

No. SC87652

**IN THE
SUPREME COURT OF THE
STATE OF MISSOURI**

GARVIS DUDLEY,

Respondent,

v.

DENIS AGNIEL

and

GARY KEMPKER

Appellants.

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is a declaratory judgment action in which the Circuit Court of Cole County, Missouri held that §559.115.7, RSMo Supp. 2003 must be applied retroactively to reduce the prior commitment count and mandatory-minimum prison term for an offense that occurred before the effective date of the statute. A panel of the Missouri Court of Appeals Western District affirmed. On May 2, 2006 a majority of the judges constituting the Missouri Court of Appeals Western District en banc voted to transfer the case to this court post-opinion.

This Court has jurisdiction under Article V Section 10 of the Missouri Constitution and Missouri Supreme Court Rule 83.02.

STATEMENT OF FACTS

This case is about whether §559.115.7, RSMo 2003, which became effective on June 27, 2003, should be applied retroactively to reduce Garvis Dudley's mandatory-minimum prison term for an offense he committed on April 20, 2000 and for which he was sentenced on March 27, 2001 (L.F. 34). Absent retroactive application of the statute Dudley must serve eighty percent of the eight year sentence before parole eligibility, 6.4 years. If §559.115.7, RSMo 2003 is applied retroactively, Dudley's mandatory-minimum prison term is reduced to four years (L.F. 34).

Garvis Dudley was received by the Department of Corrections for the service of felony sentences on June 9, 1977, January 8, 1987, June 16, 1999 and March 29, 2001 (L.F. 57). Dudley's 1999 receipt was for a 120-day incarceration under §559.115, RSMo for second degree assault (L.F. 38). Dudley was released on probation on that offense on October 14, 1999 (L.F. 33).

While on probation for that second degree assault offense, Dudley committed a new second degree assault on April 20, 2000 (L.F. 34). On January 19, 2001 the Circuit Court of St. Louis City revoked Dudley's probation on the first second degree assault sentence, and ordered his five year sentence executed, then on March 7, 2001 sentenced him to a concurrent term of eight years for the new second degree assault offense (L.F. 37, 39-44).

The Department of Corrections has calculated that Dudley must serve an eighty percent mandatory-minimum prison term on his most recent eight year sentence for which he was received on March 29, 2001 because he has prior commitments to the Department of

Corrections on June 9, 1977, January 9, 1987 and June 16, 1999 (L.F. 57). See §558.019.2(3), RSMo 2000 (stating that an inmate with three or more prior commitments to the Department of Corrections must serve eighty percent of his sentence as a mandatory-minimum prison term).

On October 6, 2003 Dudley filed a petition for declaratory judgment in the Circuit Court of Cole County (L.F. 48-51). Dudley sought a declaration that incarcerations under §559.115, RSMo are not commitments that can be used to increase a mandatory-minimum prison term under §558.019, RSMo (L.F. 48-51).¹ Dudley did not argue for the retroactive application of §559.115.7, RSMo Supp. 2003 (L.F. 48-51).

A summons was served on the defendants on November 12, 2003 (L.F. 1). On December 4, 2003 the defendants filed an answer, a motion for summary judgment, and a legal memorandum in support of the motion for summary judgment (L.F. 23-44). The thrust of these pleadings was that the argument that receipt under §559.115, RSMo cannot be counted as a commitment is not legally tenable (L.F. 23-43).

No more pleadings were filed by the parties (L.F. 1-2). The Circuit Court of Cole County entered judgment for Dudley on April 12, 2005 relying on *Irvin v. Kemper*, 152

¹ That argument is without merit as a matter of law. *Star v. Burgess*, 160 S.W.3d 376, 378 (Mo. banc 2005) (“nothing in section 558.019 or section 559.115...provides that commitments under §559.115 are not to be used for determining prior commitments under section 558.019”).

S.W.3d 358 (Mo. App. W.D. 2004). In *Irvin* the court held that §559.115.7, RSMo Supp. 2003, which states that a first 120-day incarceration under §559.115 is not to be counted as a prison commitment, applies retroactively to reduce the number of prison commitments on offenses and sentences occurring before the effective date of the statute (Addendum 1-2).

Defendants appealed (L.F. 30). The Court of Appeals Western District affirmed the trial court (Addendum at A3-A5). The Missouri Court of Appeals found that this Court in *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988) held that a change in the law that affects the minimum prison time to be served is substantive as opposed to procedural and therefore not retroactively applicable (Addendum A4). The Court of Appeals, however found that this Court overruled *Lawhorn sub silentio* by its decision in *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004), thus making the trial court decision in this case correct (Addendum at A4-A5).

A majority of the judges of the Missouri Court of Appeals Western District en banc then voted to transfer the case post-opinion to this Court (Addendum A7).

POINT RELIED ON

The Circuit Court of Cole County erred in granting declaratory judgment for the plaintiff on the issue of whether §559.115.7, RSMo Supp. 2003 should be applied retroactively to reduce plaintiff's number of prior prison commitments and thereby reduce his mandatory-minimum prison term, because that holding is contrary to §1.160, RSMo 2000 which bars the retroactive application of laws that reduce punishments and general Missouri law principles ban retrospective laws that retroactively affect substantive rights. absent a clearly manifested intent by the legislature for retroactive application, in that §559.115.7, RSMo Supp. 2003 is controlled by the ban on reduction in punishment in §1.160, RSMo. and even if it were not it is a law that changes substantive rights that the legislature has not manifested a clear intent should be applied retroactively.

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988)

State ex rel. St. Louis-San Francisco Ry. Co. v. Buder, 515 S.W.2d 409 (Mo. banc 1974)

State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991)

Star v. Burgess, 160 S.W.2d 376 (Mo. banc 2005)

§1.160, RSMo 2000

ARGUMENT

The Circuit Court of Cole County erred in granting declaratory judgment for the plaintiff on the issue of whether §559.115.7, RSMo 2003 should be applied retroactively to reduce plaintiff's number of prior prison commitments and thereby reduce his mandatory-minimum prison term, because that holding is contrary to §1.160, RSMo 2000 which bars the retroactive application of laws that reduce punishments and general Missouri law principles ban retrospective laws that retroactively affect substantive rights, absent a clearly manifested intent by the legislature for retroactive application, in that §559.115.7, RSMo Supp. 2003 is controlled by the ban on reduction in punishment in §1.160, RSMo, and even if it were not it is a law that changes substantive rights that the legislature has not manifested a clear should be applied retroactively.

STANDARD OF REVIEW

The decision of a circuit court in a declaratory judgment action is evaluated on whether there is substantial evidence to support the decision, whether the decision is supported by weight of the evidence, and whether the decision correctly declares and applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

There are no disputed material facts in this case. The case therefore is subject to *de novo* review of whether the circuit court decision correctly declares and applies the law.

SUMMARY

Article I section 13 of the Missouri Constitution bans the enactment of laws that are retrospective in their operation. This Court has interpreted the provision to mean that a law cannot be applied retroactively unless the legislature manifests a clear intent that the provision be applied retroactively or the law is “procedural only and does not affect any substantive rights of the parties.” *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974). This general principle is reinforced in the context of penal statutes by §1.160, RSMo 2000, which bars the reduction of fines penalties or forfeitures by the amendment or repeal of a statute.² *See State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 516-518 (Mo. banc 2001) (interpreting §1.160 to ban a reduction in punishment from that required by the law in effect on the date of the offense).

Dudley’s mandatory-minimum prison term is retroactively reduced from eighty-percent of his current eight year sentence or 6.4 years to fifty percent of that sentence or 4.0 years if §559.115.7, RSMo Supp. 2003 is applied retroactively to the calculation of the mandatory-minimum prison term on Dudley’s 2001 assault sentence (L.F. 34, 57). Reduction of the mandatory-minimum prison term is a reduction in a penalty by the amendment of a statute and reductions in penalties by such amendments are banned by §1.160, RSMo 2000. But even if one defines “penalty” or “amendment” in §1.160, RSMo

² Section 1.160, RSMo has been amended since this case was brought. *See* §1.160, RSMo Supp. 2005. This change removes an exception to the general rule against retroactivity that is not relevant to this case.

2000 to exclude the relevant change in §559.115, RSMo the more general ban on laws that operate retrospectively would still apply. The precedent of this Court dictates that a change in a mandatory-minimum prison term is substantive as opposed to procedural, *State v. Lawhorn*, 762 S.W.2d 820, 824 (Mo. banc 1988). The legislature manifested no clear intent that §559.115.7, RSMo Supp. 2000 should apply retroactively. *See Nieuwendaal v. Missouri Department of Corrections*, 181 S.W.3d 153, 155 (Mo. App. W.D. 2005) (stating “we find no indication the General Assembly intended for §559.115.7 to apply retroactively”). Therefore §559.115.7, RSMo Supp. 2003 may not be applied retroactively without violating the general ban on retrospective laws.

ANALYSIS

Absent the retroactive application of §559.115.7, RSMo Supp. 2003 Dudley’s receipt for service of a 120-day program under §559.115 does count as a prior commitment that requires him to serve eighty percent of his most recent eight year sentence as a mandatory-minimum prison term prior to parole eligibility. *Star v. Burgess*, 160 S.W.3d 376, 378 (Mo. banc 2005).³ Therefore the resolution of this case turns on whether §559.115.7, RSMo Supp.

³ In *Star* this Court did not apply 559.115.7, RSMo 2003 retroactively. But in a footnote this Court noted that it did not reach the retroactivity issue because the inmate had not raised the issue in the trial court. *Star v. Burgess*, 160 S.W.3d at 378 n. 2. The trial court in *Star* did not consider the retroactivity issue. In Dudley’s case, the trial court decided the case based on the retroactive application of §559.115.7, RSMo Supp. 2003. The issue is thus

2003 applies retroactively to reduce Dudley's eighty percent mandatory-minimum prison term on his current sentence. The answer to that question turns on whether the retroactive application of §559.115.7, RSMo Supp. 2003 is barred either by §1.160, RSMo 2000 or by the more general bar to retrospective laws.

In *State v. Hillis*, 748 S.W.2d 694, 697-698 (Mo. App. E.D. 1988), the Missouri Court of Appeals analyzed whether §558.019, RSMo 1986, which became effective on January 1, 1987 could be applied retroactively to the calculation of parole eligibility for an offense committed on July 26, 1986. The effect of the new statute was to create a mandatory-minimum prison term of eighty percent or forty years in the case of the specific inmate, where under the old statute the inmate would have been parole eligible after one year. *Id.*⁴ The Court of Appeals held that although not part of the sentence, parole eligibility constitutes

before this Court for the first time.

⁴ The parole statute that was in force at the time, §217.690.2, RSMo 1986, allowed Hillis to apply for parole after one third of the sentence or one year whichever was shorter. The current version of §217.690.2, RSMo contains no mandatory-minimum provision at all. So an inmate with no statutory mandatory-minimum term arising from some other statutory provision could in theory be paroled on day one of his sentence. See *Gettings v. Missouri Department of Corrections*, 950 S.W.2d 7, 9-10 (Mo. App. W.D. 1997) (regulations and guidelines for parole release dates do not limit the Parole Board's almost unlimited statutory discretion to grant or deny parole and need not be followed in an individual case).

part of the punishment for a crime, and that changes that disadvantage a defendant could violate the Ex Post Facto Clause. *Id.* at 697. The Court of Appeals noted that the United States Supreme Court had found that application of a statute that raised a mandatory-minimum term from six months to fifteen years on the sentence for an offense committed before the effective date of the statute, violated the Ex Post Facto Clause. *Id.* at 698, *citing Lindsey v. Washington*, 301 U.S. 397 (1937). The Missouri Court of Appeals held that even though the new statute did not technically increase the inmate's sentence, its effect was to increase his mandatory-minimum prison term and this violated the Ex Post Facto Clause. *Id.* at 698.

This Court addressed the same issue in *State v. Lawhorn*, 762 S.W.2d 820 (Mo. banc 1988). The inmate in *Lawhorn* received a seven year sentence for an offense that occurred on November 28, 1986, before the January 1, 1987 effective date of §558.019, RSMo 1986. *Id.* at 824. The retroactive application of §558.019, RSMo 1986 would have required the inmate to serve a forty percent mandatory-minimum prison term. *Id.* at 824.

This Court held that the application of §558.019, RSMo 1986 to the inmate in the *Lawhorn* case would be retrospective. *Id.* at 825. This Court explicitly rejected the argument that increasing the inmate's mandatory-minimum prison term did not involve a substantive right, noting that parole eligibility is part of the punishment for a crime. *Id.* at 826. This Court held that the retroactive application of §558.019, RSMo 1986 to increase the inmate's

mandatory-minimum prison term would violate Article I §13 of the Missouri Constitution.⁵
Id. at 821.

As this Court's decisions indicate that §559.115.7, RSMo Supp. 2003 should not be applied retroactively because this would violate the general ban on retrospective laws, this Court's precedents also indicate that retroactive application would violate the specific statutory ban on decreasing a punishment through an amendment to a law.

In *State v. Sumlin*, 820 S.W.2d 487, 489-490 (Mo. banc 1991) this Court addressed the issue of what is an "amendatory law" for purpose of the prohibition on the reduction of punishment by the repeal or amendment of a law by §1.160, RSMo. This Court held that the Comprehensive Drug Control Act of 1989 is controlled by the provision of §1.160, RSMo even though it was a comprehensive alteration of Missouri's drug laws that divided many offenses previously contained in §195.020, RSMo 1986, among new statutory provisions. *Id.* at 490. This Court noted that legislature typically amends the law by repealing old provisions and enacting new provisions. *Id.*

Lawhorn and *Sumlin* are the cases from this Court that are on point. *Lawhorn* teaches that a change in a mandatory-minimum prison term is a change in punishment and *Sumlin*

⁵ That provision bans both "ex post facto" laws and any law that is "retrospective in its operation." The opinion in *Lawhorn* indicates both that retroactive application of §558.019, RSMo 1986 would have violated the prohibition on ex post facto laws, *id.* at 821, and holds that the provision is substantive and retrospective, *Id.* at 825-826.

teaches that a law is amendatory even if the legislature amends a statutory provision by the creation of a new provision. Therefore, §1.160, RSMo 2000, which bans the retroactive application of amendments to laws that reduce punishment controls the reduction of Dudley's mandatory-minimum prison term, and the term cannot be reduced by the retroactive application of §559.115.7, RSMo Supp. 2003. Even though paragraph seven is a new paragraph in §559.115, RSMo, it is an amendment to the statute and statutory scheme just as the changes in the law in *Sumlin* were.

But even if one does not apply §1.160, RSMo 2000 on the theory that the addition of paragraph 7 of §559.115 is not an amendment within the meaning of §1.160, RSMo 2000 the result is the same because the more general ban on retrospective laws control. In *Lawhorn* this Court held that a change in a mandatory-minimum prison term is substantive and its retroactive application is retrospective. Therefore the retroactive application of §559.115.7, RSMo Supp. 2003 to reduce Dudley's mandatory-minimum prison term is prohibited by Article I §13 of the Missouri Constitution as was the change in the mandatory-minimum prison term considered in *Lawhorn*. See *State ex rel. St. Louis-San Francisco Railway Co. v. Buder*, 515 S.W.2d at 410 (a law that affects substantive rights may not be applied retroactively absent a manifestation of a clear intent of the legislature for retroactive application).

Therefore this is a straight forward case. Based on the precedents of this Court, the trial court necessarily erred in applying §559.115.7, RSMo Supp. 2003 to reduce the mandatory-minimum prison term on Dudley's 2001 sentence. Apparent complexity enters

into the case because the Missouri Court of Appeals affirmed the trial court decision by holding that this Court overruled the controlling *Lawhorn* precedent *sub silentio* in *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004) (Addendum at A3-A5, *Garvis v. Agniel*, Slip. Op. WD65507).⁶ This complexity is only apparent rather than real because the *Lawhorn* and *Russell* decisions do not conflict and in fact co-exist harmoniously.

In *Russell*, this Court addresses the question of whether §558.016.8, RSMo Supp. 2003 should be applied retroactively to an inmate who pleaded guilty to the relevant offense in 1999 before the June 27, 2003 effective date of the statute. This provision allowed an inmate convicted of a nonviolent C or D felony with no prior prison commitments to petition for judicial parole after serving 120-days of his sentence. *State ex rel. Nixon v. Russell*, 129 S.W.3d at 868 n.3.⁷

The inmate in *Russell* necessarily had no statutory mandatory-minimum prison term at all as §558.016.8, RSMo Supp. 2003 by its own terms excluded inmates with prior commitments, and the general statutory minimum term present in the 1986 version of §217.690 had long since been repealed. *Compare* §217.690.2, RSMo 1986 (the statute in

⁶ The Respondent's name is Garvis R. Dudley, and the body of the Court of Appeals opinion notes this. However Appellant mistakenly referred to the Respondent as Dudley R. Garvis and this was copied in the captions of the trial court and appellate court decisions.

⁷ The legislature subsequently repealed this provision. See §558.016, RSMo Supp. 2005.

place when *Lawhorn* was decided), with §217.690.2, RSMo Supp. 1990 and §217.690.2, RSMo 2000. The inmate in *Russell* therefore could in theory have been paroled by the Board on day one or day 120 of his sentence, regardless of the passage of §558.016.8, RSMo Supp. 2003. See *Shaw v. Missouri Board of Probation and Parole*, 937 S.W.2d 771 (Mo. App. W.D. 1997) (regulations concerning parole release in the Code of State Regulations do not and cannot bind the almost unlimited discretion provided to the Parole Board by §217.690, RSMo) (cited by *Lee v. Kemna*, 523 U.S. 1, 14 (1998) for the proposition the statute “gives the Board almost unlimited discretion in whether to grant parole release”); *Gettings v. Missouri Department of Corrections*, 950 S.W.2d at 7-10 (regulatory guidelines for the timing of releasing inmates on parole are merely aids to the Board that cannot limit its statutory discretion which is almost unlimited).

What the inmate in *Russell* received by the retroactive application of §558.016.8, RSMo Supp. 2003 then was not a new parole right but an additional procedure for receiving parole. He could receive parole from the Parole Board and the sentencing judge. The inmate had no statutory mandatory-minimum prison term to be reduced and was not eligible for parole one second sooner than had the statute not been passed, as the Board in its almost unlimited discretion and could have released him on day one of his sentence if it chose to do so.⁸

⁸ The case law saying the Parole Board has unlimited discretion not to follow guideline release dates necessarily arises in cases in which the Board declines to release an

Russell does not contradict or overrule *Lawhorn*. This Court in *Russell* did not deal with a change in a mandatory-minimum prison term. It dealt with a change in the procedure by which an already parole-eligible-inmate is considered for parole. In that way *Russell* is like *State v. ex rel. Cavallaro v. Goose*, 908 S.W.2d 133 (Mo. band 1995), in which this Court held that the retroactive application of a new parole statute giving greater discretion to the Parole Board was not improper so long as the reason for any parole denial under the new statute would have been a satisfactory reason under the old statute. The mechanics of the procedures used in determining whether to grant parole are not substantive. Changing a mandatory-minimum term that an inmate must serve prior to parole eligibility is substantive. *Cavallaro* and *Russell* are about procedure. *Lawhorn* is about substance. There is no conflict.

There is *dicta* in *Russell* that appears to conflict with the holding in *Sumlin*. Specifically in *Russell* this Court stated that §558.016.8, RSMo Supp. 2003 is not an amendatory law covered by §1.160, RSMo because §558.016.8 is a new statutory provision. *State ex rel. Nixon v. Russell* 129 S.W.3d at 870. In *Sumlin* this Court held that new provisions are controlled by §1.160, RSMo. *State v. Sumlin*, 820 S.W.2d at 489-490. But the statement in *Russell* is *dicta*, because a change in the mechanics of parole consideration for an already parole-eligible-inmate does not change the punishment for an offense, so

inmate at or before the guideline range. One would not expect an inmate to sue if he is paroled early. He could simply decline parole if he felt that strongly about the matter.

whether the change occurred in a new provision or not cannot affect the outcome of the case. Further, even if §1.160 is not applied, the result in Dudley's case is the same because it is controlled by the general ban on retrospective laws in Article I §13 of the Missouri Constitution, and *Lawhorn* which holds that a change in a mandatory-minimum prison term is substantive and retrospective.

In *dicta* in *Russell* this Court also stated that "As long as the new statute does not increase the length of an offender's sentence it is a fit subject for legislation." *State ex rel. Nixon v. Russell*, 129 S.W.3d at 871. In context, this Court was dealing with the retroactive application of a purely procedural statute that did not change an inmate's punishment. One should not read this statement completely out of context as supporting the idea that this Court silently overruled *Lawhorn*. In *Lawhorn* a retroactive change in punishment that did not affect the actual sentence imposed was held to violate Article I §13 of the Missouri Constitution. The language this Court used in *Russell* explains the decision in *Russell*. As *Russell* and *Lawhorn* do not conflict, and exist harmoniously, it is not correct to pick *dicta* from *Russell* out of context and apply it to a completely distinguishable fact pattern dealing with issues that were not before this Court in *Russell* and are controlled by *Lawhorn*. In *Nieuwendaal v. Missouri Department of Corrections*, 181 S.W.3d 153, 155 (Mo. App. W.D. 2005). The Missouri Court of Appeals acknowledged that it found no indication the General Assembly intended §559.115.7, RSMo 2000 to apply retroactively. Section 558.019.9, RSMo Supp. 2003 states the provisions of the new version of §558.019 are only to be applied to offenses committed after August 28, 2003. Therefore, not only is there an absence of

clearly manifested legislative intent that changes in mandatory-minimum prison terms are to be applied retroactively, there is a manifest intent that such changes not apply retroactively. In fact, there is a strong argument that §559.115.7, RSMo Supp. 2003 must be read in *pari materia* with §558.019.9, RSMo Supp. 2003 and is controlled by the date of application language of that provision, and which states that the law only applies offenses committed before August 28, 2003. *See State v. Tivis*, 948 S.W.2d 690, 696-697 (Mo. App. W.D. 1997) (finding that an inmate could not benefit retroactively from the removal of burglaries from the list of dangerous felonies subject to mandatory-minimum terms under §556.061(8), RSMo 1994 because that provision is controlled by the date of application language in §558.019.7, RSMo 1994 with which it must be read in *pari materia*).

If *Lawhorn* were not good law, which it is, and therefore changes in mandatory-minimum prison terms were really procedural as opposed to substantive then the law concerning mandatory-minimum prison terms as a whole would become self-contradictory. Statutory changes increase mandatory-minimum prison terms as well as decrease them. Compare for instance the relatively small number of dangerous felonies under §556.061(8), RSMo 2000 that are subject to an eighty-five percent mandatory-minimum prison term with the increased number of dangerous felonies subject to a mandatory-minimum term in §556.061(8), RSMo Supp. 2005. If changes in mandatory-minimum prison terms are really purely procedural then the Department of Corrections would be required to retroactively increase the mandatory-minimum prison terms of inmates who had committed crimes that

are now designated as dangerous felonies but that were not designated as dangerous felonies at the time of the offense.

It seems self-evident that increasing mandatory-minimum terms would necessarily retroactively substantively disadvantage the inmates involved, inviting Ex Post Factor Clause litigation in federal and state courts, which the inmate would presumably win. Therefore in order to justify retroactively decreasing mandatory-minimum prison terms but not retroactively increasing them, one would have to conclude that a change in mandatory-minimum prison term is procedural when it works to an inmate's advantage but substantive when it does not. Such a result is unreasonable but this Court need only apply *Lawhorn*, the controlling precedent, to the facts of this case to avoid it.

Further it is reasonable that helping achieve certainty concerning the mandatory-minimum time an inmate will serve facilitates plea bargains and shorter total sentences. A model in which mandatory-minimum sentences may be reduced or eliminated at an unknown future time, removes certainty from the calculation of how long an offender must serve on a particular sentence. That seems to encourage imposing a longer total sentence than would be imposed if the court and prosecutor knew with reasonable certainty the time an inmate must serve on a particular sentence. Therefore it would seem to be sound public policy as well as the correct application of controlling precedent to find that the trial court erred in applying §559.115.7, RSMo Supp. 2003 retroactively to reduce a mandatory-minimum prison term.

In short, §559.115.7, RSMo Supp. 2003 may not be applied retroactively to reduce mandatory-minimum prison terms because to do so would be contrary to §1.160, RSMo and the general ban on retrospective laws set forth in Article I §13 of the Missouri Constitution. This Courts decision in *State v. Lawhorn* is controlling and dictates this result. Further, reaching a different result would not be sound public policy as it would introduce apparent contradictions into the law and would reduce the amount of certainty that now exists in sentencing. The trial court therefore erred in applying §559.115.7, RSMo Supp. 2003 retroactively to decrease Dudley's mandatory-minimum prison term.

CONCLUSION

Appellants pray that the judgment of the Circuit Court of Cole County, Missouri
be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 5,104 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of May, 2006, to:

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RESPONDENT'S APPENDIX

Decision, Judgment, Order and Decree A1

The Missouri Court of Appeals Opinion A3

Section 1.160, RSMo 2000 A6

Section 559.115.7, RSMo 2003 A7

Article I, § 13 Missouri Constitution A8