

No. SC88651

REGINALD A. TURNER,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal to the Missouri Supreme Court
From the Circuit Court of Lafayette County, Missouri
Fifteenth Judicial Circuit, Division I
The Honorable Dennis A. Rolf, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Reginald A. Turner, appeals from the denial of his Supreme Court Rule 24.035 motion for postconviction relief. On April 18, 2005, Mr. Turner pleaded guilty in the Circuit Court of Lafayette County to one count of Driving While Intoxicated (“DWI”) as a persistent DWI offender. He was sentenced to three years’ imprisonment.

Mr. Turner was delivered to the Missouri Department of Corrections on April 18, 2005. On October 6, 2005, he timely filed a *pro se* motion for postconviction relief. Appointed counsel timely filed an amended motion on January 5, 2006.

On April 3, 2006, the motion court held a hearing on the State’s “Answer and Motion to Deny Without Evidentiary Hearing.” The motion court denied Mr. Turner’s Amended Motion on April 17, 2006. Mr. Turner timely filed his notice of appeal on May 30, 2006, and timely filed Appellant’s brief on December 26, 2006.

After the Missouri Court of Appeals, Western District issued its order and memorandum affirming the motion court’s judgment in case number WD67015, this Court accepted transfer pursuant to Supreme Court Rule 83.03. Therefore, this Court has jurisdiction of this appeal. Mo. Const. Art. V, § 10; Supreme Court Rule 83.04.

STATEMENT OF FACTS

This is the appeal from the motion court's denial of Mr. Turner's Supreme Court Rule 24.035 postconviction motion. (L.F. 82)¹. In the underlying criminal case, Mr. Turner was charged with Driving While Intoxicated ("DWI"). § 577.010 RSMo². He was also charged as a persistent DWI offender under § 577.023.1(2)(a), because the State alleged that he had two prior DWI convictions, one prior State charge and one prior municipal charge, in that:

“on or about June 2, 1997, defendant had pleaded guilty to driving while intoxicated for events occurring on or about December 26, 1998 [sic], in the Circuit Court of Lafayette County, Missouri, and

on or about August 14, 1996, defendant had pleaded guilty to driving while intoxicated, for events occurring on or about October 17, 1995, in the Municipal

¹ The Record on Appeal consists of the Legal File ("L.F."), which includes the Guilty Plea and Sentencing transcript, and the transcript of the court's hearing on the State's Motion to Deny Without a Hearing ("Tr.").

² Unless otherwise noted, all statutory citations are to Missouri Revised Statutes (Supp. 2002), the definition in effect as of the date of the offense, October 14, 2004. *State v. Pritchard*, 982 S.W.2d 273, 273 (Mo. banc1999). Subsections 1(2) (a) and 14 are now numbered 1(4) (a) and 16 in the current version of the statute.

Court of Higginsville, Missouri, in front of an attorney judge and defendant was represented by counsel.”

(L.F. 3). Because he was charged as a persistent DWI offender, Mr. Turner faced enhanced sentencing, upon conviction, to a Class D felony. § 577.023.3 RSMo.

On April 18, 2005, Mr. Turner pleaded guilty. (L.F. 10, 12). Because the court found him to be a persistent DWI offender as a Class D felony, Mr. Turner was sentenced to three years’ imprisonment. (L.F. 7, 12).

Mr. Turner timely filed a *pro se* motion for postconviction relief on October 6, 2006. (L.F. 19, 55). Counsel timely filed an Amended Motion on January 4, 2006. (L.F. 26, 55).

Mr. Turner alleged in his amended motion that the sentence imposed by the plea court was in excess of the maximum sentence authorized by law because § 577.023 RSMo, the section providing for enhanced punishment for persistent DWI offenders, is conflicting on its face and therefore ambiguous. (L.F. 28, 30-34). Under that statute, a person charged with DWI who has one prior intoxication-related traffic offense is a prior DWI offender and, if convicted, is guilty of a Class A misdemeanor. § 577.023.2 RSMo. A person charged with DWI who has two prior intoxication-related traffic offenses is a persistent DWI offender, and if convicted, is guilty of a Class D felony. § 577.023.3 RSMo.

Mr. Turner argued that it cannot be determined from the face of the statute whether or not a prior municipal DWI guilty plea resulting in a suspended imposition of sentence (“SIS”) qualifies as a “prior intoxication-related offense” allowing for

enhancement of punishment under § 577.023. He claimed that two subsections of § 577.023, subsection 1(2)(a) and subsection 14, conflict with each other, each subsection resulting in a different possible penalty. (L.F. 28, 30-34). Because of this, Mr. Turner claimed that the plea court was required to apply the rule of lenity to resolve the conflict in favor of the lesser penalty. (L.F. 32). He argued that the court therefore should have not considered his prior Higginsville guilty plea resulting in an SIS, but only his prior State DWI conviction, in determining his sentence. (L.F. 28, 30-34). Considering only his prior State conviction, he alleged, at most he was guilty of a Class A misdemeanor as a prior (not persistent) DWI offender. § 577.023.2. RSMo. Therefore, he claimed that the plea court lacked jurisdiction to sentence him to a Class D felony. (L.F. 33).

On February 9, 2006, the prosecutor filed an “Answer and Motion to Deny Without Evidentiary Hearing.” (L.F. 48). In its Answer, the State argued that two Southern District cases had already addressed the issue of whether § 577.023 was ambiguous and held that the State Legislature intended to include municipal DWI guilty pleas as “prior intoxication-related traffic offenses” to enhance sentencing under § 577.023. (L.F. 49).

The motion court held a hearing on the prosecutor’s “Motion to Deny Without an Evidentiary Hearing” on April 3, 2006. (PCR Tr. 1). Although this hearing was technically not an evidentiary hearing on Mr. Turner’s Amended Motion, it was a *de facto* evidentiary hearing because the only evidence necessary to prove claim 8(A) was a

certified copy of Mr. Turner's Higginsville municipal record, which counsel had marked and moved to admit into evidence without objection as Movant's Exhibit 1.³ (Tr. 4-5).

Exhibit 1 showed that Mr. Turner pleaded guilty to a municipal DWI charge in Higginsville Case No. BWT546 on August 14, 1996, and received a suspended imposition of sentence. According to Exhibit 1, Mr. Turner's sentence in Case No. BWT546 was never executed. (Movant's Ex. 1).

The motion court issued its Judgment, Findings of Fact, and Conclusions of Law on April 25, 2006 denying Movant's Amended Motion. (L.F. 53, 62). Respecting the rule of lenity, the court found:

Since 1982 . . . the General Assembly has moved away from the requirement that there be a "conviction" and now merely requires a finding of guilty. These subsequent amendments reflect a clear intent on the part of the General Assembly to expand the prior offenses which can be used to enhance the punishment for driving while intoxicated. Movant's argument would have result[ed] in these amendments having no meaning whatsoever contrary to the canon of construction presuming that amendments are intended to change the law. Furthermore, this claim has been previously raised and examined by the Court of Appeals in 1997. See *State v. Meggs*, 950 S.W.2d 608 (Mo. App. S.D. 1997); *State v. Haskins*, 950 S.W.2d 613 (Mo. App. S.D. 1997). Since these cases, the General Assembly has amended other parts of Section 577.023 without changing the relevant language to the questioned provisions. As such, given the presumption that the General

³ Exhibit 1 was deposited with this Court on August 24, 2007.

Assembly is aware of the law, the law assumes that the General Assembly intends the relevant part of Section 577.023 to be interpreted consistent with the *Meggs* and *Haskins* decisions . . . In fact, the sole basis of Movant's claim is the 'rule of lenity.' The rule of lenity is merely a default mechanism under the rules of construction.

(L.F. 56-57).

Mr. Turner first appealed to the Western District Court of Appeals, which affirmed the motion court's judgment by memorandum opinion on May 2, 2007. Appellant ultimately moved for transfer to this Court, and the Court sustained the motion on August 21, 2007.

POINT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING MR. TURNER'S SUPREME COURT RULE 24.035 MOTION AFTER A HEARING, IN VIOLATION OF MR. TURNER'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, BECAUSE THE MOTION COURT IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM SENTENCE AUTHORIZED BY LAW, IN THAT ONE OF THE PRIOR CONVICTIONS USED TO ENHANCE MR. TURNER'S CHARGE TO PERSISTENT DWI OFFENDER STATUS WAS A MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE, AND SUBSECTIONS 1(2)(A) AND 14 OF § 577.023 RSMo ARE CONFLICTING ON THEIR FACE AS TO WHETHER A PRIOR MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE COUNTS AS A "PRIOR INTOXICATION-RELATED TRAFFIC OFFENSE" TO ENHANCE PUNISHMENT. MR. TURNER WAS PREJUDICED BECAUSE THE RULE OF LENITY REQUIRES THAT THE CONFLICTING SUBSECTIONS BE STRICTLY CONSTRUED AGAINST THE STATE TO GIVE THE DEFENDANT THE BENEFIT OF THE LESSER PENALTY, SO THAT THE COURT WAS AUTHORIZED AT MOST TO SENTENCE MR. TURNER TO A CLASS A MISDEMEANOR.

State v. Graham, 204 S.W.3d 655 (Mo. banc 2006);

Woods v. State, 176 S.W.3d 711 (Mo. banc 2005);

State v. Meggs, 950 S.W.2d 608 (Mo. App. S.D. 1997);

Fainter v. State, 174 S.W.3d 718 (Mo. App. W.D. 2005);

§ 577.023 RSMo;

U.S. Const. Amends. V and XIV;
Mo. Const. Art. I, §§ 10, 18(a); and
Supreme Court Rule 24.035.

ARGUMENT ON APPEAL

THE MOTION COURT CLEARLY ERRED IN DENYING MR. TURNER'S SUPREME COURT RULE 24.035 MOTION AFTER A HEARING, IN VIOLATION OF MR. TURNER'S RIGHT TO DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 18(A) OF THE MISSOURI CONSTITUTION, BECAUSE THE MOTION COURT IMPOSED A SENTENCE IN EXCESS OF THE MAXIMUM SENTENCE AUTHORIZED BY LAW, IN THAT ONE OF THE PRIOR CONVICTIONS USED TO ENHANCE MR. TURNER'S CHARGE TO PERSISTENT DWI OFFENDER STATUS WAS A MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE, AND SUBSECTIONS 1(2)(A) AND 14 OF § 577.023 RSMo ARE CONFLICTING ON THEIR FACE AS TO WHETHER A PRIOR MUNICIPAL CONVICTION RESULTING IN A SUSPENDED IMPOSITION OF SENTENCE COUNTS AS A "PRIOR INTOXICATION-RELATED TRAFFIC OFFENSE" TO ENHANCE PUNISHMENT. MR. TURNER WAS PREJUDICED BECAUSE THE RULE OF LENITY REQUIRES THAT THE CONFLICTING SUBSECTIONS BE STRICTLY CONSTRUED AGAINST THE STATE TO GIVE THE DEFENDANT THE BENEFIT OF THE LESSER PENALTY, SO THAT THE COURT WAS AUTHORIZED AT MOST TO SENTENCE MR. TURNER TO A CLASS A MISDEMEANOR.

Standard of Review

An appellate court's review of a denial of a post-conviction motion under Rule 24.035 is limited to a determination whether the motion court's findings of fact and conclusions of law were clearly erroneous. Supreme Court Rule 24.035 (k); *Weeks v. State*, 140 S.W.3d 39, 44 (Mo. banc 2004). The motion court's findings and conclusions

are clearly erroneous only if, after the review of the record, the appellate court is left with the definite and firm impression that a mistake has been made. *Id.*

Mr. Turner alleges that the sentence imposed by the plea court was in excess of the maximum sentence authorized by law, because § 577.023 is conflicting and ambiguous, and under the rule of lenity, he was entitled to the benefit of the lesser penalty. *See*, Supreme Court Rule 24.035(a). Whether a statute is ambiguous is purely a question of law, which this Court reviews *de novo*. *State v. Barraza*, 2007 WL 2766677, slip op. at 3 (Mo. App. W.D. 2007); *State v. Gibson*, 122 S.W.3d 121, 126 (Mo. App.W.D. 2003).

Discussion

When two subsections of a penal statute are conflicting on their face, providing for two different punishments for the statute's violation, is the Court automatically required to apply the rule of lenity and sentence a defendant to the lesser penalty, or may the Court first examine the legislative history and decide which subsection the legislature must have intended? Some courts which have examined the ambiguity in the language of a statute have held that the rule of lenity applies "only if, after seizing everything from which aid can be derived, the court make no more than a guess," as to what the legislature intended. *See, e.g., United States v. Wells*, 519 U.S. 482, 499 (1997). A close reading of these cases shows that the courts have applied this test to analyze whether a clause or term in a statute was ambiguous in the first place. *See, e.g., Fainter v. State*, 174 S.W.3d 718, 721 (Mo. App. W.D. 2005) (statute ambiguous because court could only guess whether legislature intended to include a golf cart in definition of "motor vehicle"); *Wells*, 519 U.S. at 931 (statute not ambiguous on its face). However, once the court

determines the statute is ambiguous, the rule of lenity *mandates* that the ambiguity be resolved to give the defendant the benefit of the lesser penalty. *Fainter*, 174 S.W.3d at 721. (emphasis added).

In this case, the court should apply the rule of lenity to give Mr. Turner the lesser penalty, because the two subsections of § 577.023 are facially inconsistent as to the possible sentence that can be imposed. Therefore, they are inherently ambiguous. *See, e.g., Almendarez-Torres v. U.S.*, 523 U.S. 224, 271 (1998) (Scalia, J. dissenting) (in cases of conflicting statutory provisions, that interpretation should be given which best protects the rights of a person charged with an offense). The court can do no more than guess which subsection the General Assembly intended, and therefore it is up to that branch of government, not the judiciary, to clarify its own intent. *State v. Brown*, 660 S.W.2d 694, 698 (Mo. banc 1983) (duty and power to define crimes and ordain punishment is exclusively vested in the legislature); *United States v. Bass*, 404 U.S. 336, 344 (1971) (principles of statutory construction are no substitute for congressional lawmaking).

Subsections 1(2)(a) and 14 of § 577.023 are Facially Conflicting

Section 577.023 RSMo provides for enhanced penalties for persons charged with DWI who have had prior intoxication-related traffic offenses. Subsection 1(2) (a) defines a persistent DWI offender as a person who has *pleaded guilty to or has been found guilty* of two or more intoxication-related traffic offenses. § 577.023.1(2)(a) RSMo (emphasis added). Under this subsection, arguably a municipal guilty plea resulting in a suspended imposition of sentence (“SIS”), can be used for enhancement to persistent DWI offender

status, because a guilty plea results in a finding of guilt. *Cf., State v. Talkington*, 25 S.W.3d 657, 658 (Mo. App. S.D. 2000) (a plea or finding of guilt is included in determining prior offender status under § 558.016, even if the sentences are suspended).

In subsection 14, however, the Missouri legislature spelled out in detail what the court may treat as a prior “intoxication-related traffic offense,” for purposes of enhancement, and specifically excluded a finding of guilty followed by an SIS in a municipal case. § 577.023.14 RSMo. The Missouri legislature specified two categories of prior convictions which can be treated as evidence of prior intoxication-related traffic offenses: 1. a *conviction* in municipal court or 2. a conviction or a plea of guilty *or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof* in a state court. *Id.* (emphasis added). In other words, subsection 14 describes in detail what types of priors constitute evidence of a prior intoxication-related traffic offense, and it conspicuously excludes a municipal guilty plea followed by an SIS.

The statute on its face is therefore conflicting:

When all provisions of § 577.023 are read together, it could be read differently by reasonably well-informed persons. Therefore the statute is ambiguous. This follows because § 577.023.14 does not list a guilty plea with suspended sentence imposed under a municipal ordinance as one that can be used as evidence to enhance punishment. On the other hand, there is clear and unmistakable language in § 577.023.1 and 2, stating that when a driver has previously been found guilty or pled guilty to a DWI offense in violation of a municipal ordinance, that fact

may be used to enhance such driver's punishment . . . *[O]n their face* those sections cannot be reconciled with the legislature's failure to list DWI guilty pleas with suspended sentence imposed in municipal court as 'prior convictions' under § 577.023.14.

State v. Meggs, 950 S.W.2d 608 (Mo. App. S.D. 1997) (nevertheless declining to apply the rule of lenity) (emphasis added).

The motion court found that the conflict between these two subsections had been cured because the legislature amended other parts of § 577.023 after the Southern District issued its opinion in *Meggs*. (L.F. 57). The court reasoned that, "given the presumption that the General Assembly is aware of the law," it was aware of the *Meggs* ruling that the legislature intended to include a prior municipal DWI guilty plea resulting in an SIS as a prior intoxication-related offense for purpose of enhancement under § 577.023. (L.F. 57).

The motion court's finding is clearly erroneous. As noted by *Wells, supra*, "the significance of subsequent congressional action or inaction necessarily varies with the circumstances . . . [We] have at most legislative silence on the crucial statutory language, and we have "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' " *Wells*, 519 U.S. at 496 (quoting *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130 (1971) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946))).

Moreover, the motion court's position would require the assumption that *Meggs* put the General Assembly on actual notice that subsections 1(2)(a) and 14 cannot be

reconciled on their face, and that it failed to correct the statute, particularly in light of abundant case law holding that the courts must be guided by the plain and ordinary meaning of statutory language. *See, e.g., State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). As noted by the Western District, “[w]hile it is true that Missouri courts have sometimes gleaned legislative purpose by considering the object the legislature seeks to accomplish with an eye towards finding resolution to the problems addressed therein, this Court is still governed by what the legislature said by its own enactment, even though we might think an important provision has been omitted through inadvertence or the use of imprecise language.” *State v. Jones*, 172 S.W.3d 448, 458 (Mo. App. W.D. 2005) (internal quotations omitted). This is impossible where, as here, the “legislature’s own enactment” provides for two different punishments.

Finally, the conflict between the subsections is not saved by the language of subsection 14 stating that, “evidence of prior convictions . . . shall include ***but not be limited to*** evidence of convictions received by a search of the records of the Missouri uniform law enforcement system [MULES],” because this sentence conflicts with the last sentence of subsection 14: “A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof ***in a state court shall be treated as a prior conviction.***” § 577.023.14 RSMo (emphasis added). In other words, the first sentence of subsection 14 could be read to permit municipal DWI SIS dispositions to be used as evidence of prior convictions.

However, the last sentence of subsection two specifically excludes them, and is therefore conflicting and ambiguous. Furthermore, courts cannot simply ignore the last sentence of subsection 14: “Judges should hesitate ... to treat as surplusage statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.” *Bailey v. United States*, 516 U.S. 137, 145 (U.S. 1995) (internal citation omitted). This Court presumes that the General Assembly does not enact meaningless provisions. *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. banc 2004); *but cf.*, *State v. Miller*, 153 S.W.3d 333, 337-338 (Mo. App. S.D. 2005)(MULES information, which requires a municipal DWI finding of guilty with an SIS to be reported, is alone is sufficient to prove the existence of a prior conviction for § 577.023 enhancement). To accept that the first sentence of subsection 14 authorizes municipal DWI offenses resulting in suspended impositions of sentence, the Court would have to conclude that the General Assembly enacted a meaningless provision and that the last sentence of subsection 14 is surplusage.

Moreover, the first sentence of subsection 14 refers to “evidence of prior *convictions.*” § 577.023.14 RSMo. When one completes an SIS probation, it is normally not considered a conviction, or a final judgment. *State v. Prell*, 35 S.W.3d 447, 450(Mo. App. W.D. 2000).

Court Must Apply the Rule of Lenity to Resolve Conflicting Provisions

Because the two subsections on their face reasonably provide for two different punishments, the Court should apply the rule of lenity. The rule of lenity *mandates* that all ambiguity in a criminal statute be resolved in a defendant’s favor. *Fainter*, 174

S.W.3d at 721(Mo. App. W.D. 2005) (emphasis added). Under this rule, this Court is to construe a criminal statute strictly against the government and liberally in a defendant's favor. *Goings v. Missouri Department of Corrections*, 6 S.W.3d 906, 908 (Mo. banc 1999). Any doubt as to whether the act charged and proved is embraced within the prohibition *must* be resolved in favor of the accused. *State v. Jones*, 899 S.W.2d 126, 127 (Mo. App. E.D. 1995) (emphasis added).

The rule of lenity is dictated by “wise principles this Court has long followed.” *Bass*, 404 U.S. at 347. First, “when [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” *Id.* This principle is founded on the fact that fair warning of prohibited conduct should be given to the world in language that the common world will understand, and what the law will do if the line is crossed. *Id.* at 348. To be fair, the line should be clear. *Id.* Second, “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *Id.*

While the *Meggs* opinion correctly found that reasonably-informed persons could find that § 577.023 provides for two different punishments, and is therefore ambiguous, the opinion improperly failed to apply the rule of lenity to give the defendant the benefit of the lesser penalty once it determined the ambiguity. *Meggs*, 950 S.W.2d at 613. Furthermore, *Meggs* held that the rule of lenity, or strict construction, “is a rule of construction, not a rule of law.” *Id.* at 612-613. This is in conflict with this Court's more

recent opinions in *Woods v. State*, 176 S.W.3d 711 (Mo. banc 2005) and *State v. Graham*, 204 S.W.3d 655 (Mo. banc 2006).

In *Woods, supra*, this Court examined § 570.040.1 RSMo, which provides: Every person who has previously pled guilty or been found guilty on two separate occasions of stealing, and who subsequently pleads guilty or is found guilty of stealing is guilty of a class C felony and shall be punished accordingly.

This Court did examine the legislative history of this section to determine whether or not there was a genuine ambiguity: i.e. whether the “two separate occasions” clause of the statute modified “stealing” or “person who has previously pled guilty or been found guilty.” *Woods*, 176 S.W.3d at 712. The Court determined that based on the legislative history the more lenient interpretation was the only possible correct interpretation. *Id.*

However, the Court went on to state:

In addition, the rule of lenity gives a criminal defendant the benefit of a lesser penalty where there is an ambiguity in the statute allowing for more than one interpretation . . . Section 570.040 is at least ambiguous as to whether it intends to require the pleas to be on separate occasions or the crimes to be on separate occasions. *Woods* is entitled to the benefit of that ambiguity.

Id. at 712 -713.

Similarly, in *Graham, supra*, this Court held that the 3-year statute of limitations of § 541.200 RSMo was ambiguous as to which offenses it applied. The Court did not

analyze the legislative history of § 541.200, but examined prior case law to determine if the statute was ambiguous. *Id.* at 657. The Court noted that:

If statutory language is subject to more than one reasonable interpretation, then the statute is ambiguous. Under the rule of lenity an ambiguity in a penal statute *will* be construed against the government or party seeking to exact statutory penalties and in favor of persons on whom such penalties are sought to be imposed. . . The rule of lenity *requires* this Court to resolve the ambiguity in Graham’s favor.

Id. at 656, 658 (emphasis added).

In both *Graham* and *Woods*, this Court correctly applied the rule of lenity to give the defendant the benefit of the lesser penalty, once it determined the statute was ambiguous. Mr. Turner respectfully suggests that *Meggs* should be reexamined in view of *Graham* and *Woods*. Once the Southern District correctly determined that § 577.023 was facially ambiguous, the Court was then required to apply the rule of lenity without further exploration into the motives of the legislature. While a court may apply the rule “only if, after seizing everything from which aid can be derived, the court make no more than a guess” as to what the legislature intended, the operative word is “*after.*” *See, e.g., Wells*, 519 U.S. at 499. “After” the court determines that a genuine ambiguity or conflict exists, the rule of lenity is mandatory. *Fainter, supra.*

Furthermore, the argument for lenity in this case is even stronger than in *Woods* and *Graham*, because the issue here is not whether a particular clause modifies one part of a statutory sentence or another, or the meaning of an undefined term in a statute. This

case involves an actual conflict between two subdivisions on the face of the statute. Examining the legislative history would be of no help to the Court because the General Assembly chose to leave two conflicting subsections in place. Courts can do nothing *but* guess which one the legislature intended. *See, Brown, Bass, supra.*

It is possible that the General Assembly intended to include a municipal DWI guilty plea resulting in an SIS as a prior offense for purposes of enhanced punishment under § 577.023 to deter repeat offenders. It is equally possible, however, because the legislature went to all the trouble of detailing the specific types of dispositions which will be treated as prior offenses in subsection 14, that it intended to specifically exclude a municipal guilty plea resulting in a SIS where the defendant successfully completed probation, concluding that if the underlying conduct had been that serious, it would have been filed as a State charge. Whichever interpretation is correct, however, it is up to the General Assembly, and not to the courts, to clarify its meaning “in language that is clear and definite.” *Bass, supra* at 347.

Because the statute is ambiguous and conflicting, and because the motion court failed to apply the rule of lenity to give Mr. Turner the benefit of the lesser penalty, it clearly erred and exceeded its jurisdiction in sentencing him to a Class D felony, which was in excess of the sentence authorized by law. As a result, Mr. Turner’s sentence violated his rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Mr. Turner therefore respectfully requests that this Court reverse

the motion's court judgment and remand the case for resentencing as a prior DWI offender under § 577.023.2 RSMo.

CONCLUSION

Because the motion court imposed a sentence in excess of the maximum sentence authorized by law by sentencing Mr. Turner as a persistent DWI offender, Mr. Turner requests that the court reverse the judgment and remand this case to the motion court with directions to resentence him as a prior DWI offender.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I, S. Kathleen Webber, hereby certify as follows:

1. The attached brief complies with the limitations contained in Supreme Court 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 5,112 words, which does not exceed the 31,000 words allowed for an appellant's brief.
2. The CD ROM disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan Enterprise 7.1.0 program, which was updated on October 2, 2007. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
3. Two true and correct copies of the attached brief and a CD ROM disk containing a copy of this brief were mailed, postage prepaid, on October 2, 2007, to the Office of the Attorney General, P.O. Box 899, 207 West High Street, Jefferson City, Missouri 65102.

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