No. SC87898

IN THE
MISSOURI SUPREME COURT

JAMES F. FUREY

Respondent/Petitioner,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant/Respondent

Appeal from the Grant of Summary Judgment in a Declaratory Judgment Action in the Circuit Court of Cole County, Missouri
The Honorable Thomas J. Brown, III Judge

RESPONDENT'S BRIEF
AFTER TRANSFER FROM THE MISSOURI COURT OF APPEALS
WESTERN DISRTICT

JAMES F. FUREY
Pro-Se Respondent/Petitioner
7784 Olde English Road
St. Louis, Missouri 63123
Phone (314) 351-2323.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 2-4

JURISDICTIONAL STATEMENT 5

STANDARD OF REVIEW 6

STATEMENT OF FACTS 7-9

POINTS RELIED ON 10-14

ARGUMENT

Point I - Petitioner has one prior commitment 15-16

Point II - The trial court correctly applied the law upon substantial evidence when it granted Summary Judgment in favor of James F. Furey 17-22

Point III - The trial Court correctly applied §559.115.7 RSMo. retroactively when granting Summary Judgment, in that it is procedural law, not substantive, in that said application does not reduce the punishment imposed, nor does it violate §1.160 RSMo. or ex post facto application of the law. 23-27

CONCLUSION 27

CERTIFICATE OF COMPLIANCE AND SERVICE 28

APPENDIX 29

APPENDIX-TABLE OF CONTENTS.....30

APPENDIX EXHIBITS.....A-1 to A-3

TABLE OF AUTHORITIES

CASES

Carlyle v. Missouri Department of Corrections, Pages:

2005 WL 3359880 (Mo. App. W.D., Dec. 13, 2005).....11, 18

Gettings v. Missouri Department of Corrections,

950 S.W.2d 7 (Mo. App. W.D. 1997).....18

In re Thomas v. Kemna,

55 S.W.3d 487 (Mo. App. W.D. 2002).....18

Irvin v. Kempker, 152 S.W.3d 358 (Mo. App. W.D. 2005)...8,10,11,13,16,18

Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976).....6

Nylon v. Missouri Board of Probation and Parole,

940 S.W.2d 3 (Mo. App. W.D. 2005).....18

Powell v. Missouri Department of Corrections,

152 S.W.3d 363 (Mo. App. W.D. 2005).....8,10,11,13,16,18

Shaw v. Missouri Board of Probation and Parole,

937 S.W.2d 771 (Mo. App. W.D. 1997).....18

Simul Vision Cable v. Continental Cablevision,

983 S.W.2d 600 (Mo. App. E.D. 1999).....6

Star v. Burgess, 160 S.W.3d 376 (Mo. banc 2005).....10,11,13,16

State ex rel. Cavallaro v. Groose,

908 S.W.2d 133 (Mo. banc 1995).....11,16

State ex rel. Nixon v. Kelly,

58 S.W.3d 513 (Mo. banc 2001).....11,16,17

State ex rel. Nixon v. Kelly,

58 S.W.3d 513 (Mo. banc 2001).....11,16,17

State ex rel. Nixon v. Russell,

129 S.W.3d 867 (Mo. banc 1994).....11,16-18

State v. Hillis, 748 S.W.2d 694 (Mo. App. E.D. 1988)...11,17

State v. Johnson, 150 S.W.3d 132 (Mo. App. E.D. 2004)..11

State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988).....11,17

State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991).....11,18

Toumayin v. State Farm General Ind.,

970 S.W.2d 822 (Mo. App. E.D. 1998).....6

Wheat v. Missouri Board of Probation and Parole,

932 S.W.2d 838, 838 (Mo. App. 1996).....6

Other Authorities

Missouri Constitution Article V,§3 (as amended in 1982)..5

§1.160, RSMo. 2000..... 11,15,17

§558.016.8, RSMo. Supp. 2004..... 11

§558.019, RSMo. Cum. Supp. 2003..... 7,10-16

§558.031 RSMo..... 12,17

§559.115, RSMo. 2003.....7,8,10,12,13,15,
19,A-1,A-2

JURISDICTIONAL STATEMENT

This Court has jurisdiction as a timely notice of appeal was filed from a declaratory judgment by the Cole County Circuit Court, a circuit court within the geographical jurisdiction of the Missouri Court of Appeals, Western District, which transferred this case after opinion to the Missouri Supreme Court. Missouri Constitution, Article V, , §3 (as amended in 1982).

STANDARD OF REVIEW

"The standard of review on appeal regarding issuance of summary judgment in a declaratory judgment action is no different from that which should be employed by the trial court to determine the propriety of sustaining the motion initially." **Simul Vision Cable Systems Partnership v. Continental Cablevision of St. Louis County, Inc.**, 983 S.W. 2d 600 (Mo. App. E.D. 1999). "Propriety of summary judgment is purely an issue of law, and the standard of review on apeal is essentially de novo." **Toumayan v. State Farm General Ins. Co.**, 970 S.W. 2d 822 (Mo. App. E.D. 1998).

The appellate court standard of review is that of **Murphy v. Carson**, 536 S.W.2d 30 (Mo. banc 1976). The appellate court "may reverse only if the trial court's judgment is not supported by substantial evidence, is against the weight of the evidence, or incorrectly declares or applies the law." **Wheat v. Mo. Bd. of Prob. & Parole**, 932 S.W.2d 835, 838 (Mo. App. 1996).

There are no disputed material facts in this case; and therefore review is to whether the circuit court decision correctly declares and applies the law.

STATEMENT OF FACTS

This case is about whether James Furey's (hereinafter "petitioner") only 120-day incarceration, pursuant to Section 559.115.7 RSMo., in the Missouri Department of Corrections (hereinafter MDOC) should count as a "Previous Commitment", therefore increasing his minimum mandatory service of sentence prior to parole eligibility from 40% to 50% pursuant Section 558.019 RSMo..

Petitioner received a commitment to the MDOC in 1989 (LF, page 50). This commitment is not a matter of controversy. Petitioner's second commitment, or first "previous commitment" to the MDOC occurred on July 3, 2001 when he was stipulated to the MDOC's 120-day subsstance abuse treatment program, pursuant to Section 559.115 RSMo., and thereafter released onto a term of probation after successful completion of said program. (LF, page 15).

Subsequent to being released onto probation, petitioner committed new felony offenses which violated the conditions of said probation. On August 23, 2002, petitioner was sentenced for said offenses. On August 28, 2002, petitioner was received by the MDOC for his third commitment, or second "previous commitment", according to MDOC records and appellant's exhibit (LF, pages 50-51). Petitioner was then told by the MDOC that he would have to serve 50% of his aforesaid sentences prior

to parole eligibility. Petitioner informed MDOC that Section 559.115 RSMo. stipulated sentences could not be used as a "previous commitment" for the purposes of determining a minimum mandatory service of sentence percentage, and were, in fact, exempt from use as a "previous commitment".

After exhausting his administrative remedies, MDOC admitted that 120-day commitments could not be used as a "previous commitment", but the MDOC would require a court order directing them to change petitioner's "previous commitment" count to one and to reduce his minimum mandatory percentage of service of sentence from 50% to 40%. (LF, page 6, para. 9; page 8, paragraph 14).

Petitioner then filed his "Petition for Declaratory Judgment with Brief in Support" in the Circuit Court of Cole County on February 28, 2005, arguing that his mandatory minimum prison term prior to parole eligibility should be 40% instead of 50% because he had only one "previous commitment" instead of two, as 120-day commitments under Section 559.115.7 RSMo. have been held by this Court to be exempt as a "previous commitment" under the decisions handed down in the, inter alia, Irwin and Powell cases. Petitioner filed a motion for summary judgment (LF, page 25) and appellant filed a motion for judgment on the pleadings (LF, page 52). The Circuit Court of Cole County, Thomas Brown, III, presiding, denied appellant's motion, and granted

petitioner's motion (LF, pages 55-56).

Appellant filed a timely notice of appeal (LF, page 57) in the Missouri Court of Appeals, Western District. After submission, the Court of Appeals affirmed the lower court's judgment of granting summary judgment in favor of the respondent. Appellant moved for transfer to this Court, and on August 1, 2006, the Court of Appeals granted transfer.

POINTS RELIED ON

I.

The circuit court, upon substantial evidence, correctly declared and applied the law, as set forth in Section 559. 115.7 RSMo. and Section 558.019.2 RSMo., in granting and entering judgment on behalf of petitioner, in that, excluding petitioner's 120-day incarceration, petitioner clearly has one "previous commitment" to the MDOC in 1989.

Irvin v. Kempker, 152 S.W.3d 358 (Mo. App. W.D. 2004).

Powell v. Missouri Dept. of Correction, 152 S.W.3d (Mo. App. W.D. 2004).

Star v. Burgess, 160 S.W.3d at 378, footnote 2. (Mo. banc 2005).

Section 558.019.2(1) RSMo. (2003).

Section 559.115.7 RSMo. (2003).

II.

The circuit court, upon substantial evidence, correctly declared and applied the law when it held that the MDOC must not count petitioner's July 3, 2001 incarceration as a "previous commitment", based upon the new law promulgated under section 559.115.7 RSMo. (2003), that directs the MDOC not to count the first incarceration in a 120-day program within the MDOC as a "previous commitment" in calculating whether a minimum mandatory percentage of sentence must be served prior to parole eligibility; in that the change that became effective under Section 559.115.7 RSMo. on June 27,

2003 created new law, and was not a statutory amendment, therefore making retroactive application thereof proper, and not a violation, inter alia, of section 1.160 RSMo. in said application. Moreover, excluding the July 3, 2001 incarceration, petitioner clearly has only one "previous commitment" under Section 558.019.2(1) RSMo. (2003).

Carlyle v. Missouri Department of Corrections, 2005 WL 3369880 (Mo. App. W.D. December 13, 2005).

Irvin v. Kempker, 152 S.W.3d 358 (Mo. App. W.D. 2004).

Powell v. Missouri Dept. of Corrections, 152 S.W.3d 363 (Mo. App. W.D. 2004).

State ex rel., Nixon v. Russell, 129 S.W.3d 867 (Mo. banc 2004).

Star v. Burgess, 160 S.W.3d 376, 378(footnote 2.) (Mo. banc 2005).

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

State v. Johnson, 150 S.W.3d 132 (Mo. App. E.D. 2004).

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

State ex rel., Nixon v. Kelly, 58 S.W.3d 513 (Mo banc 2001).

State ex rel., Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995).

State v. Hillis, 748 S.W.2d 694 (Mo. App. 1988).

Section 1.160 RSMo..

Section 558.016.8 RSMo. (2003).

Section 558.019.2 RSMo. (1986).

Section 558.019.2(1)(2) RSMo. (2003).

Section 558.019.9 RSMo. (2003).

Section 559.115.7 RSMo. (2003).

Section 558.031 RSMo..

III.

The trial court correctly applied §559.115.7 RSMo. retroactively when granting summary judgment because it is a procedural law, not substantive, in that said application does not reduce the punishment imposed, nor does the retroactive application of a procedural law violate §1.160 RSMo., or ex post facto application of law.

Brennecka v. Director of Revenue, 855 S.W.2d 509 (Mo.App.W.D.1993)

Holden v. Antom, Inc., 930 S.W.2d 526 (Mo.App.E.D.1996)

Hunt v. Director of Revenue, 10 S.W.3d 144 (Mo.App.E.D.2004)

Jones by Williams v. Mo. Dept. of Social Services, 966 S.W.2d 324 (Mo.App.E.D.1998)

Liberty Mutual Ins. Co. v. Garffie, 939 S.W.2d 484 (Mo.App.E.D.1997)

Nieuwendaal v. Mo. Dept. of Corrections, 181 S.W.3d 153 (Mo.App.W.D.2005)

Powell v. Mo. Dept. of Corrections, 152 S.W.3d 363, 366 (Mo.App.W.D.2004)

State ex rel., Nixon v. Russell, 129 S.W.3d 867 (Mo.banc 2004)

State v. Jaco, 156 S.W.3d 775, 781 (Mo.banc 2005)

State v. St. Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409, 410 (Mo.banc 1974)

State v Trivis, 948 S.W.2d 690 (Mo.App.W.D.1997)

Wellner v. Director of Revenue, 16 S.W.3d 352 (Mo.App.W.D.2000)

Missouri Constitution, Article I, Section 13

Section 1.160 RSMo.

Section 558.016.8 RSMo.

Section 558.019 RSMo.

Section 559.115 RSMo.

Section 559.115.7 RSMo.

ARGUMENT

I.

The circuit court, upon substantial evidence, correctly declared and applied the law, as set forth in Section 559.115.7 RSMo. (2003) and Section 558.019.2 RSMo. (2003), in granting and entering judgment on behalf of petitioner, in that, in excluding petitioner's 120-day incarceration, petitioner clearly has only one "previous commitment" to the MDOC in 1989.

Petitioner was committed to the MDOC on three separate occasions; in 1989, 2001 and 2002. Petitioner, including his 2001 incarceration, has two (2) "previous commitments" to the MDOC. Section 558.019.2(2) RSMo., required petitioner to serve 50% of his term prior to parole eligibility.

The trial court ordered appellant not to count petitioner's July 3, 2001, 120-day incarceration in the MDOC as a "previous commitment" due to the enactment of new law under Section 559.115.7 RSMo. (2003) and its retroactive application under precedent set forth under Irwin v. Kempker, 152 S.W.3d 358 (Mo. App. W.D. 2004). This court and the Missouri Supreme Court further confirmed the retroactive application of Section 559.115.7 RSMo. (2003) in Powell v. Missouri Department of Corrections, 152 S.W.3d 363 (Mo. App. W.D. 2004), and Star v. Burgess, 160 S.W.3d 376, 378-(footnote 2.)(Mo. banc 2005).

Pursuant the trial court's ruling of exempting Petitioner's July 3, 2001, 120-day incarceration, Petitioner now has one "previous commitment", based upon his 1989 commitment. Petitioner's 2002 commitment is his current, not "previous" commitment, and therefore, pursuant to §558.019.2(1) RSMo. (2003), Petitioner must serve only forty percent (40%), not fifty percent (50%), of his current sentences prior to parole release eligibility.

The circuit court, upon substantial evidence, and not against the weight of the evidence, correctly declared and applied the law in its Order granting Summary Judgment in favor of the Petitioner. (LF, pages 55-56). The ruling by the circuit court was therefore affirmed on this point by the Court of Appeals.

II.

The circuit court, upon substantial evidence, correctly declared and applied the law when it held that the MDOC must not count petitioner's July 3, 2001 incarceration as a "previous commitment", based upon the new law promulgated under Section 559.115.7 RSMo. (2003), that directs the MDOC not to count the first incarceration in a 120-day program within the MDOC as a "previous commitment" in calculating whether a minimum mandatory percentage of sentence must be served prior to parole eligibility; in that the change that became effective under Section 559.115.7 RSMo. (2003) on June 27, 2003 created new law, and was not a statutory amendment, therefore making the retroactive application thereof proper, and not a violation, inter alia, of Section 1.160 RSMo. (2000) in said application. Moreover, excluding petitioner's July 3, 2001 incarceration, petitioner clearly has only one "previous commitment' under Section 558.019.2(1) RSMo. (2003).

The circuit Court of Cole County, Missouri properly and correctly declared and applied the law, upon substantial evidence, that petitioner's July 3, 2001 incarceration in the MDOC should not count as a "previous commitment" for the purposes of determining the correct minimum mandatory

service of sentence percentage, as set forth under Section 559.115.7 RSMo. (2003) and Section 558.019.2(1) RSMo. (2003). The Court and the Missouri Supreme Court have both held that the first 120-day incarceration under Section 559.115.7 RSMo. is exempt as a "previous commitment". Irvin v. Kempker, 152 S.W.3d 358 (Mo. App. W.D. 2004); Powell v. Missouri Department of Corrections, 152 S.W.3d 363 (Mo. App. W.D. 2004); Star v. Burgess, 160 S.W.3d 376, 378(Footnote 2.)(Mo. banc 2005). This Court has further held that Scetion 559.115.7 RSMo. (2003) is retroactive in its application in both Irvin and Powell. The Missouri Supreme Court further retroactively applied Section 558. 016.8 RSMo. (2003) in State ex rel. Nixon v. Russell, 129 S.W. 3d 867 (Mo. banc 2004). Both holdings were based on similar criteria, inter alia, "that said statutes were new law, not repealed or amended; that the plain language and/or legislative intent of the new laws applied retroactively; and that the granting of an earlier parole eligibility does not shorten a prison term; nor do the statutes after the law creating the offense." State ex rel., Nixon v. Kelly, 58 S.W.3d 513, 518 (Mo. banc 2001); State ex rel., Cavallaro v. Groose, 908 S.W.2d 133 (Mo. banc 1995); State ex rel., Nixon v. Russell, 129 S.W.3d 867 (Mo. banc 2004). It is therefore well settled that new laws which meet the aforesaid criteria cannot violate Section 1.160 RSMo. (2000) when they are applied retroactively.

"Section 558.016.8 is a new statutory provision; it does not repeal or amend any previously existing statute." Kelly. "Application of Section 558.016.8 does not shorten [a] sentence, nor does it alter the law creating the offense." **Id.** The same is true of Section 559.115.7 RSMo. (2003). "Finding the State's argument unpersuasive, we agree with Irwin that Russell counsels us to apply Section 559.115.7 RSMo. (2003), retroactively....the time Irwin spent in the custody of the Department of Corrections in the spring of 2000 under the 120-day callback program and prior to his release on probation cannot be considered a "prior commitment" to the Department of Corrections for the purpose of calculating his minimum prison term before becoming eligible for parole under Section 558.019 RSMo." 152 S.W.3d at 362 (Mo. App. W.D. 2004).

Inasmuch as appellant has apparently relied on Section 1.160 RSMo. (2000) as its authority to seek reversal, it is properly applied to Section 558.019 RSMo. and Section 558.031, in that these sections were repealed and/or amended Strictly to apply to decrease or increase a term of confinement; to disadvantage; or to create or prohibit an ex post facto application of law; and the cases presented by appellant in support thereof are not on point to the subject matter of this appeal. State v. Hillis, 748 S.W.2d 694 (Mo. App. E.D. 1998); State v. Lawhorn, 762 S.W.2d 820 (Mo. banc 1988);

Nylon v. Missouri Board of Probation and Parole, 940 S.W.2d 3 (Mo. App. W.D. 1997); In re Thomas v. Kemna, 55 S.W.3d 487 (Mo. App. W.D. 2002).

Appellant cites that the holding that 558.031 RSMo. could not be applied retroactively because it would, in fact, reduce the punishment. If relief were granted under this statute a punishment would be reduced in the form of a shorter overall sentence of comfinement. As opposed to Section 559.115.7 RSMo., wherein any relief granted thereunder does not change the length of the sentence; just where the offender would serve it. "Parole does not reduce a sentence imposed." Irvin, citing McCulley v. State, 486 S.W.2d 419, 423 (Mo. 1972). Again, appellant is not on point.

Contrary to appellant's analysis of the subject matter of this appeal, both Irwin and Powell were correctly decided in this Court, as was Russell in the Missouri Supreme Court. In fact, appellant admits, concedes and recognizes that his analysis of Shaw v. Missouri Board of Probation and Parole, 937 S.W.2d 771 (Mo. App. W.D. 1997); Gettings v. Missouri Department of Corrections, 950 S.W.2d 7 (Mo. App. W.D. 1997); and State v. Sumlin, 820 S.W.2d 487 (Mo. banc 1991) have been, in fact, rejected by this Court in its recent decision in Carlyle v. Missouri Department of Corrections, 2005 WL 3369880 (Mo. App. W.D. December 13, 2005).

Appellant, in conclusion, states petitioner "is not entitled to relief for another independent reason." (Brief, page 20). Appellant states "Section 559.115.7 RSMo. Cum. Supp. 2005 (sic) excludes a 120 day incarceration as a commitment only when it was the offender's "first incarceration". If an offender's first incarceration was for a 120-day program, then it is not a commitment." (Brief, page 20, lines 14-17). Appellant is misguided and has misconstrued the plain language of Section 559.115.7 RSMo. (2003).

Section 559.115.7 RSMo. (2003) clearly states, to-wit:

> "7. An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo." (Emphasis added)

The statute does not mandate that an offender's first incarceration must be for a 120-day program to be exempt, but in the alternative, does mandate that an offender's first incarceration for participation in a 120-day program shall be exempt as a later finding as a previous prison commitment. The statute clearly indicates that it does not matter which commitment was stipulated to a 120-day program, but only that the first commitment thereto will be exempt as a previous prison commitment under Section 559.115.7 RSMo. (2003). Appellant is incorrect on this point.

The circuit court, upon substantial evidence; and not against the weight of the evidence, correctly declared and applied the law in granting Summary Judgment in favor of the Petitioner on this Point II., and the Court of Appeals affirmed the circuit court's ruling granting Summary Judgment in favor of the Petitioner.

III.

The trial court correctly applied §559.115.7 RSMo. retroactively when granting summary judgment because it is a procedural law, not substantive, in that said application does not reduce the punishment imposed, nor does the retroactive application of a procedural law violate §1.160 RSMo., or ex post facto application of law.

Both the circuit court and the Court of Appeals properly applied §559.115.7 RSMo.. Respondent is not on point when they rely upon the doctrine of in para materia and its relationship between, in the instant case, §559.115.7 RSMo. and §558.019 RSMo. (now amended). Respondent states as authority State v. Livis, 948 S.W.2d 690 (Mo.App.W.D.1997). This reliance is misplaced and untimely. In 1993, the applicable to Tivis, §558.019 RSMo. (1993) was a substantive law affecting the rights of a Defendant applied by the finding of the judiciary at sentencing of said Defendant. The finding applicable to the sentencing court was based upon the quantity of prior felony convictions of the defendant.

After August 28, 1994, §558.019 RSMo. (1994) became a new procedural law no longer applicable to a finding by the sentencing court; but in the alternative, became a ministerial duty of procedure by Respondent based upon an Offender's "prior remands" (now "previous commitments") to Respondent's custody. Tivis, is not on point as to the subject matter presented herein, as §559.115.7 RSmo. (2003), read in para materia with §558.019

RSMo. promotes the public policy and legislative intent of retroactive application of procedural law set forth under §559.115.7 RSMo. (2003).

In State v. Whitaker, 499 S.W.2d 412 (S.Ct.1973) this Court properly found under §1.160 RSMo. that retroactive application of jail time credit did not violate ex post facto application of law. Further, this Court, in State ex rel Nixon v. Russell, 129 S.W.3d 867 (Mo.banc 2004), again, properly applied retroactively §558.016.8 RSMo. to persons sentenced prior to the amendment's effective date, and held said Section to be procedural, not substantive, "as it did not increase or change the punishment imposed by the sentencing court, and therefore could be validly applied." Id.

Moreover, the issue of retroactive application has been extensively addressed. Irvin v. Kempker, 152 S.W.3d 358 (Mo.App.W.D.2004); Ridinger v. Mo. Dept. of Corrections, 189 S.W.3d 658 (Mo.App.W.D., decided April 25, 2006); Powell v. Mo. Dept. of Corrections, 152 S.W.3d 363, 366 (Mo.App.W.D.2004); and with particularity to the subject matter of this instant proceeding, Niegwendaal v. Mo. Dept. of Corrections, 181 S.W.3d 153 (Mo.App.W.D.2005) wherein it was plainly held that "Section 559.115.7 is procedural." at 155. And "in para materia" to §558.019 RSMo. "...clarifies the procedure by which minimum prison terms are determined under Section 558.019." Id.

In Irvin, the court of appeals ruled "that Section 1.160 RSMo. did not apply because Section 559.115.7 RSMo. was a new statute that did not repeal or amend a previous statute and

because Section 559.115.7 RSMo. did not shorten the defendant's sentence or alter the law creating the offense." Id. at 362. See also Powell v. Mo. Dept. of Corrections, 152 S.W.3d 363, 366 (Mo.AppW.D.2004).

"Thus, because Section 1.160 RSMo. does not apply, we turn to the common law under which we presume newly enacted statutes to operate prospectively only. This rule has two exceptions:

(1) When the legislature manifests a clear intent that the statute apply retroactively, or

(2) When the statute is solely procedural and does not affect a party's substantive rights. Id. at 155 (citing State ex rel., Saint Louis-San Francisco Railway Company v. Buder, 515 S.W.2d 409, 410 (Mo.banc 1974)(emphasis added).

"We find no indication that the General Assembly intended for Section 559.115.7 RSMo. to apply retroactively. Thus, we must determine whether the statute is procedural or substantive in nature. A law affects substantive rights if it would take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attack a new disability in respect to transactions or considerations already passed; whereas substantive law creates, defines and regulates rights; procedural law is the machinery used for carrying on the suit and prescribes a method of enforcing rights and obtaining redress for their invasion." Id. at 155 (citing State v. Jaco, 156 S.W.3d 775, 781 (Mo.banc 2005)). See also, Wellner v. Director of Revenue, 16 S.W.3d 352 (Mo.App.W.D.2000); Liberty

Mutual Ins. Co v. Garfire, 939 S.W.2d 484 (Mo.App.E.D.1997); Holden v. Antom, Inc., 930 S.W.2d 526 (Mo.App.E.D.1996); State v. Thomaston, 726 S.W.2d 448 (Mo.App.W.D.1987).

As aforesaid, §559.115.7 RSMo. has been consistently held to be procedural law and therefore valid in its retroactive application in the circuit courts, and both Western and Eastern Court of Appeals. It clarifies the procedure by which minimum prison terms are determined under §558.019 RSMo. (2005). It does not "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attack a new disability in respect to transactions or considerations already passed". Id. at 155 (citing Buder, 515 S.W.2d at 410). "It is more akin to the "machinery" by which minimum prison terms are determined". Id. at 155.

In State ex rel. Nixon v. Russell, 129 S.W.3d 867 (Mo.banc 2004), this Court held that a new statutory provision, §558.016.8 RSMo. (2003), could be applied retroactively to individuals sentenced before amendment's effective date. See Irvin, 152 S.W.3d at 362.

Section 558.016.8 RSMo. provided that an individual convicted of a nonviolent Class C or Class D Felony, with no prior prison commitments could seek early release onto probation, parole, or other alternative sentence by petitioning the sentenced court after serving 120 days of his or her sentence. The Russell court concluded that §1.160 RSMo. did not apply and held that, because §558,016.8 did not increase the offender's punishment, it could be validly applied. Russell, 129 S.W.3d

at 871.

"As long as the new statute does not increase the length of an offender's sentence, the changes it makes are a fit subject for legislation." Russell, **Id.**.

"Section 559.115.7 RSMo. is procedural law. Likewise, §559.115.7 RSMo. does not increase the length of an offender's sentence or affect substantive rights. The statute may be validly applied retroactively. Nieuwendaal v. Mo. Dept. of Corrections, 181 S.W.3d 153, at 155 (Mo.App.W.D.2005)(emphasis added).

CONCLUSION

Respondent prays this Honorable Court to affirm the judgment of the Circuit Court of Cole County and Mandate of the Missouri Court of Appeals, Western District of Missouri, rendered in favor of Respondent and against Appellant; and for any other or further relief the Honorable Court deems fit and proper.

Executed this 21st day of September, 2006.

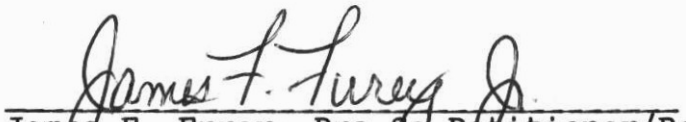
Respectfully submitted,

James F. Furey, Jr., Pro-Se Respondent,
#76,
7784 Olde English Road,
St. Louis, Missouri 63123
Phone (314) 351-2323.

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies that, pursuant to M.S.C. Rules 84.06(b)(e), that Respondent's Supplemental Brief contains less than 90 pages and contains 3,489 words, excluding cover, and this certification.

The undersigned further hereby certifies that a true and correct copy of the foregoing Respondent's Supplemental Brief and Argument was mailed, postage prepaid, pursuant M.S.C. Rule 55.03, on this 21st day of September, 2006, to the Clerk of the Court, Missouri Supreme Court, P.O. Box 150, Jefferson City, Missouri 65102-0150; and to Stephen D. Hawke, Attorney for Appellant, at P.O. Box 899, Jefferson City, Missouri 65102-0899 (two (2) copies per M.S.C. Rule 84.05(a).



James F. Furey, Pro-Se Petitioner/Respondent,
7783 Olde English Road,
#76
St. Louis, Missouri 63123,
Phone (314) 351-2323.

RESPONDENT'S APPENDIX

TABLE OF CONTENTS

Nieuwendaal v. Mo. Department of Corrections, 181 S.W.3d 153 (Mo.App.W.D.2005) .....A-1 to A3

instruction, disregard[ing] contrary evidence, and [we] reverse where the party challenging the instruction shows that the instruction misdirected, misled, or confused the jury." *Id.*

As previously discussed, in addition to Drs. Handoyo and Singh, Drs. Lee and Kayembe were also named in Mr. and Mrs. Wicklund's original petition. At the jury instruction conference, Appellants' counsel argued that the jury should be permitted to apportion fault to Drs. Lee and Kayembe because there was testimony at trial that their care was negligent. In particular, Appellants argued that the plaintiff's own expert witness testified that both Drs. Lee and Kayembe also deviated from the standard of care by failing to recommend a surgical consult for David. However, the trial court ultimately ruled that the jury would only be permitted to apportion fault, if any, among the Appellants in this case, Drs. Handoyo and Singh.

In support of this proposition, Appellants argued in their brief that, "[a]lthough subparagraph 3 of Section 538.230 clearly speaks to individuals that have been released or dismissed, it does *not* address issues regarding parties that have not been released or dismissed, have never been served, or were never parties" (emphasis in original). Appellants further suggest that, "[a]llowing the jury to consider the proposed verdict director against Dr. Lee would not be contradictory to the plain language of the statute."

Although we agree that such an application of Section 538.230 would not directly contradict the plain language of the statute, we decline to accept Appellants' invitation to adopt this tortured reading of the statute.

[13] It is an elementary principle of statutory construction, as well as established law in Missouri, that the expression of one thing means the exclusion of another.[6] This principle is derived from the Latin maxim, *expressio unius est exclusio alterius*, and it applies to this case. Section 538.230(1) specifically provides that, where applicable, a court "shall instruct the jury to apportion fault among such persons and parties" who have been "*released* pursuant to subsection 3 of this section" (emphasis added). Although Appellant's brief does not expressly admit that Drs. Lee and Kayembe were not "released" pursuant to Section 538.230, their argument certainly implies as much. Regardless, we find that neither Dr. Lee nor Dr. Kayembe fall within the parameters of a "released" party under Section 538.230(3) because the record reveals no evidence that any release, covenant not to sue, or similar agreement was ever entered into with Mr. Wicklund.

Accordingly, by applying the aforementioned maxim of statutory construction, we hold that the trial court correctly refused to allow the jury to apportion fault to Drs. Lee and Kayembe because Section 538.230(1) does not apply to parties named in the original petition, but not "released" pursuant to Section 538.230(3). Point three is denied.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err when it denied Appellants' motions for a directed verdict and JNOV, or in the alternative, for a new trial because Dr. Cooperman properly stated the standard of care and

6. *See, e.g., Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 352 (Mo. banc 2001); *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885, 887 (Mo. banc 1999); *Kansas City v. J.I. Case Threshing Mach. Co.*, 337 Mo. 913, 87 S.W.2d 195 (banc 1935).

established a causal connection between Appellants' care and David's subsequent death. Finally, the trial court did not err when it instructed the jury that it may only apportion fault to Drs. Handoyo and Singh because, under Section 538.230(3), Drs. Lee and Kayembe were never "released" from liability, and as such, they could not be subject to a jury's apportionment of liability pursuant to Section 523.230(1).

The judgment of the trial court is AFFIRMED.

GARY M. GAERTNER, SR., P.J., and GEORGE W. DRAPER III, J., concur.

David E. NIEUWENDAAL,
Respondent,

v.

MISSOURI DEPARTMENT OF CORRECTIONS, Appellant.

No. WD 65245.

Missouri Court of Appeals,
Western District.

Nov. 1, 2005.

Motion for Rehearing and/or Transfer to Supreme Court Denied Dec. 20, 2005.

Application for Transfer Denied Jan. 31, 2006.

Background: Inmate brought declaratory judgment action against Department of Corrections, asserting that he should not be required to serve mandatory minimum prison term of 40 percent of his sentences for most recent conviction before being eligible for parole since his previous 120-day incarceration on unrelated offense did not constitute a prior commitment. The Circuit Court, Cole County, Thomas J. Brown III, J., granted petition and ordered Department not to count the 120-day incarceration as a prior commitment. Department appealed.

Holding: The Court of Appeals, Paul M. Spinden, P.J., held that statute prohibiting use of a defendant's previous probationary 120-day commitment to department of corrections program as means to imposing greater mandatory minimum prison terms for subsequent offenses applied retroactively to defendant's benefit.

Affirmed.

1. Sentencing and Punishment ⚷664(5)

Statute prohibiting use of a defendant's previous probationary 120-day commitment to department of corrections program as means to imposing greater mandatory minimum prison terms for subsequent offenses applied retroactively to defendant's benefit, as statute was a purely procedural law that merely clarified the procedure by which minimum prison terms were to be determined under sentencing guidelines. V.A.M.S. §§ 1.160, 558.019, 559.115, 559.115(7).

2. Constitutional Law ⚷188

Statutory rights which are substantive and which therefore cannot be applied retrospectively are those which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed. V.A.M.S.Const. Art. 1, § 13.

3. Statutes ⚷243

Whereas substantive law creates, defines, and regulates rights, procedural law is the machinery used for carrying on the

suit and prescribes a method of enforcing rights or obtaining redress for their invasion.

Jeremiah W. (Jay) Nixon, Atty. Gen., Michael J. Spillane, Office of Attorney General, Jefferson City, for appellant.

David E. Nieuwendaal, Ballwin, pro se.

PAUL M. SPINDEN, Presiding Judge.

The Department of Corrections appeals the circuit court's judgment granting David E. Nieuwendaal's *pro se* petition for declaratory judgment. The circuit court determined that, pursuant to Section 559.115.7, RSMo Supp.2004, the department should not consider Nieuwendaal's prior 120–day incarceration as a prior prison commitment for the purpose of calculating his minimum prison term under Section 558.019, RSMo Supp.2004. We agree and affirm the circuit court's judgment.

Nieuwendaal committed the offenses of first degree tampering, stealing, and receiving stolen property on August 9, 1996. The circuit court sentenced him to three years in prison with the possibility of a 120–day call back under Section 559.115, RSMo 1994, on the tampering charge and concurrent 120–day sentences on the stealing and receiving stolen property charges. Nieuwendaal completed his 120–day incarceration, and the department released him to serve his probation.

On January 3, 2002, Nieuwendaal was convicted of stealing two motor vehicles and received consecutive four-year sentences. On June 7, 2002, Nieuwendaal was convicted of tampering and received a five-year sentence. The department determined that Nieuwendaal would need to serve 40 percent of these sentences before being eligible for parole because his 120–day incarceration in 1996 was a prior commitment under Section 558.019.[1]

[1] Nieuwendaal filed a petition for declaratory judgment with the circuit court asserting that he should not be required to serve a mandatory minimum prison term of 40 percent of his sentences. His petition alleged that the department's ruling violated Section 559.115.7, RSMo Supp. 2004, which says, "An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo."

The circuit court agreed with Nieuwendaal and ordered the department not to count the 120–day incarceration as a prior commitment. The department asserts on appeal that the circuit court erred because Section 1.160, RSMo 2002, bars the circuit court from retroactively applying Section 559.115.7, RSMo Supp.2004.

We faced the same issue in *Irvin v. Kempker*, 152 S.W.3d 358 (Mo.App.2004). We ruled in that case that Section 1.160 did not apply because Section 559.115.7

1. Before June 27, 2003, 120–day incarcerations were counted as prior commitments under Section 558.019. In *Star v. Burgess*, 160 S.W.3d 376, 378 n. 2 (Mo. banc 2005), the Supreme Court acknowledged that the General Assembly amended Section 559.115, RSMo Supp.2004, and added subsection 7 which provides that "an offender's first incarceration for 120 days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for purposes of section 558.019, RSMo." The court concluded that, because Star did not raise the issue of whether subsection 7 applied before the circuit court, it would not "convict a lower court of error on an issue that was not put before it to decide." *Id.*

was a new statute that did not repeal or amend a previous statute and because Section 559.115.7 did not shorten the defendant's sentence or alter the law creating the offense. *Id.* at 362; *see also Powell v. Missouri Department of Corrections*, 152 S.W.3d 363, 366 (Mo.App.2004).

Thus, because Section 1.160 does not apply, we turn to the common law under which we presume newly enacted statutes to operate prospectively only. This rule has two exceptions: (1) when the legislature manifests a clear intent that the statute apply retroactively, or (2) when the statute is solely procedural and does not affect the party's substantive rights. *State ex rel. Saint Louis–San Francisco Railway Company v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974).

[2, 3] We find no indication that the General Assembly intended for Section 559.115.7 to apply retroactively. Thus, we must determine whether the statute is procedural or substantive in nature. A law affects substantive rights if it would "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed." *Id.* (quotation omitted). Whereas substantive law creates, defines, and regulates rights, procedural law "is the machinery used for carrying on the suit" and prescribes a method of enforcing rights or obtaining redress for their invasion. *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005) (quotation omitted).

Section 559.115.7 is procedural. It clarifies the procedure by which minimum prison terms are determined under Section 558.019. It does not "take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed." *Buder*, 515 S.W.2d at 410. It is more akin to the "machinery" by which minimum prison terms are determined.

In *State ex rel. Nixon v. Russell*, 129 S.W.3d 867 (Mo. banc 2004), the Supreme Court held that a new statutory provision, Section 558.016.8, RSMo Supp.2003, could be applied retroactively to individuals sentenced before the amendment's effective date. *Irvin*, 152 S.W.3d at 362. Section 558.016.8 provided that an individual convicted of a nonviolent Class C or Class D felony, with no prior prison commitments, could seek early release on probation, parole, or other alternative sentence by petitioning the sentencing court after serving 120 days of his or her sentence. The *Russell* court concluded that Section 1.160 did not apply and held that, because Section 558.016.8 did not increase the offender's punishment, it could be validly applied. 129 S.W.3d at 871.[2] "As long as the new statute does not increase the length of an offender's sentence, the changes it makes are a fit subject for legislation." *Id.*

Likewise, Section 559.115.7 does not increase the length of an offender's sentence or affect substantive rights. The statute may be applied retroactively; therefore, we affirm the circuit court's judgment.

VICTOR C. HOWARD and RONALD R. HOLLIGER, JJ., concur.

2. In a footnote, the Russell court said, "Challenges to legislation that would increase sentences are made under the ex post facto clause of the constitution. Mo. Const. art. I, sec. 13. *State ex rel. Cavallaro* [*v. Groose*], 908 S.W.2d [133,] at 136 [(Mo. banc 1995)]." 129 S.W.3d at 871 n. 7.

of probation; defense asked for probation or 120-day treatment program, prosecuting attorney opposed probation, so judge imposed sentence of four years' confinement and announced that court would retain jurisdiction over defendant and that if he were successful, he would be released on probation, but later report judge received reported that defendant would not commit to quit using alcohol, that defendant did not consider driving drunk to be crime, and that defendant acknowledged that he drove when he was drunk "all the time," and judge concluded that putting defendant on probation would have been abuse of discretion. Spears v. State (App. S.D. 2005) 2005 WL 3149134. Criminal Law ⚷ 273.1(2)

Statute prohibiting use of a defendant's previous probationary 120-day commitment to department of corrections program as means to imposing greater mandatory minimum prison terms for subsequent offenses applied retroactively to defendant's benefit, as statute was a purely procedural law that merely clarified the procedure by which minimum prison terms were to be determined under sentencing guidelines. Nieuwendaal v. Missouri Dept. of Corrections (App. W.D. 2005) 181 S.W.3d 153, rehearing and/or transfer denied. Sentencing And Punishment ⚷ 664(5)

Possibility of probation eligibility under 120-day call back program was collateral consequence of guilty plea, and thus, counsel's failure to inform defendant of such program prior to plea did not establish ineffective assistance; probation does not definitely, immediately, and largely automatically follow entry of plea. Brown v. State (App. E.D. 2002) 67 S.W.3d 708. Criminal Law ⚷ 641.13(5)

6. Guilty plea

Defendant was not entitled to withdraw his guilty plea based upon the sentencing court refusing to grant defendant probation, as was recommended in his plea agreement, but instead imposing a sentence of seven years imprisonment for assault in the second degree; the sentencing court can grant probation only upon its own motion, defendant's plea agreement stated that the sentence to be imposed was "completed within the control of the judge," and defendant stated that he understood that the court was not bound by any recommendations of the State with regard to sentencing. Gresham v. State (App. S.D. 2002) 68 S.W.3d 591, rehearing and/or transfer denied. Criminal Law ⚷ 274(3.1)

7. Presentence investigation report

Defense counsel's failure to request presentence investigation report (PSI) following defendant's entry of guilty plea to second-degree burglary as means to persuading trial court to impose probation in lieu of prison was not ineffective assistance of counsel; defendant failed to make requisite showing that, but for counsel's representation, he would not have pleaded guilty but would have insisted on going to trial, or, in trial court's words, defendant got exactly what he bargained for, and counsel did exactly what he was asked to do. McDonald v. State (App. S.D. 2004) 141 S.W.3d 526. Criminal Law ⚷ 641.13(5)

V. A. M. S. 559.115, MO ST 559.115

Statutes and Constitution are current through West ID number 1, 3, 4, 5, 7, 32, 33-37, 54(302.171) & 55(115.427), 62, 71 and 72 of the Second Regular Session of the 93rd General Assembly (2006).

© 2006 Thomson/West
END OF DOCUMENT

(C) 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.