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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Honorable Jessica A Salvini, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MATHEW GILLESPIE,

APPELLANT

APPELLATE CASE NO 2025-000562

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. Respondent's reliance on the potential common law treatment of felons fails to establish the required historic analog that would allow S.C. Code Ann. § 16-23-30 to survive a Second Amendment challenge.

When a statute implicates the plain text of the Second Amendment, the statute is presumptively unconstitutional, and the state must present evidence of an analogous statute from the founding era to demonstrate that the statute is "consistent with the Nation's historical tradition of firearm regulation." New York State Rifle & Pistol Assn. v. Bruen, 597 U.S. 1, 24 (2022); Wolford v. Lopez, 146 S.Ct. 2032, 2044 (2026). Two factors play a "central role" in "render[ing] a modern law relevantly similar to historical ones." United States v. Hemani, 146 S.Ct. 1677, 1686 (2026) (internal quotation marks omitted). These are referred to as "the 'why' and 'how.'" Id. "The more closely a contemporary law mirrors a well-established historical analogue in *purpose and operation*, the more likely it is to be upheld. Conversely, the more a modern law diverges from traditional laws in purpose and operation, the less likely it is to survive review." Id. (emphasis added).

A. Common law punishment of felonies does not provide a historical analog for infringing the 2nd Amendment rights of persons convicted of felonies under the modern penal codes.

Respondent relies upon the common law treatment of "felons" in terms of use of force to effectuate an arrest and punishment in an effort to establish the required historical analog. This efforts fails to acknowledge the limited nature of true common law felonies:

> And while in earlier times 'the gulf between the felonies and the minor offences was broad and deep,' 2 Pollock & Maitland 467, n. 3; *Carroll v. United States*, *supra*, 267 U.S., at 158, 45 S.Ct., at 287, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. Wilgus, 22 Mich.L.Rev., at 572–573. These

> changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life. They have also made the assumption that a 'felon' is more dangerous than a misdemeanant untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.

Tennessee v. Garner, 471 U.S. 1, 14 (1985). This "gulf" between the traditional common law designation of felonies versus misdemeanors highlights the weakness between this claimed historical analog that is required under the 2nd Amendment as set forth in Bruen and Hemani.

Founding-era legislatures would have understood an exception to the Second Amendment to allow governments to disarm individuals who pose "a clear threat of physical violence to another." United States v. Rahimi, 602 U.S. 680, 698 (2024). However, this was done only on a case-by-case basis, after a judicial finding that a person was presently dangerous. See, e.g., Bruen, 597 U.S. at 56 (surety laws permitted a judge to require a peace bond after an evidentiary showing that a person posed a threat to someone's safety); Rahimi, 602 U.S. at 697 (affrayer laws required forfeiture of the specific arms that had been misused); Kanter v. Barr, 919 F.3d 437, 461 (7th Cir. 2019) (Barrett, J., dissenting) (rights of felons "were merely *suspended* during the term of the sentence." (emphasis in original)); Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 268 (2020) ("once the perceived danger abated, the arms disability was often lifted."). Therefore, the Statute here differs from founding-era regulations on both the "how," (temporary disarmament of presently dangerous individuals), and the "why," (because those individuals pose a "clear threat of physical violence to another"). As argued in Appellant's principal brief, the "gap between" the Statute and the historical tradition "is just too wide." Wolford, 146 S.Ct. at 2052. This gap is not bridged by the common law treatment of felons through the (at times) use of capital punishment.

The State asserts that, at common law, all or almost all felonies were capital offenses;[1] thus, the ability for the state to take someone's life must necessarily include the ability to take their firearms. BOR at 8. Further, the state's argument omits the crucial point that not everyone convicted of a felony at common law was executed. When a felon was sentenced to a term of years rather than life imprisonment or death, their rights "were merely *suspended* during the term of the sentence." Kanter v. Barr, 919 F.3d 437, 461 (7th Cir. 2019) (Barrett, J., dissenting) (emphasis in original). A *temporary* disarmament, during the service of a sentence for a conviction, is much closer to what the Framers imagined. *See, e.g.,* id. ("Those who ratified the Second Amendment would not have assumed that a free man, previously convicted, lived in a society without any rights and without the protection of law."); Ruffin v. Commonwealth, 21 Gratt. 790, 796 (Va. 1871) ("*For the time being*, during his term of service...he has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights...." (emphasis added)). It is also substantially more in line with the treatment of other constitutional rights that were not subject to permanent forfeiture simply because of a felony conviction. *See* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (*prisoners* possess no Fourth Amendment right against prison-cell searches).[2]

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[1] The state, in a parenthetical, quotes a line that states "[t]he idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them.... And therefore if a statute makes any new offense felony, the law implied that it shall be punished with death." BOR 8-9 (*quoting* Tennessee v. Garner, 471 U.S. 1, 13 n.11 (1985) (*itself quoting* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 98)). This requires more context. Blackstone, on the same page of his Commentaries, would go on to state that "I have mentioned, *of felonies that are not capital*, and capital offenses that are not felonies...." 4 BLACKSTONE, *supra*, at 98 (emphasis added). And one paragraph previously, Blackstone wrote: "Felony may be without inflicting capital punishment...." Id. at 97. Therefore, the idea that all felons were immediately put to death at English common law is not only irrelevant for the reasons stated herein, but incorrect historically.

[2] To the extent that the state makes a similar argument regarding forfeiture of estate, *see* BOR 9, this fails for the same reasons. *See, e.g., Kanter*, 919 F.3d at 461-62 (Barrett, J.); *Ruffin, supra*;

This is apparent when the State's argument that since a felony conviction could have been "punishable by death at the founding; therefore, the government is authorized to impose the lesser penalty of stripping the right to gun ownership" is considered when the phrase "gun ownership" is replaced with any other constitutional right. If, for example, the state asserted that a person convicted of murder could be stripped of their right to religious freedom simply because the state *could have* executed them, that argument would fail, because convicted murderers, even those on death row, indisputably retain that right. *See generally,* Ramirez v. Collier, 595 U.S. 411 (2022). The state also, at common law, had the authority to execute a person convicted of rape; but this does not mean that conviction can form the basis for, for example, permanently barring a rapist's use of social media. *See generally,* Packingham v. North Carolina, 582 U.S. 98 (2017). "[W]e wouldn't say that the state can deprive felons of the right to free speech because felons lost that right via execution at the time of the founding." Kanter, 919 F.3d at 461-62 (Barrett, J., dissenting); Range v. Attorney General, 124 F.4th 218, 226 (3rd Cir. 2024) (*en banc*) ("Felons are not categorically barred from First Amendment or Fourth Amendment protection because of their status.").[3] The only way the state's argument that the limited scope of common law felonies punishable by death works is if the Second Amendment is "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." McDonald v. City of Chicago, Ill., 561 U.S. 742, 780 (2010). *Even if this Court could* adopt the concept that because certain felonies at

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Cannon v. Windsor, 1 Houst. 143, 144 (Del. 1855) ("there is no such general forfeiture of property...on a conviction for treason or felony"); *and cf.* U.S. Const. art. III, § 3, cl. 2.

[3] By way of example, the Commonwealth of Massachusetts only temporarily barred the participants of Shay's Rebellion from possessing firearms. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 268-69 (2020) (*citing* 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780-1805, 145 (1805)).

common law supported death sentences, that would not create the required historic analog since the range of true common law felonies, as noted in Garner, was dramatically different than in today's criminal codes and the specific nature of the underlying felony conviction would, by necessity, needed to have been a felony at common law.

The State asserts that Appellant's specific prior conviction, burglary in the second degree (non-violent), is "indisputably the kind of serious felony for which founding-era legislatures prescribed the harshest possible punishments." BOR 11. Appellant's prior conviction was for burglary second degree, non-violent, in violation of S.C. Code Ann. § 16-11-312(A). That conviction means that Appellant: (1) entered a dwelling without consent; and (2) with the intent to commit a crime therein. Id. The state asserts that burglary was a serious capital offense at the time of the founding. However, Appellant's crime would not have been considered burglary at the time of the founding. Burglary, at common law, was understood to require *breaking* and entering a dwelling house, *at night*, with the intent to commit a *felony* therein. 4 BLACKSTONE, *supra*, at 224. All these elements mattered greatly: "in the daytime there is no burglary." Id. Moreover, entry into a dwelling house at night, even without the owner's consent, if done by walking through a door inadvertently left open, was not burglary. Id. at 226. Compare that to Appellant's offense, which required merely that he entered a dwelling house in the daytime,[4] with the intent only to commit any illegal act, rather than a "felony." Again, whether the founding-era criminal justice system believed burglary to be a capital offense is irrelevant for the purposes of the Second Amendment analysis. Kanter, 919 F.3d at 461 (Barrett, J., dissenting). But, if the state insists on arguing otherwise, it must be noted that Appellant would not have been deemed a "felon" in the founding-era to begin with.

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[4] Not at nighttime, because that would have constituted burglary first degree. S.C. Code Ann. § 16-11-311(A)(3).

B. Strict scrutiny and narrowly tailored concepts do not answer the historic analog requirement under the 2nd Amendment.

The State argues that S.C. Code Ann. § 16-23-30 is "narrowly tailored" because it applies only to "crimes of violence," rather than uniformly to all felonies. BOR 10. Whether the Statute is "narrowly tailored" is simply not relevant to the initial constitutional analysis. The phrase "narrowly tailored" is a legal term of art—it makes up half of the test for determining whether a statute satisfies strict scrutiny *once it is deemed to impact a fundamental right. See, e.g.,* Republican Party of Minnesota v. White, 536 U.S. 765, 775 (2002) (to satisfy strict scrutiny, a law must be "(1) narrowly tailored, to serve (2) a compelling state interest"). However, this sort of "means-end scrutiny" expressly does not apply to Second Amendment challenges. Bruen, 597 U.S. at 19 ("*Heller* and *McDonald'* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."). It does not matter how "narrow" the state believes the Statute to be; all that matters is whether it is sufficiently analogous to historical firearm regulations. Id. at 24.

Here, Appellant would argue that only after the state demonstrates that its statute is sufficiently analogous to a historical regulation would this Court apply strict scrutiny, because even if the law passes muster under the Second Amendment historic analog requirement, it is still an infringement of a fundamental right and must further survive the substantive components of the Due Process Clause. Even if this Court were to grant some credence to the State's argument that common law felony punishments provide the required historical analog, the fact that the General Assembly has limited the rights-stripping provision of the Statute to those convicted of (*what the State designates as*) "crimes of violence," is not so "narrowly tailored" as the state asserts. Limiting a complete felon in possession ban to only certain felonies does not solve the logical problems with this sort of legislative rights-stripping. Granting a legislature the authority to exclude certain unfavored classes of persons from a constitutional right just based on their status as a "felon" would grant that legislature "extreme deference" giving them "unreviewable power to manipulate the Second Amendment by choosing a label." Range, 124 F.4th at 228; Greenlee, *supra*, 20 WYO. L. REV. at 254 ("Congress and state legislatures could, by classifying any trivial crime as a felony, constrain the scope of the constitutional right to any extent desired."). Those problems do not disappear merely because the General Assembly has chosen the words "crime of violence" rather than "felony." The General Assembly retains sole authority to classify a crime as a "crime of violence." Thus, under the state's theory, the Statute could permit it to revoke the Second Amendment rights of any person who receives a speeding ticket, so long as the General Assembly first updated the Statute to define speeding as a "crime of violence." *See* Greenlee, *supra*, 20 WYO. L. REV. at 254. If this seems absurd, Appellant would point out that this is the precise type of manipulation employed by King Charles II, whose actions formed the Framers' motivation for adopting the Second Amendment in the first place.[5]

For these reasons, the state has not met its burden of identifying a "historic analogue" to justify the Statute. *See* Rahimi, 602 U.S. at 701. Because the Statute implicates the plain text of the Second Amendment, and the state has not overcome the presumption of unconstitutionality, the Statute violates the Second Amendment. Appellant's conviction, therefore, must be reversed.

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[5] *See* Rahimi, 602 U.S. at 694 (English law permitted the King to "seize all Armes in the custody or possession of any person...judge[d] dangerous to the Peace of the Kingdome."); Greenlee, *supra*, 20 WYO. L. REV. at 258 (King Charles used this authority to disarm Catholics *en masse*); Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840) (the ultimate result of this authority was that it permitted the King to seize arms from "disaffected persons.").

II. The State's assertion that the scienter element of the statute is an assertion of ignorance of the law is misplaced.

The State asserts that Appellant's scienter argument "borders on the frivolous" and is "absurd." BOR 12-13. According to the State, the scienter requirement for a conviction under S.C. Code Ann. § 16-23-30 is nothing more than an assertion that ignorance of the law is a defense to a crime. BOR 13. The state misconstrues Appellant's arguments.

Appellant would note that his "frivolous" and "absurd" arguments were adopted by the Supreme Court of the United States as it relates to the federal version of the statute. "We conclude that in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." Rehaif v. United States, 588 U.S. 225, 237, (2019).

Further, the logic of the Rehaif Court, while only applying to the federal statute, applies in equal force to this case. Rehaif essentially held that all criminal offenses were presumed to include a scienter requirement, and therefore, in the absence of legislative intent to remove the scienter requirement, the Court must require the level of scienter necessary to separate illegal from innocent acts. Id. at 229, 232. South Carolina also follows the general common law rule that all criminal offenses require some form of criminal intent. State v. Ferguson, 302 S.C. 269, 271, 395 S.E.2d 182, 183 (1990). Thus, under South Carolina law as well as federal law, courts must read into a statute the minimum level of *mens rea* necessary to separate wrongful conduct from otherwise innocent conduct. State v. Adams, 430 S.C. 420, 430, 845 S.E.2d 217, 222 (Ct. App. 2020).

The Statute here prohibits: (1) possession of a firearm; (2) by any person previously convicted of a crime of violence. As noted in Rehaif, the first element can never constitute illegal conduct but for the second element. Moreover, the Statute is not a strict liability statute for the same reason its federal counterpart is not: both prohibit "*knowingly*" violating the law. Rehaif, 588 U.S. at 230; S.C. Code Ann. § 16-23-30(A) ("It is unlawful for a person to *knowingly* sell, offer to sell, deliver, lease, rent, barter, exchange, or transport for sale into this State any handgun to…" (emphasis added)).

The State asserts that a requirement that Appellant be aware he was a felon would be to allow Appellant to assert a defense of ignorance of the law. BOR 13. While "ignorance of the law" is not a defense, the state overextends what "ignorance of the law" entails. For example, one of the cases cited by the State shows that a person's good faith, reasonable, yet mistaken belief that he was not violating the law may, indeed, form a defense. Cheek v. United States, 498 U.S. 192, 202 (1991).

Furthermore, Appellant is not asserting that he is entitled to a jury instruction that he was aware of *the law*, he is entitled to a jury instruction that he was aware his underlying felony was covered by the law. There is a significant difference between the two. General "knowledge of the law" is typically not[6] an *element* of a crime. If a defendant possesses a stolen television with knowledge it was stolen but genuinely did not know that possession of stolen goods was a crime, they would still be guilty because knowledge of the law is not one of the elements of that offense. However, if a defendant genuinely believed the television was not stolen he would not be guilty. However, in this case, Appellant's status as a felon subject to the restrictions of S.C. Code Ann. § 16-23-30 *is* an element of the offense. In fact, without the felon element, the Statute

[6] A very rare exception to this general rule can be found in the federal tax code, owing to its complexity. Cheek, 498 U.S. at 201.

would not state a criminal act at all. Therefore, Appellant's status as a felon covered by S.C. Code Ann. § 16-23-30 is the single fact that differentiates innocent conduct from criminal conduct. In such cases, the Court must read the *mens rea* requirement onto that differentiating fact. Adams, 430 S.C. at 430, 845 S.E.2d at 222; Rehaif, 588 U.S. at 232. Therefore, because Appellant's "status" is an element of the offense, the state must prove that Appellant had some knowledge of his status.

It is entirely logical that Appellant may have known he was a felon but believed he was not prohibited from owning a firearm. The Statute at issue here bars any person convicted of a "crime of violence" from possessing a firearm. S.C. Code Ann. § 16-23-30. Confusingly—at least to a layperson—an entirely different part of the South Carolina Code defines "violent crimes." S.C. Code Ann. § 16-1-60. "Crime of violence" and "violent crime" do not mean the same thing. That is on full display in this case. Appellant's conviction for burglary second degree, non-violent, is a "crime of violence" but it is not a "violent crime." *Compare* S.C. Code Ann. § 16-23-10(3) *with* S.C. Code Ann. § 16-1-60. Appellant's sentencing sheet after pleading guilty to the burglary offense designated his conviction as "non-violent." While the State would be free to argue constructive knowledge through publication, their burden at trial was to establish beyond a reasonable doubt that Appellant knowingly violated S.C. Code Ann. § 16-23-30.

Rather than doing so, the trial court simply told the jury that "burglary" was "a crime of violence." Tr. 115, ll. 20-21. Appellant agrees with the state, of course, that this charge is an accurate statement of the law since the Legislature has designated it as a crime of violence and ignorance of the law would not be a defense. BOR 12. However, the charge was missing the crucial piece that an element of the offense is that Appellant *knew* he had been convicted of a "crime of violence." Without that element explained to the jury, the trial court's instruction went from an instruction merely informing the jury of the existence of a statute to an instruction that essentially commanded they find the state met its burden of proof on one of the elements of the offense.

CONCLUSION

Based upon the reasons asserted in Appellant's Principal Brief and in this Reply, this Court should reverse Appellant's conviction.

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This 17th day of August, 2026.