

**Summary of SC94096, *State of Missouri v. Marcus Merritt***

Appeal from the St. Louis circuit court, Judge John F. Garvey Jr.

Argued and submitted December 9, 2014; opinion issued August 18, 2015

**Attorneys:** The state was represented by Solicitor General James R. Layton and Shaun J. Mackelprang of the attorney general’s office in Jefferson City, (573) 751-3321; and Merritt was represented by Matthew W. Huckleby of the public defender’s office in St. Louis, (314) 340-7662. Senator Kurt U. Schaefer, an attorney in Jefferson City, (573) 761-5008, filed a brief as a friend of the Court and represented himself.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** The state appeals the circuit court’s dismissal of charges alleging a man had violated the state’s “felon-in-possession” firearm law. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri reverses the judgment and remands (sends back) the case. All seven judges agree that, although Missouri’s constitutional right to bear arms recently was amended, the prior version of the constitution applies. Four judges agree “strict scrutiny” applies in reviewing the case. The felon-in-possession law passes strict scrutiny, as it is tailored narrowly to achieve the state’s compelling interest in ensuring public safety and reducing firearm-related crime.

Judge George W. Draper III concurs in result in an opinion joined by two other judges. He agrees that the felon-in-possession law is constitutional as the constitution was written at the time the man was charged, but he disagrees that this Court is required to apply strict scrutiny.

**Facts:** The state charged Marcus Merritt in January 2013 with three counts of unlawful possession of a firearm. The indictment alleged that Merritt had been convicted in 1986 of federal felony distribution of a drug and, in November 2012, knowingly possessed a revolver, a shotgun and a .22-caliber rifle. Merritt moved to dismiss the indictment, arguing that section 571.070, RSMo – the “felon-in-possession” law on which the charges were based – violated the state constitution. He argued the statute is unconstitutionally retrospective in violation of article I, section 13 and violated his right to bear arms under article I, section 23. The circuit court sustained the motion and dismissed, with prejudice (so that they cannot be refiled), the three firearm charges. The state appeals. While the appeal was pending, article I, section 23 was amended to state that courts must apply “strict scrutiny” to laws restricting the right to bear arms.

**REVERSED AND REMANDED.**

**Court en banc holds:** (1) The prior version of article I, section 23 applies. The amended version contains no text suggesting it was intended to be applied retroactively, and absent such an intent, this Court applies the constitution as it was written at the time of the offense.

(2) “Strict scrutiny” applies to Merritt’s case under the prior version of article I, section 23. In its 2010 decision in *McDonald v. City of Chicago, Illinois*, the United States Supreme Court held

that the right to bear arms is fundamental to our scheme of ordered liberty and fully applicable to the states through the Fourteenth Amendment to the federal constitution. While Merritt's appeal was pending, this Court heard and decided *Dotson v. Kander*, holding that strict scrutiny would have applied under the state constitution – regardless of the recent amendment – to constitutional challenges that occurred after *McDonald* was decided.

(3) Section 571.070 survives strict scrutiny. As this Court noted in *Dotson*, laws regulating the right to bear arms are not presumptively invalid, recognizing that certain United States Supreme Court decisions involving the right to bear arms did not cast doubt on longstanding prohibitions such as those against the possession of firearms by felons and the mentally ill. Generally, strict scrutiny is satisfied if the law at issue is tailored narrowly to achieve a compelling governmental interest. Section 571.070 meets this test. The state has a compelling interest in ensuring public safety and reducing firearm-related crime. Prohibiting felons from possessing firearms is tailored narrowly to that interest because a felon is more likely than a law-abiding citizen to commit violent crimes and engage in illegal and violent gun use. Narrow tailoring does not require exhaustion of every conceivable alternative. Section 571.070 does not apply to misdemeanors, felony convictions that have been pardoned or expunged, or possession of antique firearms, nor does it prevent self-defense.

**Opinion concurring in result by Judge Draper:** The author agrees – in result only – that section 571.070 is constitutional under article I, section 23 as it was written when Merritt was charged. He disagrees that strict scrutiny must be applied to any right to bear arms claim brought under article I, section 23 as it was written prior to the 2013 amendment. The recent United States Supreme Court decisions do not compel Missouri courts to apply strict scrutiny when reviewing the constitutional validity of section 571.070. This Court is not bound to follow its advisory and erroneous determination in *Dotson v. Kander* that – had a challenge been made under article I, section 23 after *McDonald* – strict scrutiny would have applied. Despite recognizing the right to keep and bear arms as a fundamental right, the United States Supreme Court specifically declined the invitation to apply strict scrutiny and explicitly avoided stating what type of scrutiny would apply to cases challenging the right to bear arms, and this Court need not reach that far in this case. Section 571.070 is constitutional because it has a real and substantial relationship to the protection of public safety by regulating the possession of firearms by convicted felons and does not invade, unjustifiably, rights secured by the constitution.