriff has purchased equipment and trained his personnel. (TR p. 43, l. 24--p. 46, l. 1). At some point in time the excess funds in Jackson County and other counties throughout Missouri will undoubtedly be used for other purposes normally paid by general revenue, whether the sheriff agree to do so or not.

F. A "User Fee" Appropriated To Supplement Or Supplant General Revenue Is A Tax Subject To The Hancock Amendment.

In Zahner v. City of Perryville, 813 S.W.2d 855, 859 (Mo. banc 1991) the Supreme Court found that a special assessment for street improvements was not a tax unless it raised revenue to defray other governmental expenditures, rather than compensating public officers for particular services rendered. User fees become general taxes which require a supplement or supplant funds used to pay for general services or activities. How the General Assembly describes a charge does not determine whether it is subject to the Hancock Amendment. Id at 858. "Thus, courts must examine the substance of a charge to determine if it is a tax subject to the Hancock Amendment, without regard to the label placed on the charge." Mullenix-St. Charles Properties, L.P. v. City of St. Charles, 983 S.W.2d 550, 561 (Mo. App. 1998), (citing Keller v. Marion County Ambulance Dist., 820 S.W. 2d 301, 303-305 (Mo. banc 1991)). If user fees are paid into general county funds or "or used to meet governmental needs or costs" then they are considered a general tax requiring a public vote. St. Louis County v. Hanne, 761 S.W.2d 697, 701 (Mo. App. 1988). While a mandate, under-funded by user fees, does not violate the Hancock prohibition against taxation without a vote, an over-funded mandate clearly does. Ashworth v. City of Moberly, 53 S.W. 3d 564, 577 (Mo. App. 2001).

The Act is over-funded for two reasons, the first because the user fees clearly exceed the cost of providing the new or increased activities and services and the second

because the Act on its face prohibits using those fees to pay for most of the activities and services mandated. The Greene County Sheriff clearly testified that the revenue he raises, both the funds he will shuffled to provide services under the Act and the additional profit received, would be used to defray customary governmental expenditures normally paid out of county funds having nothing to do with the Act. This unilaterally imposed tax violates the Hancock Amendment unless voters approve it.

G. The Act Eviscerates The Hancock Amendment And Evades The Will Of The People.

If not enjoined, the Act will eviscerate the Hancock Amendment and by doing so, evade the will of the people of Missouri. The testimony offered by the State clearly shows not only the intent, but actual plans to avoid the constitutional limitations of Article X, Section 16 et seq. Three county sheriffs, government officials sworn to uphold the constitution, testified that they would administer the funds generated by the Act in violation of the Hancock Amendment or the Act itself. Between them, these sheriffs and presumably other sheriffs like them will: 1) not deposit all of the application fees into the sheriff's revolving fund in violation of Sections 571.094 and 50.535.1; 2) use the county sheriff's revolving fund for purposes other than the purchase of equipment or to provide training in violation of Section 50.535.2; 3) use money from other revenue sources to pay for activities or services mandated by the Act in violation of Article X, Sections 16 and 21; 4) use money from the county sheriff's revolving fund to purchase equipment and provide training having nothing to do with implementation of the Act in violation of

Article X, Sections 16 and 22; and 5) charge application fees exceeding the cost of providing the new or increased services and activities to fund general expenditures that would normally require the voters to approve a separate tax, also in violation of Article X, Sections 16 and 22.

The Act provides a road map for the General Assembly or any of its political subdivisions to create a statutory scheme in which a user fee is created or increased to pay for alleged activities or services, but part or all of the money received is diverted to pay for other unrelated government costs without a public vote. For instance, the State could assess a user fee for certain roads or bridges, similar to a turnpike authority, charge more than it cost to build and/or maintain the facilities and authorize use of the excess "user fees" to pay for general revenue expenditures such as other roads, parks or any other purpose–all to avoid having to ask the people of Missouri for a tax increase. This road only leads to endless government shuffles of various taxes, licenses or fees to pay for things never intended by the people, and ultimately by the lawmakers themselves. At best, it is misguided and at worst, fraudulent. An injunction was and is also necessary to prevent an Act from taking effect that on its face prohibits expenditure of the funds necessary to pay for its implementation. The Missouri General Assembly passed a plainly unconstitutional Act and government officials can only make it worse by trying to creatively enforce it.

VI. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT IS VOID FOR VAGUENESS IN THAT THE ACT FAILS TO PROVIDE ADEQUATE NOTICE OF THE PROHIBITED CONDUCT AND SET STANDARDS FOR ITS FAIR ENFORCEMENT.

A. Due Process Requirements

This Court has set forth the grounds on which a law may be invalidated due to vagueness. They are identical to the grounds set forth by the United States Supreme Court for vagueness challenges. A penal law may be invalidated due to vagueness for *either* 1) failing to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits, *or* 2) authorizing or encouraging arbitrary and discriminatory enforcement. City of Chicago v. Morales, 527 U.S. 41, 56 (1999). This Court has stated: "A criminal statute must convey adequate warning of the proscribed conduct when measured by common understanding and practices." State v. Lee Mechanical Contractors, Inc., 938 S.W.2d 269, 272 (Mo. banc 1997). "A statute imposing criminal penalties must be sufficiently specific to give notice to a potential offender so that people of common intelligence do not have to guess at the meaning." Id. "Additionally, a statute is vague if it lacks explicit standards necessary to avoid arbitrary and discriminatory application by the state." State v. Barnes, 942 S.W.2d 362, 366 (Mo. banc 1997).

In Morales, the United States Supreme Court held unconstitutionally vague an anti-gang ordinance that prohibited criminal street gang members from loitering in any public place without an apparent purpose. The ordinance failed to meet the notice requirement because it did not give ordinary citizens adequate notice of what was prohibited and what was permitted. The line between innocent conduct and criminal conduct was not apparent in the ordinance. The ordinance also failed the second test for vagueness in that it provided absolute discretion to police to determine what activities constituted the crime of loitering.

The Court in Morales found that the vagueness of the ordinance made a facial challenge appropriate because it was a criminal law that had no *mens rea* requirement and infringed on constitutionally protected rights. 527 U.S. at 55. The present legislation is a criminal law, has no *mens rea* requirement, and infringes on the constitutionally protected rights of Missouri citizens. This Court has held that a key factor in determining whether a criminal statute is vague is whether a scienter, or *mens rea*, requirement is present. In Lee Mechanical, the statute required a specific intent to willfully violate prevailing wage laws. This Court held that the scienter element cured any uncertainty as to the meaning of the disputed terms. Lee Mechanical Contractors, Inc., 938 S.W.2d at 272. See also State v. Shaw, 847 S.W.2d 768 (Mo. 1993).

B. The Act Does Not Have a Scienter Requirement

There is no scienter requirement in the legislation at issue here. A person becomes subject to criminal penalties for carrying a concealed weapon in a location where there initially is no criminal prohibition against doing so. That person immediately becomes

criminally liable if he or she refuses to leave the premises and a peace officer is summoned. It is not a crime to enter one of the 17 listed locations with a concealed weapon, but only becomes a crime when the person refuses to leave. But the legislation does not require that a person be advised it is illegal to carry a concealed firearm in that location, nor does it set forth what notice or demand must be made on the person to leave the premises. There is simply no requirement that the person knowingly violate the provisions of the law.

The present case is similar in many respects to State v. Young, 695 S.W.2d 882 (Mo. banc 1985), where this Court held a statute prohibiting one's presence at any place used for the purpose of cockfighting to be unconstitutionally vague and in contravention of the due process clause. An offender was subjected to criminal liability under that statute without having any knowledge that a cockfight had taken place or would take place, or that the facility was a place used for such activities. 695 S.W.2d at 884. In the present case, persons can at first, without criminal penalty, enter any home or building in the state with a concealed weapon if they have a permit. Then at the whim of an owner or occupier, who summons a peace officer, the person can suddenly become subject to criminal penalties.

The Act begins by allowing permit holders to carry concealed firearms with a proper permit, then it states where that conduct is not permitted, even with a permit. In this regard, the list of 17 quasi-prohibited concealed carry locations renders the proscribed conduct as *malum prohibtum*, or a wrong prohibited, and not *malum in se*, because the conduct is no longer wrong in itself. The Act provides that carrying a

concealed firearm is no longer wrong in itself if the person has a valid permit. State v. Bratina, 73 S.W.3d 625, 628 (Mo. banc 2002.) Because the conduct is *malum prohibitum*, a higher standard applies. The "statute must be precise because a person would not have a common societal understanding that he or she is committing a crime." Bratina, 73 S.W.3d at 628. Indeed, the new legislation sets up a statutory scheme to both permit and limit regulate the carrying of concealed firearms, but specifically states that entering one of the listed locations with a concealed firearm is not a criminal act.

C. U.S. Supreme Court Held A Similar Law Void For Vagueness

The flaws of the legislation here mirror almost exactly those of the anti-gang ordinance in Morales. In that case, the Chicago ordinance aimed at gang activity first required a police officer to believe that one of the two or more persons present in a public place was a criminal street gang member. The persons had to be loitering, which was defined as remaining in any one place "with no apparent purpose." Then the officer had to order all the persons to disperse. The final element arose when a person disobeyed the officer's order. 527 U.S. at, 47. In Morales, the Court found the phrase "to remain in any one place with no apparent purpose" to be unconstitutionally vague. The Court questioned how anyone could know someone else's purpose. That simply requires speculation, which often is colored by the preconceptions or prejudices of the peace officer. Likewise, here no one can know in advance if the person controlling the property will permit concealed carry, or prohibit it by summoning a peace officer. The property "controller's" purpose regarding permitting concealed firearms may vary with the person

carrying the weapon, either party's reason for being there, or merely time of day and how the person in control feels at the time.

It can be no defense that the legislation does not impose criminal penalties until after the person refuses to leave a location at the request of the owner or manager. Chicago made this precise argument in Morales, suggesting that the police officer's direction to disperse resolved any question about notice of the nature of a violation. The Supreme Court rejected this argument easily, first by concluding that the very conduct the ordinance was meant to prohibit would have already occurred by the time the officer made the dispersal order. The Court stated, "If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965)." The Court found that since a police order could only be issued after the prohibited conduct had already occurred, the dispersal order could not provide the kind of advance notice that would protect the putative offender from being ordered to disperse.

The situation with the Missouri law is even more offensive. It is not the unbridled discretion of a police officer which is at work, but the total whim of the home owner or business manager of the property. The offensive conduct, that being the presence of a person with a concealed weapon, will have already occurred by the time the owner or manager makes the request that the person leave. But the owner or manager has total discretion, with no standards in the law, to determine who can stay with a weapon and

who cannot. The restaurant manager's cousin who has a permit and has a concealed weapon might be allowed to stay in the restaurant, while the businessman carrying a concealed weapon might be asked to leave. Also, an unexplained request to leave need not be followed. See Morales, O'Connor and Breyer concurring, 527 U.S. at 69. There can be situations where the owner or manager may not be justified in requesting that the person leave, such as when someone else with authority has given that person permission to be on the property with the concealed weapon.

The lack of guidelines for a request to leave also compounds the inadequacy of the notice afforded by the law. The Morales Court would ask these questions in the present case: How long must the person with the weapon stay away? Must everyone with a concealed weapon be asked to leave when one person is asked to leave ? Is the person barred forever, or just until a different person is there to give consent? It is clear that more than one person would have authority to consent or not to consent to the presence of concealed weapons. Most of the exceptions refer to the consent of the "owner or manager." What if the owner of a bar gives his brother-in-law permission to carry his gun into the bar, but the manager asks him to leave? Has he violated the law? What if the pastor of a church says that parishoners cannot bring their weapons to church, but the president of the church consistory says they can?

Because the Act has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment, it should also be struck down as vague. Morales. The purpose of setting out locations where the ability to carry a concealed firearm with a permit could be prohibited was to ensure the safety of those

locations, such as schools and churches. However, mere consent by anyone with any authority over those premises totally guts the provisions of the law.

D. The Act Forces Hobson's Choice on Homeowners and Businesses

Grave premises liability ramifications arise from the Act for all owners or occupiers of land, from homeowners and business owners to landlords and tenants. Missouri has a complex system of determining liability of an owner or occupier of property based upon the status of the entrant on the land of another. Adams v. Badgett, 114 S.W.3d 432 (Mo. App. 2003). The Act will force a duty on homeowners to interrogate any visitor and businesses to interrogate any patron. For it is not illegal to enter a home or business carrying a concealed firearm. It is only a crime if the person with the concealed firearm refuses to leave when asked. But how will the homeowner or business owner know who is carrying a concealed weapon without inspection, interrogation, or search? Posting a no-weapons sign, as allowed by the legislation, has no effect. A person commits no crime by ignoring the sign. Is the homeowner who does post a sign, but does not enforce it with searches of visitors, liable when visitors use their concealed firearms? On the other hand, is the homeowner who does not post a sign liable when visitors who use concealed firearms in the home because they did not warn of the no-guns policy?

If they truly want to give the best notice possible regarding their no-guns policy, Missouri residents hosting holiday parties might be well advised to send invitations that say: "Happy Holidays: No Gifts. No Guns." In addition, holiday visitors might see a large sign telling them to leave their guns in the car. But even then, it is not a crime for a

visitors to ignore their hosts and enter their home with a concealed firearm. This Hobson's choice given to all premises owners violates their constitutional rights as well.

E. Exemplar Provisions Which Fail To Provide Adequate Notice Of Prohibited Conduct And Set Standards For Fair Enforcement

Several specific provisions of the legislation are stark evidence of the vagueness of the measure. Section 571.094.2(6) requires that a person applying for a concealed carry permit prove he "has not engaged in a pattern of behavior, documented in public records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others." This total grant of discretion to the sheriff is precisely the type of standardless system which the Morales Court sought to prevent.

571.094.20(7) which relates to whether concealed firearms can be taken into restaurants and bars requires an unbelievable level of inquiry by the public before they enter such an establishment with a concealed firearm. This section requires that a person determine how many persons are allowed in the facility, and whether the establishment receives at least 51% of its gross annual income from the dining facilities by the sale of food. If so, the concealed weapon is allowed. Because these facts are not apparent to any member of the general public, there is a true lack of notice of what conduct is permitted in such an establishment.

In addition, Section 571.094.20(15), which appears to attempt to set forth methods by which property owners can warn that their property is off-limits to concealed firearms, is so confusing as to be of no value to the average citizen. While the first sentence appears to allow private property owners to post off-limits signs, it is not clear if the first

sentence applies to residential property, business property, neither or both. A later sentence in the same section refers to signs by employers, but includes no standards for such signs as the first sentence does. Provisions regarding employees are likewise unclear.

VII. THE TRIAL COURT ERRED BY NOT DECLARING THE CONCEAL AND CARRY ACT UNCONSTITUTIONAL AND ENJOINING IT BECAUSE THE ACT VIOLATES ARTICLE I, SECTION 1 OF THE MISSOURI CONSTITUTION IN THAT THE ACT USURPS THE PEOPLES' WILL AS EXPRESSED BY THE DEFEAT OF PROPOSITION B IN 1999.

The State of Missouri was founded on that principle that supreme power resides in its citizens. Accordingly, Article I, Section 1 of its Constitution provides:

> "§ 1. Source of political power—Origin, basis and aim of government-That all political power is vested in and derived from the people; that all government of right originates from the people, **is founded upon their will only**, and is instituted solely for the good of the whole." (emphasis added)

In 1908, the people of Missouri believed so strongly in their right to determine the law under which they lived that they amended the Constitution to add Sections 49 through 53 of Article III. These provisions reserved the power to enact laws by initiative of the people or upon referral from the legislature:

> "§49. Reservation of power to enact and reject laws—The people reserve power to propose and enact or reject laws and amendments to the constitution by the initiative, independent of the general assembly, and also reserve power to approve or reject by referendum any act of the general assembly, except as hereinafter provided."

In 1999, the Missouri General Assembly considered concealed carry so important, and so *divisive*, that it elected to refer the issue to the voters pursuant to Article III, Section 52(a) of the Missouri Constitution. The defeat of Proposition B reiterated the public policy of this state regarding wearing concealed weapons. Concealed carry was an appropriate subject for a referendum. Mo. Const. Art. III, §52(a). Governor Carnahan encouraged a vote of the people on this political issue despite the fact that he would lose any veto power over the result pursuant to Article III, Section 52(b) of the Missouri Constitution. Missouri citizens responded by rejecting concealed carry as set forth in Proposition B, despite an expensive advertising campaign supporting concealed carry mounted by entities within and outside of Missouri. To our knowledge, this is the only time the issue of whether to legalize concealed carry has been submitted to a public vote in the United States. Proposition B was very similar to the Act.

The purpose of the referendum process is primarily to restrict or subject to more immediate control the lawmaking power. State ex rel. Drain v. Becker, 240 S.W. 229, 231 (Mo. banc 1922). "If [the people] determine, as they have in the adoption of the ... referendum, to limit the province or modify the purview of the Legislature in the adoption or rejection of laws, there is no power that can say them nay." Id. at 230.

Rather than accepting "NO" as the answer, this year the General Assembly voted to ignore the public policy set by the people of this state. Governor Holden vetoed the concealed carry bill in an effort to preserve the will of the people, among other constitutional concerns, to no avail. By passing the Act, Missouri lawmakers ignored the peoples' decision to prohibit concealed carry in 1999, as well as in 1875 and 1945. Acts

of the General Assembly that violate the public policy of this state as set forth by the people in the Constitution are void. Rutledge v. First Presbyterian Church of Stockton, 212 S.W. 859, 860 (Mo. banc 1919). The same is true of the more recent public policy statement of the people, referred to them by the General Assembly in Proposition B. The State argues at length that great deference must be given to legislative enactments, but should not more be given to the people whom the General Assembly is supposed to represent.

VIII. THE TRIAL COURT ERRED BY DENYING BROOKS, ET AL, PRE- AND POST-JUDGMENT MOTIONS TO AMEND PLEADINGS TO CONFORM TO THE EVIDENCE BECAUSE RULE 55.33 CONTEMPLATES SUCH AN AMENDMENT IN THAT THE TESTIMONY OF STATE'S WITNESSES RAISED NEW HANCOCK VIOLATIONS.

On October 30, 2003, Brooks, et al. filed a Verified Motion to Amend Pleadings, which was denied by the Circuit Court without further comment in its Judgment and Order of November 7, 2003. (LF-377) On November 20, 2003, Brooks, et al. filed a Verified Motion to Amend Pleadings (Post-Judgment) (LF 431), which was denied by the Circuit Court after a hearing held December 18, 2003.[16] (LF 475) Brooks, et al. sought in all instances to amend their Amended Verified Petition to add the allegation that provisions of the Hancock Amendment other than those identified in their Amended Verified Petition, namely Article X, Sections 16, 18 and 22, would be violated based on the testimony of State's witnesses at trial. Specifically, Brooks, et al. sought to add the following to paragraph 2l (a)(2)(iii):

(3) Article X, Section 22 of the Missouri Constitution also prohibits counties and other political subdivisions levying new, or increasing the current levy of "tax, license or fees without approval of the required majority of the

[16] The request to amend the pleadings was also contained in Brooks' et al. Motion for New Trial or, in the Alternative, to Amend Judgment filed November 20, 2003. (LF 331-350)

qualified voters of that county or other political subdivision voting thereon." If a county or other political subdivision converts the concealed carry user fees for other purposes, such as the purchase of equipment or to provide training having nothing to do with the subject law, this constitutes the levy of a new or increased tax, license or fee without voter approval.

A county or other political subdivision cannot shift revenue from one source to an entirely different use, particularly if the result is an increase in net revenue, without a local public vote. Article X, Section 22 Mo. Const. Nor can the State of Missouri assess a user fee to be collected by a county or other political subdivision and authorize its use for purposes other than the law it supports. Article X, Sections 16 and 18, Mo. Const.

In support of their Motion, Brooks et al. stated that one or more of the county sheriffs State presented as witnesses testified that it was their intention to use money from their "sheriff's revolving fund" established by Section 50.535 RS Mo. for purposes other than implementing and enforcing the Act, if and when it goes into effect. A user fee used to pay for something other than the subject government activities or services becomes a general tax, license or fee. Article X, Section 22 of the Missouri Constitution requires that any such new or increased tax, license or fee be approved by the voters. If the government is allowed to shift user fees from the program that they are intended to support to other programs, the whole intent and purpose of the Hancock Amendment to the Missouri Constitution will be been avoided.

Furthermore, based upon testimony from the sheriffs, the concealed carry user fees they will charge under the Act substantially exceed the costs of administering the law, even if the legislature had permitted use of the funds for all concealed carry purposes, not just training or equipment. As the witnesses admitted, this would result in an actual revenue increase, which they would use for training or equipment having nothing to do with the concealed carry law. This clearly results in a new or increased tax, license or fee contrary to Article X, Section 22. The only way such a revenue-generating scheme would be permissible is if the voters approved it, which obviously did not occur with respect to the Act. Nor can the State of Missouri assess a user tax to be collected by counties or other political subdivisions and authorize its use for purposes other than the law it supports. This also violates both the spirit of the Hancock Amendment and the law found in Article X, Sections 16, 21 and 22 of the Missouri Constitution.[17]

State presented testimony from three sheriffs regarding how they were going to collect, administer and expend the money in their revolving funds. This new and unexpected testimony clearly raises other constitutional issues under the Hancock Amendment that Brooks, et al. did not anticipate or plead. Missouri Rule of Civil Procedure 55.33(b) states: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." The rule goes on to state that a party may make a motion to conform the pleadings to the evidence at any time. State cannot be heard to complain

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17 See Points Relied On IV and V of this Brief.

about an issue raised by their own witnesses. Nor did it by objecting at trial. Brooks, et al. made their motions to amend their Petition to advise the Trial Court of the additional Hancock violations presented by the evidence so that they could be properly addressed then and on appeal.

Under Rule 55.33(b), the Circuit Court should have granted Brooks, et al. Motions to Amend because "such amendment of the pleadings as may be necessary to cause them to conform to the evidence...may be made upon motion of any party at any time, *even after judgment*...." (Emphasis added)

CONCLUSION

Respondents respectfully request that this Court affirm, in part, the Judgment of Honorable Steven R. Ohmer that the Conceal and Carry Act is unconstitutional because it violates Article I, Section 23 of the Missouri Constitution. Respondents next request that this Court affirm, in part, the Judgment of Trial Court denying the State's request for a change of venue. Respondents also request that this Court reverse, in part, the Judgment of the Trial Court denying them leave to Amend their Amended Verified Petition to conform to the evidence at trial, and show the Petition so amended. Finally, Respondents request that this Court reverse, in part, the Judgment of Judge Ohmer by holding that the Conceal and Carry Act violates Article X, Sections 16, 21 and 22 and Article I, Section I of the Missouri Constitution, and find that it is also void for vagueness because of due process violations.

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