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JURISDICTIONAL STATEMENT

Appellant, Vanessa Severe, appeals her conviction, after a jury trial in Gentry County, Missouri, of the class D felony of Driving While Intoxicated, §§577.010, 577.023 RSMo 2000¹. The Honorable Roger M. Prokes sentenced Ms. Severe to three years in the Department of Corrections.

On March 31, 2009, this Court sustained Respondent's Application for Transfer from the Missouri Court of Appeals, Western District, WD 69162. Therefore jurisdiction lies with the Missouri Supreme Court. Rule 83.04.

¹ All statutory references are to RSMo 2000 unless otherwise noted.

STATEMENT OF FACTS

On January 12, 2007, Ms. Severe and Steve Gabriel were driving on Highway 136 in Gentry County when their car flipped into a ditch (Tr. 62, 63, 65, 66). A civilian who stopped to help testified he could smell beer and saw beer cans in the car, some of which had burst open (Tr. 66). Ms. Severe admitted she was driving (Tr. 85).

Highway Patrolman Jason Cross spoke with Ms. Severe and smelled a strong odor of intoxicants, noted that her eyes were bloodshot, and her speech was slurred (Tr. 87). Cross had Ms. Severe perform a number of tests for the detection of intoxication and she did poorly on all of them (Tr. 89, 90, 91, 101, 103, 105). During the horizontal gaze nystagmus test, Ms. Severe's eyes jerked, a sign of intoxication (Tr. 95, 99). Cross arrested Ms. Severe for driving while intoxicated (Tr. 106).

Before submitting the case to the jury, the trial court found Ms. Severe to be a prior and persistent DWI offender (Tr. 78; L.F. 20). The State submitted two prior alcohol-related convictions (Tr. 76-77). Exhibit 7 is a certified copy of a 1999 Albany, Missouri municipal violation, case number, MU499-49MT (Tr. 76). Ms. Severe pled guilty to driving while intoxicated and received a suspended imposition of sentence (Exh. 7). Exhibit 8 is a certified copy of a Gentry County charge of the class B misdemeanor of driving while intoxicated, case number CR402-67M (Tr. 77). Ms. Severe pled guilty and was sentenced to pay a \$350 fine and all court costs. (Exh. 8).

The State rested and Ms. Severe's Motion for Judgment of Acquittal was denied (Tr. 131, 135 L.F. 12). The defense presented no evidence (Tr. 135). The jury returned its verdict finding Ms. Severe guilty of driving while intoxicated (Tr. 158; L.F. 15).

Ms. Severe's Motion for New Trial was overruled (Tr. 165, 168; L.F. 16-18), and she was sentenced to three years imprisonment (Tr. 177, L.F. 22). Her notice of appeal was timely (L.F. 24).

POINT RELIED ON

The trial court plainly erred in finding Ms. Severe a persistent offender under §577.023.1(2)(a) and enhancing her punishment from a class A misdemeanor to a class D felony because those actions violated Ms. Severe's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution in that Ms. Severe was sentenced in excess of the maximum sentence authorized by law because her 1999 prior intoxication-related traffic conviction, which was one of the two prior convictions used to find her a persistent offender, was a municipal offense that resulted in a suspended imposition of sentence and therefore could not be used to enhance her punishment.

State v. Emery, 95 S.W.3d 98 (Mo. banc 2003);

State v. Teer, 275 S.W.3d 258 (Mo. banc 2009);

State v. Miller, 427 S.W.2d 506 (Mo. 1968);

State v. Cullen, 39 S.W.3d 899 (Mo. App., E.D. 2001);

U.S. Constitution, Amendment XIV;

Mo. Constitution, Article I, §10;

§§ 556.280 RSMo 1959; 558.016; 558.021; 565.060; 577.010;

577.023.5, RSMo Cum. Supp. 1983; 577.023.6, RSMo 2000;

577.023.8, RSMo Cum. Supp. 2008; 577.036;

Rule 30.20;

32 Missouri Practice Series: Missouri Criminal Law §56.11 (2nd ed. 2004);

Canon 3, Code of Judicial Conduct; and

MACH-CR 31.02.

ARGUMENT

The trial court plainly erred in finding Ms. Severe a persistent offender under §577.023.1(2)(a) and enhancing her punishment from a class A misdemeanor to a class D felony because those actions violated Ms. Severe's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and by Article 1, §10 of the Missouri Constitution in that Ms. Severe was sentenced in excess of the maximum sentence authorized by law because her 1999 prior intoxicated-related traffic conviction, which was one of the two prior convictions used to find her a persistent offender, was a municipal offense that resulted in a suspended imposition of sentence and therefore could not be used to enhance her punishment.

Vanessa Severe was charged by amended information with the class D felony of driving while intoxicated, §577.010. The trial court found her to be a persistent offender, and enhanced her punishment based on that finding. The trial court plainly erred in doing so because one of the prior alcohol-related offenses used by the State was a municipal violation which resulted in a suspended imposition of sentence. This Court has ruled that such a prior conviction cannot be used to enhance a driving while intoxicated conviction. *State v. Turner*, 245 S.W.3d 826 (Mo. banc 2008).

Preservation:

Defense counsel had no objection to the admission of Exhibits 7 and 8 (Tr. 77-78), nor did she include this issue in the motion for new trial (L.F. 16). Therefore, this issue is not properly preserved for review.

Standard of Review:

Rule 30.20 provides for review of certain errors even if they are not properly preserved. These errors include sentencing errors. *Id.* Thus, appellate courts frequently grant plain error review to errors challenging sentences. *State v. Grubb*, 120 S.W.3d 737 (Mo. banc 2003) (plain error review under Rule 30.20 granted on the issue of whether a military conviction can be used to enhance a sentence); *State v. Vaught*, 34 S.W.3d 293, 295-96 (Mo. App. W.D. 2000) (use of two offenses occurring after date of charge offense found to be plain error). An error is plain if, on its face, this Court discerns substantial grounds for believing that the error caused manifest injustice or a miscarriage of justice. *Id.*

Facts:

Prior to submission of the case to the jury, the trial court found Ms. Severe was a persistent offender on the basis of two prior intoxication-related traffic offenses. §577.023.1(4)(a). Exhibit 7 is a certified copy of a 1999 Albany, Missouri municipal violation, case number, MU499-49MT (Tr. 76). Ms. Severe pled guilty to driving while intoxicated and received a suspended imposition of sentence (Exh. 7). Exhibit 8 is a certified copy of a Gentry County charge of the

class B misdemeanor of driving while intoxicated, case number CR402-67M (Tr. 77). Ms. Severe pled guilty and was sentenced to pay a \$350 fine and all court costs. (Exh. 8).

Based on this finding, Ms. Severe was charged with a class D felony, rather than a class B misdemeanor. §§ 577.010, 577.023.3. While her case was pending appeal, this Court decided *State v. Turner*, 245 S.W.3d 826, 829 (Mo. banc 2008), holding that “prior municipal offenses resulting in an SIS cannot be used to enhance punishment under § 577.023.”

The State has “reluctantly agree[d] that the trial court’s finding that [Ms. Severe] was a persistent offender is no longer properly supported by two valid ‘convictions,’ and [Ms. Severe] is thus entitled to a new sentencing hearing.”² Resp. original br. at 8.

The issue before this Court is the appropriate remedy. Ms. Severe submits that the Western District Court of Appeals was correct in remanding the case for entry of conviction of the class A misdemeanor of driving while intoxicated, and resentencing accordingly. *State v. Severe*, WD69162, slip op. 12 (November 25, 2008). Respondent asserts that the case should be remanded with directions that

² Ms. Severe concedes that she was properly found to be a prior offender on the basis of her guilty plea in Gentry County to the class B misdemeanor of driving while intoxicated. Therefore, on remand, she should be sentenced within the range of punishment for a Class A misdemeanor. §577.023.2.

the State be allowed to present new evidence of Ms. Severe's status as a persistent offender. Resp. App. for Transfer, p. 1.

Argument:

Intoxication-related traffic offenders have been subject to enhanced penalties since 1982. The Missouri legislature has tinkered with this enhancement statute almost continuously since it was first enacted. But the one section that has remained as originally written is the mandate that the finding of prior or persistent alcohol-related offender status must be made:

In a jury trial, the facts shall be pleaded, established
and found prior to submission to the jury outside of their hearing.

§577.023.5 RSMo Cum. Supp. 1983.

In a jury trial, the facts shall be pleaded, established
and found prior to submission to the jury outside of its hearing.

§577.023.6 RSMo 2000

In a jury trial, the facts shall be pleaded, established
and found prior to submission to the jury outside of its hearing.

§577.023.8 RSMo Cum. Supp. 2008.

But despite this clear and unambiguous language, Missouri prosecutors consistently violate the statute, Missouri trial courts consistently let them, and Missouri appellate courts, while at times expressing frustration and issuing threats, permit the practice to continue. *See e.g., State v. Street*, 735 S.W.2d 371, 372 (Mo. App., W.D. 1987) (“If the courts continue to indulge the laxity which has

characterized so many cases of extended term sentencing, a judicial emasculation of the legislative direction will be the accepted procedural norm.”)

State v. McGowan, 774 S.W.2d 855, 858 (Mo. App., W.D. 1989) (future violations of section 558.021.2 will be “dealt with harshly”)

State v. Wynn, exemplifies the way Missouri appellate courts dealt with violations of the timing requirements in enhancement statutes. In *Wynn*, the court held that the trial court’s failure to comply with the statutory procedures³ was more than mere irregularity, it constituted error. 666 S.W.2d 862, 864 (Mo. App., E.D. 1984). But because Mr. Wynn was a persistent offender, there could be no prejudice and the error was harmless. *Id.* at 864. *See also, State v. Weimer*, 658 S.W.2d 77 (Mo. App., E.D. 1983) (failure to comply with the statute was error, but harmless); *State v. Richardson*, 719 S.W.2d 884, 886 (Mo. App., W.D. 1986) (same); *State v. Jones*, 703 S.W.2d 41, 43 (Mo. App., S.D. 1985) (same).

The appellate courts’ treatment of errors in pleading and proof when enhancement statutes were first enacted stands in stark contrast to the laxity that developed over time. In *State v. Miller*, 427 S.W.2d 506 (Mo. 1968), the information was defective because it failed to allege Miller’s commitment or its equivalent as required under the Second Offender Act, §556.280, RSMo 1959.

³ The statutes at issue in *Wynn* were §558.016 and §558.021.2 RSMo 1981, the general enhancement statutes. The timing requirements were the same as those in §577.023.

The State alleged that on February 27, 1956, Miller had been convicted in the Circuit Court for the County of Genesee, State of Michigan of larceny, and had been duly sentenced to imprisonment in the State Prison of Southern Michigan, at Jackson, Michigan, for a term of two to four years. *Id.* at 506-507.

The Court held that the information failed to invoke the Second Offender Act because the State failed to plead that Miller had been “subsequently placed on probation, paroled, fined or imprisoned on said sentence.” *Id.* at 507. The Court explained that it had recently held that the Second Offender Act was highly penal and had to be strictly construed. *Id.* “Both the prior conviction and subsequent probation, parole, fine or imprisonment therefor must be pleaded and proved. *Id.*, citing, *State v. Hacker*, 291 S.W.2d 155, 157 (Mo. 1956); *See also, State v. Watson*, 383 S.W.2d 753, 755-756 (Mo. 1964) (same). *State v. Wiley*, 412 S.W.2d 485, 487 (Mo. banc 1967) (same). When an indictment or information was insufficient to invoke the Second Offender Act, the appellate courts routinely found that the defendants had been prejudiced since a jury might have returned a lower sentence. *Miller*, 427 S.W.2d at 507; *Wiley*, 412 S.W.2d at 487,

Over time it seems that the strict construction of the “highly penal” enhancement statutes has been replaced with a judicial tolerance for violations of the statutes. In *State v. Merrill*, 990 S.W.2d 166 (Mo. App., W.D.1999), the charging document did not contain any facts concerning prior convictions. *Id.* at 172. Despite that, the trial court allowed the State to introduce evidence of two

prior convictions and found Merrill to be a prior and persistent offender. *Id.* at 173. The Western District's response was that:

Merrill's situation is governed by [*State v.*] *Street* [735 S.W.2d 371 (Mo. App., W.D. 1987)] and its progeny. The state clearly did not comply with the statute because it did not plead "all essential facts warranting a finding that [Merrill] is a prior ... [and] persistent offender." § 558.021.1. As in *Street*, however, Merrill is entitled only to a limited remand for the purposes of permitting the state to amend the information and submit proof supporting prior and persistent offender sentencing. "In the unlikely event that the proof were to fail, a new trial is, of course, required." *Street*, 735 S.W.2d at 374.

Id. at 173.

In 1994, this Court decided *State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994). Cobb had been convicted of driving while intoxicated as a persistent intoxicated driving offender. §§577.010; 577.023 RSMo 1986. The trial court found Cobb a persistent offender on the basis of two prior intoxication-related offenses committed within the previous ten years. *Id.* at 534.

While *Cobb* was pending appeal, this Court decided *State v. Stewart*, 832 S.W.2d 911 (Mo. banc 1992), holding that the persistent DWI offender statute, §577.023, could only be invoked by proof of *three* prior convictions committed within a ten-year period. *Id.* at 913 (emphasis in the original) The Eastern District transferred the case to this Court because of the general interest and importance of

Cobb's contention that double jeopardy prevented the State from proving a third prior conviction on remand. *Id.*

This Court found that double jeopardy did not attach to noncapital persistent offender sentencing schemes. *Id.* at 535.

In sum, double jeopardy is no obstacle in this noncapital proceeding to permitting the state to present whatever evidence it may have at a resentencing to establish the defendant is, as he was charged and sentenced the first time, a persistent offender.

Id. at 537.

The Eastern District's opinion in *State v. Cullen*, 39 S.W.3d 899 (Mo. App., E.D. 2001) was a departure from earlier sentencing enhancement statute cases. The difference may be attributed to the fact that *Cullen* was a State's appeal, and the issue was whether the trial court had erred in refusing to sentence Cullen as a persistent DWI offender "merely because the State failed to prove his status before submission of the case to the jury." *Id.* at 902.

First the Court determined that double jeopardy was not an issue in the case. *Id.* at 905. The Court then turned to the propriety of the trial court's refusal to allow post-trial proof of alleged prior convictions. *Id.* The *Cullen* Court recognized that "numerous cases under §558.021 have held that when a defendant in a jury trial is found to be a prior or persistent offender after, rather than before, the case has been submitted to the jury, the failure to timely prove and find the

defendant's prior or persistent offender status is not reversible error unless it results in actual prejudice to the defendant." *Id.* at 906 (citations omitted). That being said, the Court also noted that in all of those cases the courts recognized "that it *is* still error- albeit 'harmless'" error. *Id.* (emphasis in the original).

Likewise, §§577.023.6 and 577.023.14 expressly, plainly and unequivocally provide that in a jury trial a defendant's status as a prior or persistent DWI offender shall be heard and determined by the trial court prior to submission to the jury. *Id.* The trial court has a duty to ensure compliance with the statute. *Id.*, citing *Wynn*, 666 S.W.2d at 864.

The Court cited Canon 3 of Missouri's Code of Judicial Conduct which states, in pertinent part: "A judge shall be faithful to the law . . ." "Thus, in the case at bar, it was not only the right but the duty of the trial judge to refuse to intentionally commit error, even "harmless" error, that involved a direct violation of the statute. *Id.* The Court mentioned "prosecutorial laxity" in the State's failure to comply with the timeliness requirements of §577.023, but a review of the facts in *Cullen* indicate that it was not prosecutorial laxity, but the unavailability of evidence that prevented the State from proving *Cullen* was a persistent DWI offender. *Id.* at 901.

The Eastern District concluded that it would not order the trial court to intentionally commit error; and the trial court did not err in declining the State's request that it do so. *Id.*

This Court announced its position on the question of whether a trial court should be ordered to allow the State to present evidence of prior or persistent offender status after submission of the case to the jury in *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003). Emery had been charged with DWI, §577.010 and second degree assault, §565.060. *Id.* at 100. He was also charged as a prior and persistent offender under §§558.016 and 557.036.4. *Id.* In order to invoke these enhancement statutes, the State had to plead and prove that Emery had pled guilty to, or had been found guilty of, two or more felonies committed at different times. These facts had to be pled and proved before the case was submitted to the jury. *Id.*

On appeal, the State conceded that it did not offer evidence proving Emery's prior and persistent offender status and that, as a result, the trial court erred in sentencing him as a persistent offender. *Id.* at 101. The State argued that the remedy was a remand with directions that the State be given the opportunity to present evidence of Emery's prior and persistent offender status. *Id.*

This Court disagreed, finding that to allow the State to present evidence of Emery's prior and persistent status on remand would violate the timing requirements of the statute. *Id.* In response to the State's assertion that such error would be harmless, this Court framed the question thus: "whether this Court should order the trial court to commit a second error in order to correct its previous error. Or, to put it another way, should the Court follow the old adage that two wrongs do not make a right? *Id.*; *See, State v. Gibson*, 122 S.W.3d 121,

(Mo. App., W.D. 2003); *State v. Rose*, 169 S.W.3d 132, 136-137 (Mo. App., E.D. 2005).

The State argued that *Cobb, supra*, would permit a remand with directions that it be allowed to prove Emery's prior and persistent offender status. *Id.* This Court declined to follow *Cobb*. The *Emery* Court distinguished *Cobb* since the issue in *Cobb* was whether double jeopardy prevented a remand for resentencing. No issue of the statute's timing requirement had been raised by either party in *Cobb. Id.*

This Court's most recent opinion concerning enhancement statutes is *State v. Teer*, 275 S.W.3d 258 (Mo. banc 2009). In *Teer*, the single issue on appeal was whether the trial court erred in sentencing Teer as a prior and persistent offender when the State had not pled or proved the facts necessary to make that finding prior to submission of the case to the jury. *Id.* at 260. This Court reversed, finding:

§558.021.2 is one of the statutes that provides a means for enhancing sentences based upon prior offenses. As such §558.021.2 implicates a defendant's liberty and, like other criminal statutes, should not be extended by judicial interpretation so as to embrace persons and acts not specifically and unambiguously brought within its terms. *State v. Lloyd*, 7 S.W.32d 344, 346 (Mo. 1928).

This interpretive rule applies to both the procedural

and substantive aspects of criminal statutes and requires the statute to be construed strictly against the state and in favor of the defendant.

Id. at 261, citing, *Goings v. Missouri Dept. of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999).

Citing *Wynn*, 666 S.W. at, 864, the *Teer* Court held that to succeed on appeal, Teer would have to show that §558.021.2 was violated, and that he was prejudiced by that violation. *Id.* at 260. But as Judge Fischer noted, “the removal of jury sentencing by amendment to pleadings and presentation of proof after submission to the jury is implicitly prejudicial.” *Id.* at 263, (Fischer, J., concurring).

Teer was prejudiced because the jury had recommended a sentence of four years imprisonment whereas the trial court sentenced him to twenty years. *Id.* at 6. Since the State had failed to plead and prove the facts necessary, there was no basis for the trial court to take sentencing away from the jury, and therefore this Court remanded the case with instructions that Teer be resentenced consistent with the jury’s recommendation and free from sentence enhancement. *Id.* at 262.

There is no question that Ms. Severe is entitled to resentencing since the State’s use of a municipal court violation resulting in a suspended imposition of sentence cannot be used as a prior conviction for enhancement purposes. *Turner v. State*, 245 S.W.3d at 829. There is also no question that she was prejudiced. A violation of §577.010, driving while intoxicated, is a class B misdemeanor for the

first offense. If the State proves that the offender has one prior intoxication-related prior conviction, a DWI is punished as a class A misdemeanor.

§577.023.2. A persistent DWI offender, someone with two or more prior intoxication-related traffic violations, is subject to a sentence within the Class D felony range. §577.023.3. Prior to submission of the case to the jury, the State had proved that Ms. Severe had only one prior conviction. But she was sentenced as a persistent offender. She was prejudiced.

The question is whether the State ought to be able to have an opportunity on remand to present further evidence of prior intoxication-related convictions, or whether Ms. Severe should be resentenced for the class A misdemeanor of driving while intoxicated as a prior, but not persistent, offender?

The State points out that the Western District's opinion in *Severe* conflicts with the Eastern District Court of Appeals decision in *State v. Bizzell*, 265 S.W.3d 892 (Mo. App., E.D. 2008). While that is true, it is *Bizzell* that was wrongly decided, and it conflicts with the Eastern District's earlier decision in *State v. Rose*, *supra*.

Bizzell was charged with the class D felony offense of driving while intoxicated. 265 S.W.3d at 893. One of the prior convictions was a 1989 municipal court ordinance violation for which *Bizzell* received a suspended imposition of sentence. *Id.* at 894. While *Bizzell*'s case was on appeal, this Court decided *Turner*, *supra*, which held that municipal court violations resulting in an SIS could not be used for enhancement purposes. *Id.* With no discussion, the

Eastern District reversed Bizzell's class D felony and remanded to give the State an opportunity to present other evidence to establish his persistent offender status.

Id.

Bizzell was wrongly decided for two reasons. First, Bizzell's municipal court violation was in 1989. In defining "persistent offender," the Eastern District omitted the part of the statute that requires the prior intoxication-related offenses to have "occurred within ten years of the occurrence of the intoxication-related traffic offense for which the person is charged. §577.023.1(2)(a). Even if this Court had not decided *Turner*, the State's proof in *Bizzell* would have been insufficient.

Second, the opinion in *Bizzell* makes no mention of the timing requirement of the statute, nor does it attempt to distinguish its own earlier case. *Rose, supra*. In *Rose*, the State argued that Rose's admission that he had two prior intoxication-related convictions was sufficient to comply with the statute. *Id.* at 136. The Eastern District disagreed, holding that the State had not introduced evidence as to when one of the two prior convictions occurred. *Id.* Citing *Emery, supra*, the Eastern District held that "the trial court is not at liberty to reopen the proceedings and allow the State to present additional evidence as to a defendant's prior and persistent status under §558.021. §577.023 follows the same procedures as §581.021 to establish persistent DWI offender status." *Id.* at 136-137. *See also, State v. McGee, __S.W.3d__, 2009WL755361 (Mo. App., E.D. 2009) (same).*

The State takes the position that this Court should draw a distinction between cases like *Cobb* and Ms. Severe's, where the State was not at fault, and all the other enhancement statute cases where "prosecutorial laxity" was the cause of the insufficient pleading or proof of prior or persistent offender status.

Ms. Severe submits, as stated by the Western District Court of Appeals, an appellate court must adhere to the specific procedures set out in the statute. "To remand and allow the state now to present evidence of [Severe's] alleged . . . persistent offender status would violate the timing requirement of" the statute. *State v. Severe*, slip op. 4, quoting *Emery*, 95 S.W.3d at 101.

Cobb is not controlling. The timing requirements of the statute were never mentioned in *Cobb*. In both *Cobb* and *Severe*, the State produced evidence which at the time of their trials was sufficient to establish prior and persistent offender status. In both cases, reinterpretation of the enhancement statutes by this Court resulted in the State's evidence being insufficient. *Cobb*, 875 S.W.2d at 534; *Severe*, slip op. at 2.

However, an examination of the cases that changed the law in *Cobb* and *Severe* indicates that this Court did not intend to provide the State with a second bite of the apple. In *State v. Stewart, supra*, this Court took transfer on the question of whether the date of commission or the date of conviction was the operative date in §577.023. 832 S.W.2d at 913. But the Court found a more fundamental question as to the State's burden to prove prior and persistent intoxication-related offender status. *Id.* The Court noted that the plain words of

the statute required “two or more . . . offenses. . .within ten years of a *previous*. . . conviction.” *Id.* (emphasis in the original).

The Court stated that the statute had to be given effect as written, and that courts cannot interpolate words or a different meaning into a criminal statute other than that which was legislatively enacted. *Id.* at 914, citing *State v. Bartley*, 263 S.W. 95, 304 Mo. 58 (1924). The *Stewart* Court did not remand to give the State a second opportunity to prove persistent offender status. Instead, it affirmed Stewart’s conviction as a prior offender since the State had proved two prior convictions. *Id.* The State argued it should be allowed another opportunity to prove persistent offender status because it had followed Supreme Court approved MACH-CR 31.02 and notes on use. This Court disagreed, holding that to the extent the recommended charge and notes were contrary to the Court’s opinion, they should no longer be followed. *Id.*

The same result occurred in *Turner, supra*. In that case Turner argued that there were two conflicting provisions within §577.023, one of which permitted the use of prior municipal violations which resulted in suspended imposition of sentence, §577.023.1(a), and one that did not §577.023.14. 245 S.W.3d. at 827.

After examining a number of canons of construction, the Court determined that the ambiguity could not be resolved by resort to other canons of construction and therefore the rule of lenity applied. *Id.* at 829. This Court did not remand the case with instructions to the trial court to give the State a second opportunity to

prove Turner's prior and persistent offender status. *Id.* The Court reversed the judgment and remanded the case. *Id.*

It may appear a simple issue of fairness to allow the State to remedy the insufficiency of its pleading and proof when its failure to do so before submission to the jury was no fault of its own. But such a result would be contrary to this Court's opinions in *Emery*, *Stewart*, and *Turner* and would require appellate courts to order trial courts to violate the clear and unambiguous language of the statute.

Emery held that the persistent-offender statute categorically forbade a court from taking action, prospectively, which the court knew to be in violation of the statute's explicit timing requirements, even if the departure from the statute's mandates would be harmless. 95 S.W.3d at 101. The Court reiterated that the timing requirements of §558.021.2 are mandatory in *Teer*, 275 S.W.3d at 261.

In all of the cases Ms. Severe has looked at on the issue of prior and persistent offender status, only two, *Cobb*, and *Severe*, involve situations where the State's proof was sufficient at the time of trial, but a change in the law rendered the proof of prior or persistent offender status insufficient. Thus, strict adherence to the statutes will not result in a windfall for undeserving defendants. What strict adherence to the statutes will do is end the practice by prosecutors, trial courts, and appellate courts of intentionally disregarding the law.

Enhancement statutes' timing requirements are not complicated or burdensome. The State normally has months to find any prior convictions a defendant may have. Requiring compliance with the timing requirements of

enhancement statutes, in all cases, would provide a clear, unambiguous rule. As Judge Dierker wrote, “the Missouri Supreme Court has settled the issue of when a defendant’s status as a prior or persistent offender must be proved: the statute means what it says, and the defendant’s status must be proved before the jury retires.” 32 Missouri Practice Series: Missouri Criminal Law §56.11, at 537 (2nd ed, 2004).

Giving the State another try at proving that Ms. Severe is a persistent DWI offender will simply be a reversion to the time when the procedures mandated in §577.023 could be ignored because prosecutors knew that trial courts and appellate courts would allow them to “fix” any deficiencies after appeal.

This Court should reiterate that the statutes mean what they say, they are the stated will of the Missouri legislature, and they must be obeyed.

CONCLUSION

For the reasons stated herein, Appellant Vanessa Severe respectfully requests that this Court reverse her sentence and remand her case to the trial court with instructions to sentence her within the range of a class A misdemeanor.

Respectfully submitted,

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Certificate of Compliance and Service

I, Nancy A. McKerrow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 5,419 words, which does not exceed the 31,000 words allowed for an appellant's substitute brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan Enterprise 7.1.0, updated in April, 2009. According to that program, these disks are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this day of April, 2009, to Richard Starnes, Assistant Attorney General, Missouri Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Nancy A. McKerrow

APPENDIX

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