NO. A14-0096
STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

v.

Dominic Jason Allen Sam,

Appellant.

APPELLANT DOMINIC JASON ALLEN SAM'S BRIEF, ADDENDUM, AND APPENDIX

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Dated: June 20, 2014

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PROCEDURAL HISTORY

June 28, 2013	Date of charged offenses.
July 1, 2013	Appellant charged with possession of a controlled substance in the fifth degree with a firearm enhancement (Minn. Stat. §§ 152.025, subd. 2(a)(1), 609.11), receiving stolen property (Minn. Stat. § 609.53, subd. 1), prohibited person in possession of a firearm (Minn. Stat. § 624.713, subd. 1(10)(i)), and giving a false name to a peace officer (Minn. Stat. § 609.506, subd. 1); Appellant's first appearance.
July 11, 2013	Rule 8 hearing.
July 25, 2013	Omnibus hearing.
September 10–11, 2013	Jury trial held before the Honorable James T. Reuter. Appellant pleads guilty to giving false name to peace officer prior to trial; jury convicts Appellant of possession of a controlled substance in the fifth degree with a firearm enhancement and prohibited person in possession of a firearm, but acquits Appellant of receiving stolen property.
September 26, 2013	Appellant moves for judgment of acquittal based upon insufficient evidence; court takes motion under advisement.
September 27, 2013	Court denies Appellant's post-trial motion.
October 24, 2013	Sentencing. Court imposes presumptive 36 month sentence for possession of a controlled substance in the fifth degree with a firearm enhancement, executed immediately; and finds other counts part of the same behavioral incident, sentences to be served concurrently.
January 21, 2014	Notice of Appeal filed. App. 1–2.
April 21, 2014	Transcripts received.

LEGAL ISSUES

I. Whether there was sufficient evidence presented at trial to support Appellant's convictions?

Dominica Jason Allen Sam ("Appellant") was convicted based on circumstantial evidence. On Appellant's post-trial motion for a judgment of acquittal, the district court refused to apply the Supreme Court's standard for reviewing the sufficiency of circumstantial evidence, asserting that this is "the standard of review for the appellate court, [which] may prevail on appeal." Addendum ("Add.") 2. The district court denied Appellant's motion. Appellant timely appealed under Rule 28.02, subd. 4(3)(a) & (c). Appendix ("App.") 1–2.

The circumstantial evidence presented at trial is insufficient to support Appellant's convictions for fifth degree possession of a controlled substance, the firearm enhancement, or prohibited person in possession of a firearm. Respondent presented no evidence to rebut several reasonable inferences, inconsistent with Appellant's guilt, that arise from the facts Respondent proved at trial.

Most Apposite Authority

State v. Al-Naseer, 788 N.W.2d 469 (Minn. 2010)
State v. Anderson, 784 N.W.2d 320 (Minn. 2010)
State v. Stein, 776 N.W.2d 709 (Minn. 2010)
State v. Elling, No. A12-1561, 2013 WL 3779181 (Minn. Ct. App. July 22, 2013)

II. Whether the Second Amendment permits Respondent to permanently disable a person convicted of a prior non-violent felony from possessing firearms?

Minnesota Statute 624.713, subd. 1(10)(i) violates Appellant's Second Amendment rights. Appellant's predicate felony, escape from custody, was not historically understood at the time of the founding to exclude Appellant from the purview of the Second Amendment. Appellant is therefore protected by the Second Amendment. As applied to Appellant, Minnesota's felon dispossession statute, which imposes a permanent, categorical bar on Appellant's right to possess any firearm, is a violation of the Second Amendment.

Appellant did not raise this issue in the district court. Under controlling federal law, however, Appellant's has not waived this issue, despite his failure to raise it in the district court.

Most Apposite Authority

U.S. Const. amend. II
Minn. Stat. § 624.713, subd. 1(10)(i)
Minn. Stat. § 624.712, subd. 5
Minn. Stat. § 609.485
Minn. Stat. § 624.714, subd. 22

State v. Craig, 826 N.W.2d 789 (Minn. 2013)
D.C. v. Heller, 554 U.S 570 (2008)
McDonald v. City of Chicago, 130 S. Ct. 3020 (2010)
United States v. Barton, 633 F.3d 168 (3d Cir. 2011)

STATEMENT OF THE CASE & FACTS

Appellant was charged with possession of a controlled substance in the fifth degree with a firearm enhancement, receiving stolen property, prohibited person in possession of a firearm, and giving a false name to a peace officer. Appellant pled guilty to giving a false name to a peace officer. Appellant was tried on the remaining counts in the Pine County Courthouse, Pine City, Minnesota, on September 10–11, 2013, the Honorable James T. Reuter presiding. Appellant was convicted of possession of a controlled substance in the fifth degree with a firearm enhancement and prohibited person in possession of a firearm. Appellant was acquitted of receiving stolen property.

On June 28, 2013, Appellant was driving a car borrowed from an acquaintance, Mr. Peter Miller (who was not present), in Hinckley, Minnesota. Tr. 150–51.[1] Mr. Romney Scarp, Appellant's acquaintance, was riding in the passenger seat of the vehicle with Appellant. Tr. 162. Appellant drove past a State Trooper, Marc Hopkins, who was out on patrol. Tr. 150–51. Trooper Hopkins ran the vehicle's license plate, which alerted

[1] "Tr." refers to the transcript of Appellant's jury trial, from September 10–11, 2013.

him that Mr. Miller's registration had expired and that his license was suspended. Tr. 151. Trooper Hopkins then initiated a traffic stop. Tr. 152.

Once Trooper Hopkins activated his emergency lights, he immediately observed the vehicle's passenger, later identified as Mr. Scarp, making furtive movements towards the vehicle's center console. Tr. 152, 179–82, 192. Trooper Hopkins testified that he did not observe the driver, later identified as Appellant, making any furtive movements toward the center console. Tr. 184. Based on his observations of Mr. Scarp's furtive movements, Trooper Hopkins searched the center console and discovered a handgun. Tr. 163, 179–82.

During the stop, Trooper Hopkins called for backup, and the officers eventually ordered both occupants out of the vehicle. Tr. 157, 162. Trooper Hopkins' backup, Deputy Carl Hawkinson, also searched the vehicle. Tr. 203–04. He discovered a crystalline substance, later identified as methamphetamine, in the glove box where Mr. Scarp was sitting. Tr. 203. Upon searching Mr. Scarp's person, Deputy Hawkinson found more of the same crystalline substance, later identified as methamphetamine, in Mr. Scarp's wallet. Tr. 205–06.

Neither Trooper Hopkins nor Deputy Hawkinson testified that they found any contraband on Appellant's person. Thus, in order to prove fifth degree possession, the corresponding firearm enhancement, and prohibited person in possession of a firearm, Respondent sought to prove Appellant's constructive possession of the handgun and

methamphetamine through circumstantial evidence.[2] Respondent offered no evidence, other than Appellant's mere presence in the vehicle, that tended to show that Appellant constructively possessed any of this contraband, or that he even knew it was present in the vehicle.

Subsequent to his conviction, Appellant's trial counsel brought a post-trial motion for judgment of acquittal, based on the standard for sufficiency of circumstantial evidence set forth in *State v. Al-Naseer*, 788 N.W.2d 469 (Minn. 2010) and related cases. Add., 3–9; *see also generally* Motion Hearing Transcript (Sept. 26, 2013) ("MH Tr."). Trial counsel argued that the circumstantial evidence presented at trial fails to satisfy this standard. *Id*. The court denied this motion, stating this standard does not apply to district court proceedings, and that only the appellate courts need to apply this standard. MH Tr. 16 ("[T]he heightened review standard is the appellate standard, not the trial court standard."); Add. 2 ("This argument, based on the standard of review for the appellate court, may prevail on appeal."). The district court's refusal to apply the sufficiency of the evidence standard to Appellant's motion forced Appellant to remain imprisoned pending this Court's initial application of the correct standard upon its review of this case.

APPELLANT HEREBY REQUESTS ORAL ARGUMENT

LEGAL ARGUMENT

Appellant raises two issues in this appeal. First, the circumstantial evidence presented by Respondent at trial was insufficient to support a finding of guilt on either of

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[2] Prior to trial, Appellant stipulated to that he had been convicted of escape from custody under Minnesota Statute Section 609.485. Tr. 33–35; *see also* Add., 13–14.

Appellant's convictions or the firearm enhancement. The district court refused to apply the controlling Supreme Court sufficiency of circumstantial evidence standard to Appellant's post-trial motion for judgment of acquittal. Application of this standard to the circumstantial evidence used to convict Appellant, however, reveals that it is insufficient to support his convictions or the firearm enhancement. Specifically, there are numerous reasonable inferences, inconsistent with Appellant's guilt, that can be drawn from the circumstances Respondent proved at trial. These reasonable alternative inferences include:

1. That Mr. Scarp had the handgun concealed on his person until the very moment that Trooper Hopkins pulled the vehicle over, at which point Mr. Scarp, fearing discovery of the handgun, sought to abandon it in the center console so that it would not be on his person when Trooper Hopkins approached the vehicle;

2. That the vehicle's owner, Mr. Miller, or someone else that Mr. Miller allowed to drive the vehicle, left the handgun in the center console;

3. That Mr. Scarp, who also had methamphetamine on his person, placed the methamphetamine into the glove box without Appellants' knowledge;

4. That Mr. Miller, or someone else that Mr. Miller allowed to drive the vehicle, left the methamphetamine in the glove box.

Because Respondent offered no evidence to rebut these reasonable alternative inferences, it failed to remove all reasonable doubt as to Appellant's guilt. Thus each of Appellant's convictions as well as the firearm enhancement must be overturned.

Second, Appellant asserts that Minnesota's prohibited person in possession of a firearm statute, as applied to him, violates his Second Amendment rights. Under the test set forth in *State v. Craig*, 826 N.W.2d 789 (Minn. 2013), Appellant's predicate felony,

escape from custody, is qualitatively different from the types of felonies that were historically understood at the time of the founding to exclude one from the purview of the Second Amendment. As such, the Second Amendment applies to Appellant. Section 624.713, subd. 1(10)(i)'s lifetime prohibition on the possession of any firearm fails any permissible standard of scrutiny that the Court might apply, and it is therefore unconstitutional as applied to Appellant. This conviction must therefore be reversed.

I. The Circumstantial Evidence Presented at Trial Is Insufficient To Support Appellant's Convictions

a. Standard of Review

In reviewing a post-conviction court's decision to grant or deny relief, issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The Court reviews issues of law *de novo*. *Id.* "In keeping with our responsibility to vindicate a denial of fundamental rights and thereby prevent manifest injustice, we have an obligation to extend a broad review of both questions of law and fact in postconviction proceedings." *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

Appellant was convicted of possession of methamphetamine, with an enhancement for possession of a firearm, and also convicted of possession of a firearm by an ineligible person. Appellant did not have either form of contraband on his person. Respondent therefore sought to prove Appellant constructively possessed both the firearm and the methamphetamine using circumstantial evidence. Respondent offered insufficient circumstantial evidence to satisfy its burden of proof with respect to either of the possession charges or the firearm enhancement.

In order to prove constructive possession, Respondent was required to show either (a) that the police found the contraband in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability, inferable from other evidence, that defendant was at the time consciously exercising dominion and control over it. *State v. Florine*, 226 N.W.2d 609, 611 (Minn. 1975) (citations omitted). The Court looks to the totality of the circumstances to determine whether Respondent has proved constructive possession. *State v. Elling*, No. A12-1561, 2013 WL 3779181, at *2 (Minn. Ct. App. July 22, 2013) (citing *State v. Munoz*, 385 N.W.2d 373, 377, (Minn. Ct. App. 1986).

In order to convict Appellant, Respondent had the burden of removing all reasonable doubt that he is guilty. *State v. Hughes*, 749 N.W.2d 307, 313 (Minn. 2008). In determining whether there was sufficient evidence to properly convict Appellant, the Court must determine whether the facts in the record, and the legitimate inferences drawn from those facts, provided the jury reasonable grounds to conclude that Appellant is guilty. *Bernhardt v. State*, 684 N.W.2d 465, 476 (Minn. 2004); *State v. Moore*, 481 N.W.2d 355, 360 (Minn. 1992).

b. Heightened Standards for Sufficiency of Circumstantial Evidence

Convictions based on circumstantial evidence are subjected to stricter scrutiny than convictions based on direct evidence. *State v. Stein*, 776 N.W.2d 709, 714 (Minn. 2010) (plurality opinion) (citing *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1998)); *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). Circumstantial evidence is insufficient

to support a conviction where "the reasonable inferences that can be drawn from the circumstances proved support a rational hypothesis other than guilt." *Al-Naseer*, 788 N.W.2d at 473 (Minn. 2010) (quoting *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002)). "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Taylor*, 650 N.W.2d at 206.

Determining the sufficiency of circumstantial evidence is a two-step process. First, the Court must identify the circumstances proved at trial. *State v. Anderson*, 784 N.W.2d 320, 329 (Minn. 2010). In identifying the circumstances proved at trial, the Court "defer[s] . . . to the jury's acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State." *Id*. (quoting *Stein*, 776 N.W.2d at 718).

Second, the Court must consider whether any of the rational inferences that can be drawn from the circumstances proved at trial are consistent with any hypothesis other than guilt. *Al-Naseer*, 788 N.W.2d at 477. In making this determination, the Court gives "no deference to the fact finder's choice between reasonable inferences." *Stein*, 776 N.W.2d at 716.

> In assessing the inferences drawn from the circumstances proved, the inquiry is not simply whether the inferences leading to guilt are reasonable. Although that must be true in order to convict, it must also be true that there are no other reasonable, rational inferences that are inconsistent with guilt. This is because if any one or more circumstances found proved are inconsistent with guilt, or consistent with innocence, then a reasonable doubt as to guilt arises.

Al-Naseer, 788 N.W.2d at 473–74 (emphasis added) (citations and internal quotations omitted).

It is undisputed that Appellant did not have either the methamphetamine or the firearm in his physical possession. It is also undisputed that the vehicle was not under Appellant's exclusive control, or that other people normally had access to it. The vehicle belonged to a third party, Peter Miller, who had regular access. At the time of Appellant's arrest his passenger, Mr. Scarp, also had access to the vehicle, including the center console and glove compartment where the firearm and methamphetamine were found, respectively.

In order to prove constructive possession of this contraband, Respondent was required to prove that Appellant was consciously exercising dominion and control over it. Because Respondent only offered circumstantial evidence of Appellant's mental state, the Court applies heightened scrutiny to determine whether the evidence is sufficient to support Appellant's conviction. This requires the Court to determine, based on the circumstances proved at trial, whether any of the reasonable inferences regarding Appellant's mental state are inconsistent with the element of the possession offenses requiring Appellant to exercise dominion and control over the methamphetamine or the firearm.

Following his convictions, Appellant's trial counsel brought a post-trial motion for Judgment of Acquittal pursuant to Rule 26.03, subd. 18(3), arguing that Appellant's convictions were based on insufficient circumstantial evidence, pursuant to *State v. Al-Naseer* and related precedent. The district court denied the motion, stating as follows:

> Defendant argues that the circumstantial evidence noted by the jury to support their verdict is not sufficient for their conclusion that Defendant is guilty of the charges laid in counts one and three of the criminal complaint. This argument, based on the standard of review for the appellate court, may prevail on appeal. However, the Court finds that the evidence in the trial court record was sufficient to support the jury's verdicts. The Court will not vacate these verdicts.

Add. 2 (emphasis added).

The district court was, of course, bound by the Supreme Court's sufficiency of circumstantial evidence standard. *E.g. State v. Peter*, 825 N.W.2d 126, 129 (Minn. Ct. App. 2012) ("[T]he district court, like [the court of appeals], is bound by supreme court precedent and the published opinions of the court of appeals.") (quoting *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. Ct. App. 2010)) (internal quotation omitted); *Percy v. Hofius*, 370 N.W.2d 490, 491 (Minn. Ct. App. 1985) ("[A] trial court must follow controlling case law."). However, the district court's refusal to apply the appropriate sufficiency of the evidence standard left the parties without a meaningful district court ruling on the sufficiency of the evidence.[3] An analysis of the circumstantial evidence in this case reveals that it was insufficient to support Appellant's convictions or the firearm enhancement.

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[3] This ruling has also forced Appellant to wait in prison for over a year pending this Court's initial application of the correct standard of review. Appellant therefore requests that the Court not compound the injustice inflicted by the district court, and that it exercise its discretion to not remand this case, and determine for itself whether Appellant's convictions merit reversal. It would be manifestly unjust to Appellant, having already served so much time in prison, to remand this case to the district court for any further determination on this issue, with the attendant delays, after which the Appellant may have to begin his appeal anew.

c. Respondent Failed To Provide Sufficient Circumstantial Evidence To Prove Appellant's Guilt Beyond a Reasonable Doubt

The circumstantial evidence in this case is insufficient to support either conviction or the firearm enhancement, because several of the reasonable inferences the jury could have drawn based on the circumstances proved at trial are inconsistent with Appellant's guilt.

Respondent proved the following circumstances at trial: (1) On June 28, 2013, Appellant was driving a vehicle in Hinckley, Minnesota, owned by Peter Miller, who was not in the vehicle (Tr. 150–51); (2) Romney Scarp, Appellant's acquaintance, was sitting in the passenger seat of the vehicle at the time police initiated the traffic stop (Tr. 162); (3) at the time of the stop, police observed the passenger, later identified as Mr. Scarp, making furtive movements toward the center console of the vehicle (Tr. 152,179–82, 192); (4) at the time of the traffic stop, police did not observe the driver, later identified as Appellant, making any furtive movements toward the center console (Tr. 184, 192); (5) the police discovered a firearm in the center console of the vehicle (Tr. 163, 179–82); (6) the police discovered a crystalline substance, later identified as methamphetamine, in the vehicle's glove compartment (Tr. 199–204); (7) the police discovered the same crystalline substance, later identified as methamphetamine, in Mr. Scarp's wallet, which was on Mr. Scarp's person at the time Deputy Hawkinson discovered it (Tr. 205–06); (8) Mr. Miller did not know Appellant had taken his car, but he had occasionally let Appellant and Mr. Scarp borrow it, and did not want to report it stolen (Tr. 186–87).

With respect to the firearm, one eminently reasonable inference that can be drawn from the circumstances proved at trial is that Mr. Scarp had the firearm on his person and placed it in the center console immediately after police initiated the traffic stop, while Appellant pulled the car over. Trooper Hopkins, the only testifying eyewitness to the traffic stop, observed Mr. Scarp making "a lot" of furtive movements toward the center console during the stop, which is precisely where he found the firearm. Tr. 152. Trooper Hopkins also testified that he did not observe Appellant making any movements toward the center console. Tr. 184, 192. It is reasonable to infer from these facts that Mr. Scarp had the firearm on his person, and that Appellant was not even aware that it was in the vehicle until Mr. Scarp placed it there during the traffic stop.

In fact, Trooper Hopkins, based on his 14 years of training and experience (Tr. 148, 183), drew this precise inference from these very same facts:

> Well, as I was pulling in, activating my lights pulling in behind, I could see the passenger in the vehicle in front of me was making a lot of movement towards the center of the vehicle. Immediately with my training and experience I know that can be a warning sign. What are they doing? Are they hiding contraband? Are there weapons? So at that point my awareness started to increase. I knew this may be a little more interesting stop so I should be a little more careful.

Tr. 152 (emphasis added).

While one need not be a 14-year veteran of the State Patrol to reasonably to infer that Mr. Scarp was hiding his weapon in the center console when Trooper Hopkins pulled the vehicle over, it so happens that Respondent proved at trial that this is the exact inference that a 14-year veteran of the State Patrol actually drew. This is powerful evidence that this inference is reasonable. And since this reasonable inference is

inconsistent with Appellant's guilt, Respondent presented insufficient evidence to prove that Appellant constructively possessed the firearm.

Another reasonable inference is that the gun was already in the vehicle's center console without Appellant's knowledge, either because the vehicle owner or another person left it there, and that Appellant did not learn of its presence until the police discovered it. The owner, Mr. Miller, normally had access to the vehicle, and may have left the firearm in the console. In fact, the only evidence tending to show that this inference is *not* reasonable is the evidence tending to show that it was Mr. Scarp who placed the firearm in the center console during the stop. Either way, Respondent's circumstantial evidence is insufficient to support Appellant's convictions, because it is reasonable to infer, based on the facts proved by Respondent at trial, that Appellant did not have constructive possession of the firearm.

Under *Al-Naseer* and the related case law, it is insufficient for Respondent to merely provide evidence permitting an inference that Appellant knew the firearm was in the car and that he was exercising dominion and control over it. "Although that must be true in order to convict, it must also be true that there are no other reasonable, rational inferences that are inconsistent with guilt." *Al-Naseer*, 788 N.W.2d at 473. Respondent failed to present evidence to rebut reasonable inferences inconsistent with Appellant's guilt, and thus failed to satisfy its obligation to remove all reasonable doubt in order to obtain a conviction.

Respondent failed to offer evidence foreclosing the reasonable inference that Appellant did not know the gun was in the vehicle, either because it was already there or,

more likely, because Mr. Scarp tried to hide it there during the stop. Absent knowledge the firearm was in the vehicle, Appellant could not have exercised dominion and control over it. This requires reversal of the firearm enhancement to Appellant's conviction for fifth degree possession of methamphetamine, which controls his sentence, as well as his conviction for prohibited person in possession of a firearm.

With respect to the methamphetamine, one reasonable inference that can be drawn from the circumstances proved at trial is that Appellant was not even aware there were drugs in the vehicle. It was in the glove box[4] of a car that did not belong to Appellant, and someone else, including but not necessarily limited to the owner, Mr. Miller, or the passenger, Mr. Scarp, could have placed the drugs there without Appellant's knowledge.

This Court's decision in *Elling* involved a nearly identical fact pattern. In *Elling*, the appellant was driving a vehicle which he did not own, had a passenger in the vehicle, and the owner was not present. 2013 WL 3779181, at *2. Police, who had been monitoring the vehicle, arrested both occupants, searched the vehicle, and discovered methamphetamine in two places: in the passenger seat, and in a pair of jeans in the back seat. *Id*. at *1. Respondent sought to prove the fifth degree possession charge based on constructive possession of the methamphetamine in the jeans found in the back seat. *Id*.[5]

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[4] Respondent does not argue that Appellant constructively possessed the methamphetamine in Mr. Scarp's wallet. *See* Tr. 243.

[5] It appears that Respondent did not seek to prove the appellant's constructive possession of the drugs found on the passenger's seat because they fell off of the passenger's person during a struggle with police at the time of arrest. *Id*. at *1.

Respondent presented evidence that the jeans fit appellant, but not the owner or the passenger, and thus, by inference, that the jeans belonged to the appellant. *Id*. at *3.

This Court observed that the evidence supported a reasonable inference that the jeans belonged to the appellant, and thus that he had constructive possession of the methamphetamine; however, it held that this was not the only reasonable inference that the respondent's evidence supported. *Id*. The court observed that it was "equally reasonable to infer that, just as appellant drove [the owner's] car, other people had also driven [the owner's car], and the jeans, and the drugs in them, belonged to someone else." *Id*. The Court held that Respondent's evidence did not exclude beyond a reasonable doubt an inference other than guilt, and therefore reversed the conviction on that basis. *Id*.

This same reasoning applies here. Trooper Hopkins testified that Mr. Miller told him that he permitted both Appellant and Mr. Scarp to borrow his car. Tr. 186–87. Mr. Miller did not wish to report the car stolen even though he was unaware that Appellant had taken the vehicle until Trooper Hopkins contacted him. Tr. 187. As in *Elling*, it is equally reasonable to infer that, just as Appellant drove Mr. Miller's car, other people (including Mr. Miller) had also driven his car, and that the contents of the vehicle may have been left there by Mr. Miller or other people.[6] The methamphetamine was in the glove box, and Respondent presented no evidence that Appellant knew it was there.[7]

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[6] Unlike *Elling*, there is no evidence that the contraband found in Mr. Miller's car did not belong to him. In *Elling*, there was evidence that the jeans did not fit the owner. *Id.* at *1–2, 3. There is no analogue to that fact in this case, and unlike *Elling*, Respondent

Respondent thus failed to satisfy its obligation to remove all reasonable doubt as to Appellant's guilt. Respondent failed to offer any evidence to rebut the reasonable inference that Appellant did not know the drugs were in the vehicle, requiring reversal of Appellant's conviction for possession of methamphetamine.

Respondent recognized the weakness in its case. It argued, without any supporting evidence, that:

> [p]eople who use drugs tend to keep their drugs close to them because they want to be able to use them when they decide they want to get high. People who possess stolen firearms want to keep that hidden. So I submit that it defies reason and common sense to think that the owner of this vehicle would have allowed the defendant to borrow the vehicle without removing these items if those items were there already.

Tr. 245.

There are two reasons this "common sense" argument is insufficient to support Appellant's conviction. First, this argument is not evidence—it is pure speculation, and it cannot support Appellant's conviction.[8] Respondent offered no expert testimony or any other evidence supporting its contention that drug users or those in possession of stolen firearms normally act in a certain way.

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presented no evidence tending to show that Mr. Miller did not place the drugs in the glove box.

[7] This reasoning applies equally to Appellant's constructive possession of the firearm. It is reasonable to infer that Mr. Miller lent his car to other people, and it is therefore reasonable to infer that someone Mr. Miller lent his car to (or Mr. Miller himself) left the firearm in the center console.

[8] Appellant's trial attorney correctly argued that the prosecutor's unsupported statements were not evidence, and that they could not be used to support a conviction. Tr. 261-62.

Second, even if such unsupported argument could substitute for evidence, it actually supports the inference that Mr. Scarp kept the gun hidden on his person until Trooper Hopkins pulled the car over, making it even more reasonable to infer that Appellant did not know of its presence until the time of the stop. With respect to the drugs, Trooper Hopkins testified that he discovered empty "bindles" (small baggies) and a scale located with the drugs in the glove box (Tr. 168), indicating that whoever placed the drugs there intended to sell them rather than use them. Thus, Respondent's unsupported assertion that "people who use drugs tend to keep their drugs close to them because they want to be able to use them when they decide they want to get high" appears inapplicable. If, for example, Mr. Miller placed the drugs in the glove box intending to sell them at a later time, he would not need to keep them close so that he could use them when he wanted to get high. It is therefore reasonable to infer that Mr. Miller left the methamphetamine in the glove box.

In sum, there are reasonable inferences, inconsistent with Appellant's guilt, that can be drawn from the facts Respondent proved at trial. Respondent thus failed to remove all reasonable doubt as to Appellant's guilt, as it was required to do in order to convict him. Appellant's convictions must therefore be overturned.

II. Appellant's Conviction Under Minnesota Statute 624.713, Subdivision 1(10)(i) Violates the Second Amendment

a. Appellant Has Not Waived His Constitutional Challenge

Appellant did not challenge the constitutionality of his conviction under Minnesota Statute Section 624.713, subd. 1(10)(i) in the district court. Nevertheless,

based on the standard set forth under controlling federal law, Appellant has not waived his constitutional challenge.

The right to keep and bear arms is an individual, fundamental right. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (individual right); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."); *see also* Minn. Stat. § 624.714, subd. 22 ("The legislature of the state of Minnesota recognizes and declares that the second amendment of the United States Constitution guarantees the fundamental, individual right to keep and bear arms.").

"The question of a waiver of a federally guaranteed constitutional right is . . . a federal question controlled by federal law." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *see also State v. Caulfield*, 722 N.W.2d 304, 312 n.6 (Minn. 2006) (recognizing this rule). "There is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.'" *Brookhart*, 384 U.S. 1, 4 (quotation in original) (citation omitted).

The standard for waiver of a fundamental constitutional right is significantly more stringent than waiver of other issues, such as a challenge to the admission of a statement based on evidentiary rules. *See United States v. Holmes*, 620 F.3d 836, 843 (8th Cir. 2010) ("[W]e are facing a constitutional challenge to the admission of the statements rather than a challenge based on evidentiary rules."). "[C]ourts indulge every reasonable

presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S 666, 682 (1999) (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)) (internal quotation omitted). "If proof of a waiver rests on one's acts, 'his [or her acts] . . . should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his [or her] conduct is possible.'" *Okeson v. Tolley Sch. Dist. No. 25*, 760 F.2d 864, 867 (8th Cir. 1985) *rev'd on other grounds*, 766 F.2d 378 (8th Cir. 1985) (quotation in original). Personal and fundamental rights cannot be waived by counsel. *Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997).

Applying this standard, Appellant cannot be deemed to have knowingly and intentionally waived his constitutional challenge. There is no indication in the record that Appellant ever knowingly and intentionally waived his Second Amendment rights. Appellant did not plead guilty to the charge of prohibited person in possession of a firearm. Appellant's counsel never expressly stated that Appellant waived his Second Amendment rights, nor did Appellant acquiesce to any such statement by his counsel.

Thus, any argument for wavier must be implied based upon Appellant's actions. But there is virtually nothing in the record to support the contention that Appellant knowingly and intentionally acted in such a way as to waive his constitutional rights—certainly not that would satisfy the controlling federal waiver standard. Appellant did stipulate that he had been convicted of escape from custody (Tr. 33–35), and did not challenge the admissibility of the certified copy of his conviction (Tr. 281; Add. 13–14). But Appellant can, of course, stipulate to this conviction and still mount a legitimate

challenge the constitutionality of Section 624.713, subd. 1(10)(i)'s firearm prohibition—indeed, he does so in this appeal. Thus, this action cannot be said to be "so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his . . . conduct is possible." *Okeson*, 760 F.2d at 867.

Here, it is not "clearly established that there was an intentional relinquishment or abandonment of a known right or privilege," (*Brookhart*, 384 U.S. at 4), and this Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Coll. Sav. Bank*, 527 U.S. at 682. Under this standard, Appellant has not waived his constitutional challenge.

b. Standard of Review

Minnesota Courts review a constitutional challenge to a statute *de novo*. *State v. Craig*, 826 N.W.2d 789, 791 (Minn. 2013). Generally, courts presume statutes a valid exercise of state power. *In re Individual 35W Bridge Litig.*, 806 N.W.2d 820, 829 (Minn. 2011). Statutes imposing core infringements of fundamental rights, however, are presumed invalid, and the State bears the burden of proving the statute's constitutionality. *E.g. State v. Melchert-Dinkel*, 844 N.W.2d 13, 18 (Minn. 2014) (state bears burden of showing content-based speech restrictions are valid); *State v. Crawley*, 819 N.W.2d 94, 100 (Minn. 2012) (content-based speech restrictions are presumptively invalid).

The right to keep and bear arms is an individual, fundamental right. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (individual right); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010) (fundamental right). The Second Amendment, however, does not apply to violent felons. *Craig*, 826 N.W.2d at 797–98. Thus, when

the state prohibits a violent felon from possessing a firearm, the Second Amendment and the fundamental right to armed self-defense that it confers are not implicated. This means that the default presumption of constitutionality applies to laws prohibiting violent felons (and anyone else excluded from the Second Amendment) from possessing firearms. Therefore, in order to determine what level of review to apply to Minnesota Statute 624.713, subd. 1(10)(i)'s prohibition on Appellant's right to possess a firearm, the Court must first determine whether he is protected by the Second Amendment.

"If felons fall within the scope of the Second Amendment's protection, then they are entitled to exercise the right to possess a firearm as secured by the Second Amendment." *Craig*, 826 N.W.2d at 793–94 (citing *Heller*, 554 U.S. at 595, 626–27). A felon may only bring an as-applied challenge to a felon-disarmament law, and in order to succeed must first demonstrate that he or she is protected by the Second Amendment by "present[ing] specific facts that distinguish his or her conviction from the convictions of other felons who are categorically unprotected by the Second Amendment." *Id*. 794, 795 (citing *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)).

In *Craig*, the Supreme Court adopted *Barton's* test for determining whether a particular defendant has satisfactorily distinguished his or her conviction from other disqualifying felonies, which requires an "examin[ation of] the Second Amendment as understood at the time of its ratification to determine which types of convictions placed a felon outside the scope of the Second Amendment's protection." *Id*. at 795. The Minnesota Supreme Court applied this test and concluded that the Second Amendment, as understood at the time of its ratification, excluded those convicted of violent felonies.

Id. at 798. Appellant's predicate conviction, however, was not historically understood to exclude him from the protections of the Second Amendment.

In concluding that the founding-era understanding of the Second Amendment excluded violent felons, the *Craig* court relied primarily on "proposals from constitutional ratifying conventions, which *Heller* characterized as 'highly influential.'" 826 N.W.2d at 796 (citing 554 U.S. at 604).[9] Specifically, *Craig* cited to three such proposals in support of its conclusion that violent felons were historically understood as excluded from Second Amendment protection:

- A failed dissenting Pennsylvania Anti-Federalist proposal that "[N]o law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals";
- A failed Massachusetts proposal to invalidate laws that would prevent "peaceable citizens" from keeping their own arms; and
- A successful New Hampshire proposal (which, of course, was ultimately not incorporated into the Second Amendment) to prohibit disarmament laws except against "such [citizens] as are or have been in Actual Rebellion."

Id. at 796–97 (citing C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 712–13 (2009)).

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[9] *Craig* also relied on certain pre-*Heller* authority for the proposition that the Second Amendment is limited to the "virtuous," or those who are not criminals. 826 N.W.2d at 796 (citing e.g., Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 (1986)). This definition, without more, is not determinative. As explained herein, the broad proposition that all criminals were understood to be unprotected by the Second Amendment during the founding era is not actually supported by these sources or other relevant historical authority. Moreover, *Craig's* as-applied challenge framework explicitly contemplates the possibility of a felon successfully challenging a firearm disability, meaning that mere criminal status is not enough, by itself, to exclude one from the Second Amendment.

However, much of the post-*Heller* scholarly authority *Craig* relied upon in support of this historical analysis pointedly questions whether conviction of a non-violent felony is sufficient to place one outside the scope of the Second Amendment's protection. *See* Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Colombia v. Heller *and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1374–75 (2009) (examining the same three founding-era sources cited by the Minnesota Supreme Court, and suggesting that they are, at best, questionable proof that felons, particularly non-violent felons, were historically understood to be excluded from the Second Amendment); Marshall, *supra* at 713 (2009) ("[T]hese three formulations [the same three proposals *Craig* relied on] do not support a lifetime ban on any 'felon' possessing any arms.").

These commentators note that the three founding-era proposals on which *Craig* relied (inconclusive as they may be) are, in fact, the only founding-era support for denying felons the protections of the Second Amendment. Marshall, *supra* at 712 ("For relevant authority before World War I for disabling felons from keeping firearms, then, one is reduced to three proposals emerging from the ratification of the Constitution."); Larson, *supra* at 1374 ("So what sources support this conclusion [that the founders did not consider felons within the common law right to arms]? The same three sources recur again and again in the literature, yet none are especially probative.").

An examination of *Craig's* additional academic sources quickly reveals the truth of this concern. For example, the Kates article, which *Craig* cited for the proposition that "the right to arms does not preclude laws disarming the unvirtuous citizen (i.e. criminals.)," itself cites to another Kates article relying on these same three founding-era

proposals. *See* Don B. Kates, Jr., *The Second Amendment: A Dialogue*, 49 Law & Contemp. Probs. 143, 146 & n.19 (1986) (citing Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 n.267 (1983) (directing the reader notes 70, 72, and 83, which discuss these same three ratification-era proposals as historical support for disarmament of felons)). The same is true for the Halbrook article *Craig* relied on. *See* Stephen P. Halbrook, *The Right of the People or the Power of the State: Bearing Arms, Arming Militias, and the Second Amendment*, 26 Val. U.L. Rev. 131, 142, 147, 185 (1991) (citing the Pennsylvania, Massachusetts, and New Hampshire proposals, respectively).[10] Indeed, *Heller* itself relied on these very three proposals (554 U.S. at 604), as did *Barton*, on which *Craig* primarily relied. 633 F.3d at 173–74.

Given the limited universe of founding-era support for felon disarmament, it is appropriate to examine the relevant states' proposals to determine whether they support a claim that the Second Amendment was historically understood to exclude non-violent criminals from the right to bear arms. But since all three of these proposals prominently demonstrate a concern for violence, it cannot be said that they provide support for the

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[10] Notably, the Halbrook article, although twice asserting that the right to arms did not extend to "criminals," cited no authority for this proposition either time. *Id*. at 147, 185. Similarly, the Cornell & DeDino article, while indeed asserting that "the Second Amendment was strongly connected to the republican ideologies of the Founder Era, particularly the notion of civic virtue," clarified that civic virtue comes from the right to bear arms, not because only the "virtuous" could exercise the right to bear arms. Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins Of Gun Control*, 73 Fordham L. Rev. 487, 492 & n.27 (2004) (explaining that its supporting source "[found] civic virtue to come from an individual right to bear arms") (emphasis added) (citation omitted).

contention that non-violent criminals were historically understood as excluded from the Second Amendment.

The New Hampshire proposal was only concerned with one crime, rebellion, a crime of violence. While this proposal, perhaps, tenuously supports a historical understanding that the Second Amendment excludes all violent criminals, its limited concern for "Actual Rebellion" does not support an extension of this historical understanding to exclude non-violent criminals from the right to arms.

Similarly, the failed Massachusetts proposal was concerned with protecting "peaceable citizens'" right to arms. The logical corollary to this proposal is that violent citizens could be constitutionally disarmed. To the extent that this proposal supports a Second Amendment disability based on criminal history, its plain language clearly contemplates such a disability would be linked to violence.

The failed Pennsylvania proposal would have permitted disarmament for "crimes committed, or real danger of public injury from individuals." This proposal also demonstrates a clear concern that the violent could gain access to firearms and thereby harm the public. It does vaguely speak to the possibility of disarming criminals generally, however:

> given the remainder of American and English history and the other two proposals (requiring one to be un-peaceable or rebellious), it seems best to read [the Pennsylvania proposal] as contemplating disarmament not for any crime committed—wildly overbroad even by current standards—but for crimes demonstrating that a person poses a 'real danger of public injury.'

Marshall, *supra* at 729 (emphasis and quotations in original); *see also* Larson, *supra*, at 1375 ("[S]uch evidence would surely be inconclusive at best in other constitutional

contexts. No court, for example, would rely on one statement from Pennsylvania Anti-Federalists to uphold a law that prohibited felons from exercising religious freedom.").

Moreover, if this portion of the failed Pennsylvania proposal meant that no criminal—or even simply no felon—could successfully challenge a permanent firearm disability, *Craig* could have easily held that no felon (or even no criminal) could successfully challenge the statute's prohibition on firearm possession. Instead, *Craig* expressly held open the door for future as-applied challenges to felon dispossession laws. 826 N.W.2d at 795. This forecloses the argument that the Pennsylvania proposal is satisfactory historical evidence that *all* criminals, or even all felons, are categorically excluded from the Second Amendment's protection.

Although none of these proposals, either alone or taken together, lend satisfactory support to the notion that non-violent felons were historically understood as excluded from the Second Amendment, *Craig* nevertheless stated in a footnote that "the federal felon-in-possession statute, which encompasses both violent and nonviolent felonies, has consistently withstood Second Amendment challenges." 826 N.W.2d at 797 n.6 (citing e.g., *United States v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *Barton*, 633 F.3d at 172; *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)).

It is certainly true that the federal felon-in-possession statute has withstood repeated Second Amendment challenges, but not by non-violent felons. *Moore*, 666 F.3d at 315 & n.1 (defendant "had prior felony convictions for selling or delivering cocaine, three common law robberies, and two assaults with a deadly weapon on a government

official" plus numerous additional violent non-felony convictions for "assault, assault and battery, assault on a government official . . . [and] carrying a concealed gun"); *Torres-Rosario*, 658 F.3d at 113 (defendant had two previous convictions for "distribution and possession with intent to distribute Class A controlled substances—[which] is notoriously linked to violence."); *Barton* 633 F.3d at 170, 174 (defendant "had prior felony convictions for possession of cocaine with intent to distribute and for receipt of a stolen firearm" "which are closely related to violent crime"); *Williams*, 616 F.3d at 693 (defendant's prior felony robbery conviction "involved his beating the victim so badly that the victim required sixty-five stitches.").

Indeed, virtually every other federal felon-in-possession case *Craig* cited involved a violent felon.[11] 826 N.W.2d at 794 (citing *United States v. Stuckey*, 317 Fed. App'x 48, 49 (2d Cir. 2009) (three unspecified prior violent felonies); *United States v. Anderson*, 559 F.3d 348, 356 (prior violent felony for battering a peace officer); *United States v. Khami*, 362 Fed. App'x 501, 508 (6th Cir. 2010) (two prior felony drug convictions); *United States v. Irish*, 285 Fed. App'x 326 (8th Cir. 2008) (prior felony convictions for aggravated assault and aggravated battery, among others)[12]; *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) (Tymkovich, J., concurring) (unspecified prior

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[11] *United States v. Vongxay* characterized the appellant's drug felony as non-violent. 594 F.3d 1111, 1114 (9th Cir. 2010). However, the great weight of authority, including *Craig*, deem drug felonies to be violent. 826 N.W.2d at 797.

[12] The *Irish* opinion itself does not specify these felonies, but the appellant's counsel filed an *Anders* brief seeking to withdraw from the case, which listed the appellant's prior convictions. *See* App. 12.

violent felony); *United States v. Rozier*, 598 F.3d 768, 769 (11th Cir. 2010) ("several" felony drug convictions)).

Notably, several of the federal cases *Craig* relies on either explicitly question or flatly disagree with the proposition that non-violent felons may be constitutionally barred from possessing a firearm. *Williams*, 616 F.3d at 693 ("[W]e recognize that [the federal felon-in-possession statute] may be subject to an overbreadth challenge at some point because of its disqualification of all felons, including those who are non-violent. . . ."); *Torres-Rosario*, 658 F.3d at 113 (conceding that "the Supreme Court may be open to claims that some felonies do not indicate potential violence and cannot be the basis for applying a categorical ban."); *McCane*, 573 F.3d at 1049 ("Non-violent felons, for example, certainly have the same right to self-defense in their homes as non-felons.") (Tymkovich, J., concurring); *see also Moore*, 666 F.3d at 320 (after emphasizing the defendant's extensive history of violence, stating that "[w]e do not foreclose the possibility that a case might exist in which an as-applied Second Amendment challenge to [the federal felon-in-possession statute] could succeed.").

Tellingly, *Barton*, whose framework *Craig* adopted, predicted that "a felon convicted of a minor, non-violent crime might show that he is no more dangerous than a typical law-abiding citizen." 633 F.3d at 174. While *Barton* does qualify this prediction with the word "minor," the fact that *Barton* spoke to a "minor" predicate felony clearly indicates that *Barton* contemplated that such a crime would be considered "minor" as compared to other felonies.

Appellant's felony is of such character. Appellant was convicted of escape from custody under Minnesota Statute Section 609.485. Add. 13–14. Unlike the predicate crime in *Craig*, Appellant's crime did not involve any violence, nor has it been statutorily defined as a crime of violence. *See generally* Minn. Stat. § 624.712 (defining "crime of violence" but omitting any mention of violations under Minn. Stat. § 609.485). Although the record does not reveal which subsection of Section 609.485, subdivision 4 Appellant was convicted under, it does reveal that he received a sentence of only twelve months and one day—the traditional minimum sentence for a felony-level offense. Add. 13. This sentence indicates that Appellant's conviction was not accompanied by violence. *See* Minn. Stat. § 609.485, subd. 4(b) (authorizing a doubling of the sentence if the escape "was effected by violence or threat of violence against a person."). Moreover, if Appellant's predicate felony had been violent, presumably Respondent would have charged him under Section 624.713, subd. 1(2) (prohibiting violent offenders from possessing any firearm), and sought to impose the much more serious sentence authorized under 624.713, subd. (2)(b) (authorizing a sentence of 15 years, a $30,000 fine, or both, for violations of Section 624.713, subd. 1(2)). These facts indicate that Appellant's crime is neither serious, as compared to other felonies, nor violent. As such, his felony is qualitatively different from other felonies that were historically understood to exclude one from the Second Amendment.

In sum, the relevant historical evidence, the scholarly authority, and the case law do not support the proposition that minor, non-violent felons such as Appellant are excluded from the Second Amendment's protection. Appellant's prior felony conviction

is demonstrably both minor and non-violent. Thus, the record reveals that Appellant's predicate crime is factually distinguishable from other felonies that would otherwise operate to disable his Second Amendment rights. Under *Craig*, Appellant is therefore not excluded from the protections of the Second Amendment.

c. Strict Scrutiny Applies to Appellant's Disqualification Under Section 624.713

The mere fact that Appellant is protected by the Second Amendment does not end the inquiry into the constitutionality of his conviction under Section 624.713, subd. 1(10)(i). The Court must first determine what standard of review applies to Appellant's Second Amendment challenge, and then it must apply that standard of review to determine whether, as applied to Appellant, Section 624.713, subd. 1(10)(i) is constitutional.[13] Both *Heller* and *McDonald* strongly suggest that First Amendment jurisprudence provides the appropriate framework for determining the standard of review in the Second Amendment context. *Heller*, 554 U.S. at 582, 595, 635; *McDonald*, 130 S. Ct. at 3045. Federal courts have recognized this, and applied First Amendment jurisprudence to Second Amendment challenges. *E.g., Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) ("[O]n the strength of [*Heller* and *McDonald's*] suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context.") (citations omitted).

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[13] In *Craig*, the Supreme Court did not reach the question of what level of scrutiny to apply to Second Amendment challenges to the ineligible-person statute. 826 N.W.2d at 798.

"Strict scrutiny is the appropriate standard of review when fundamental rights are at issue." *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). Suppression of speech or free expression is therefore subjected to strict scrutiny. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 677–78 (1994) (even "benignly motivated" speech suppression is subject to strict scrutiny) (quotation in original); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (if the regulation's purpose is to suppress speech, must be analyzed under strict scrutiny). To survive strict scrutiny, "a law must advance a compelling state interest and must be narrowly tailored to further that interest." *SooHoo*, 731 N.W.2d at 821.

Intermediate scrutiny is used where the government enacts policies in pursuit of legitimate state interests, unrelated to core infringements of First Amendment rights (such as speech suppression), that nevertheless impose incidental burdens those rights. *See, e.g., Pap's A.M.*, 529 U.S. at 289 (intermediate scrutiny applicable where the governmental purpose behind the regulation is not speech suppression); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (same). In order to survive intermediate scrutiny, the government must have the power to pass the law in question, it must further an important state interest unrelated to speech suppression, the law must be narrowly tailored to achieve the government's interest, and—importantly—it must leave the speaker with an ample alternative opportunity to communicate his or her message. *E.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The traditional example of an incidental burden qualifying for intermediate scrutiny is a reasonable time, place, and manner restriction on free speech. *E.g., id.* at 798.

The United States Supreme Court, the Eighth Circuit, and this Court have all repeatedly recognized that an incidental regulation must, if it is to survive intermediate scrutiny, provide an ample alternative opportunity to exercise one's free speech rights. *E.g. Hill v. Colorado*, 530 U.S. 703, 726 (2000) ("As we have emphasized on more than one occasion, when a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.") (emphasis added); *Pap's A.M.*, 529 U.S. 321 ("Because time, place, and manner regulations must leave open ample alternative channels for communication of the information . . . a total ban would necessarily fail that test.") (Stevens, J., dissenting) (internal quotations omitted); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 75–76 (1981) ("To be reasonable, time, place, and manner restrictions not only must serve significant state interests but also must leave open adequate alternative channels of communication.") (emphasis added); *Peterson v. City of Florence*, 727 F.3d 839, 843 (8th Cir. 2013) (in order to survive intermediate scrutiny, a speech restriction must leave open ample alternative opportunity to communicate the information); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1553–54 (8th Cir. 1995) (same); *State v. Dahl*, 676 N.W.2d 305, 309–310 (Minn. Ct. App. 2004) (same); *Goward v. City of Minneapolis*, 456 N.W.2d 460, 464 (Minn. Ct. App. 1990) (same).

Section 624.713, subd. 1(10)(i)'s lifetime prohibition on firearm possession cannot principally be deemed anything other than a core infringement of the Second Amendment. It explicitly bars the disabled person from ever exercising his or her Second

Amendment right ever again. It is difficult to imagine what kind of restriction could more completely abridge a person's right to armed self-defense.

The Court would be required to apply strict scrutiny to a law that placed a complete, lifetime prohibition on a felon's right to exercise free speech. In fact, the United States Supreme Court has applied the strict scrutiny test to far lesser infringements of criminals' First Amendment rights. *See generally Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (striking down, on First Amendment grounds, a law requiring a book publisher to turn over royalties owed to admitted mob figure Henry Hill to the state crime victims board). The Court should view Section 624.713 no less skeptically. The only appropriate test for such a severe restriction is strict scrutiny.[14]

> Application of the intermediate-scrutiny test to any lifetime possession ban ignores the obvious fact that such statutes are a direct, rather than incidental, burden on one's Second Amendment rights. This makes intermediate scrutiny inapplicable in the first instance. While some might argue that the main goal of these laws is [to advance] societal safety, and that the burden to criminals is an incidental consequence of those laws, such an argument does no more than semantically recast the justification for the societal interest at stake into an assertion that the burden to the right is indirect.
>
> This would be akin to arguing that a law forbidding any news coverage of the 2008 market crash would not be suppression of speech, but rather an attempt to prevent an economic meltdown by putting an "incidental"

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[14] Appellant expressly disclaims any assertion that all gun-control measures must be analyzed under strict scrutiny. The vast majority of firearm restrictions are properly classified as incidental burdens on the Second Amendment, to which intermediate scrutiny would apply. The sweep of Section 624.713, subd. 1(10)(i) is so broad, however, that it represents the rare instance of a gun-control law that must be analyzed under the Supreme Court's more restrictive test.

> burden on the press's free-speech rights. The problem becomes even clearer when these lifetime-possession bans are tested under the "meaningful alternative opportunity" prong of the intermediate-scrutiny test. Indeed, there is expressly never going to be any opportunity for someone subjected to a lifetime ban on simple possession to meaningfully exercise his or her Second Amendment right to self-defense. The absolute inapplicability either of these parts of the test to such laws highlights the inability of intermediate scrutiny to properly adjudicate their constitutionality.

Reid J. Golden, Note, *Loaded Questions: A Suggested Constitutional Framework for the Right to Keep and Bear Arms*, 96 Minn. L. Rev. 2182, 2197–98 (2012) (citations omitted).

There are two closely-related reasons why intermediate scrutiny is inapplicable to this law. First, as just described, an unqualified lifetime prohibition on the possession of any firearm cannot be legitimately characterized as an incidental burden on one's Second Amendment rights. Second, even if one could characterize such a disability as merely incidental, the law would automatically fail under intermediate scrutiny because it does not allow the disabled person an ample alternative opportunity to exercise the right to armed self-defense. *See* Golden, *supra* at 2216 ("[A]s the backstop to the threshold scrutiny question of whether a burden is direct or incidental, failure of the meaningful alternative opportunity prong only really means that the proper test was not really intermediate scrutiny in the first place, but rather strict scrutiny.") (citation omitted). Section 624.713, subd. 1(10)(i) expressly provides that there is never going to be any opportunity for Appellant to possess any firearm for any reason. This core infringement of Appellant's Second Amendment rights must survive, if at all, under strict scrutiny.

It is true that in *Craig*, this Court held that strict scrutiny does not apply to any of the "presumptively lawful regulatory measures" referenced in *Heller*, including felon dispossession laws such as Section 624.713, and thus applied intermediate scrutiny. 807 N.W.2d 453, 462 (Minn. Ct. App. 2011) *aff'd* 826 N.W.2d 789; *but see Craig*, 826 N.W.2d at 798 (vacating this Court's determination that intermediate scrutiny applies).

The Court gave two reasons for this conclusion. First, the Court reasoned that these "presumptively lawful regulatory measures" regulated conduct that fell outside the scope of the Second Amendment, which favored a rejection of the strict scrutiny standard. *Craig*, 807 N.W.2d at 462 (citing *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010)). The Minnesota Supreme Court clarified on appeal, however, that only *certain types* of felons are excluded from the Second Amendment. *Craig*, 826 N.W.2d at 795 (adopting the *Barton* test for determining whether a particular type of felon is entitled to the protections of the Second Amendment). Thus, to the extent that felons, such as Appellant, are actually protected by the Second Amendment, this rationale no longer applies.

Second, the Court reasoned that "the Supreme Court did not explicitly hold that the Second Amendment right is a fundamental right, so that restrictions on this right are subject to a strict-scrutiny analysis." *Craig*, 807 N.W.2d at 462. But this is not a correct statement of the law. The United States Supreme Court expressly stated in *McDonald* that "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." 130 S. Ct. at 3042. Indeed, the Minnesota legislature has expressly

stated that the Second Amendment right to keep and bear arms is fundamental. Minn. Stat. § 624.714, subd. 22 ("The legislature of the state of Minnesota recognizes and declares that the second amendment of the United States Constitution guarantees the fundamental, individual right to keep and bear arms.").

These justifications do not warrant a departure from the well-settled principle that comprehensive suppression of fundamental rights must be subjected to strict scrutiny. *See SooHoo*, 731 N.W.2d at 821 ("Strict scrutiny is the appropriate standard of review when fundamental rights are at issue."). Section 624.713, subd. 1(10)(i)'s categorical bar to Appellant's exercise of any Second Amendment right whatsoever requires analysis under strict scrutiny.

d. Appellant's Disqualification Under Section 624.713 Fails Strict Scrutiny

As applied to Appellant, Section 624.713, subd. 1(10)(i) fails both prongs of the strict scrutiny test, and his conviction under that statute must therefore be vacated.

Presumably, promoting public safety is the State's primary interest in prohibiting felons from possessing firearms. And to the extent that Section 624.713 bars dangerous felons from possessing firearms, the compelling nature of this public safety interest cannot be doubted.

But the legal and scholarly sources *Craig* relied upon question whether the government is justified in disarming non-violent felons. *See Moore*, 666 F.3d at 320; *Torres-Rosario*, 658 F.3d at 113; *Barton*, 633 F.3d at 174; *Williams*, 616 F.3d at 693; *McCane*, 573 F.3d at 1049 (Tymkovich, J., concurring); Marshall, *supra* 728–31

(examining the justification for disarming felons, and concluding that only predicate crimes involving violence, the threat of violence, or that are closely linked to violence warrant a firearm disability); Larson, *supra* at 1381 ("Consider first the case of nonviolent felons. Why would we think that a tax evader, an embezzler, or someone who bribed a public official would be more likely to commit acts of gun violence? As Professor Adam Winkler points out, '[i]t is hard to imagine how banning Martha Stewart or Enron's Andrew Fastow from possessing a gun furthers public safety.'") (quotations in original) (citations omitted).

In this case, there is nothing in the record that indicates Appellant's conviction for escaping custody involved any violence. Appellant's crime is not statutorily defined as a crime of violence. And nothing about Appellant's conviction indicates any likelihood that he is prone to commit any violent acts in the future. Thus, supposing Respondent asserts the same public safety concern it uses justify its prohibition on violent felons possessing firearms, this concern can only be characterized as speculative as applied to Appellant based on the record presented in this case. Although Respondent's interest in keeping the public safe is "compelling," there is simply no logical reason to believe that Appellant's prior conviction for escaping custody demonstrates that he is a danger to the public. Whatever the merit of Respondent's public safety justification, it is not implicated in this case.

Just as importantly, a lifetime prohibition on possession of any firearm for any purpose is not the least restrictive means of achieving Respondent's interest, at least as applied to Appellant's predicate crime, which does not indicate any propensity for

violence in general, or misuse of a firearm in particular. It may well be that conviction of a non-violent felony constitutionally permits some lesser disability, such as a temporary prohibition on firearm possession, while Respondent determines whether or not such a conviction signals the beginning of an offender's descent into a career of violent crime. But the Court need not determine where the line need be drawn in this case. A lifetime prohibition on any firearm possession simply cannot be said to be the least restrictive means of vindicating Respondent's currently-speculative concern that a non-violent crime, wholly unrelated to the misuse of a firearm, justifies the most severe restriction capable of being imposed on one's Second Amendment rights.

For these reasons, Section 624.713, subd. 1(10)(i) is unconstitutional as applied to Appellant, and his conviction under this statute must be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that the Court reverse his convictions for possession of a controlled substance in the fifth degree with a firearm enhancement and prohibited person in possession of a firearm.

Respectfully submitted,

Dated: June 20, 2014

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NO. A14-0096
STATE OF MINNESOTA
IN COURT OF APPEALS

State of Minnesota,

Respondent,

v.

Dominic Jason Allen Sam,

Appellant.

APPELLANT DOMINIC JASON ALLEN SAM'S ADDENDUM

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