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**IN THE MISSOURI SUPREME COURT**

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**No. SC97631**

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**GARY MITCHELL,**

***Appellant,***

**v.**

**KENNY JONES,**

***Respondent.***

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**ON APPEAL FROM THE**
**CIRCUIT COURT OF COLE COUNTY**
**THE HONORABLE DANIEL R. GREEN, PRESIDING**

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# APPELLANT'S SUBSTITUTE BRIEF

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## JURISDICTIONAL STATEMENT

Gary Mitchell, appellant herein, acting pro se, sued the Chairman of the Board of Probation and Parole, respondent herein, for declaratory judgment in the Circuit Court of Cole County. In response, respondent filed a motion to dismiss. The circuit court granted respondent's motion to dismiss and entered judgment for respondent.

Appellant filed a timely notice of appeal to the Missouri Court of Appeals, Western District. After briefing and argument, the Court of Appeals affirmed the circuit court's judgment. However, at the conclusion of its opinion, the Court of Appeals granted transfer to this Court pursuant to Rule 83.02 because the issues in this appeal present issues of exceptional importance. This Court has jurisdiction pursuant to Mo. Const., Art. V, § 10.

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## STATEMENT OF FACTS

Appellant, Gary Mitchell, was charged in the Circuit Court of Jasper County with the Class A felony of drug trafficking in the second degree in violation of § 195.223 RSMo (2000) in Case No. 09AO-CR02034-01. Appellant was subsequently charged in a second amended information as a prior drug offender under § 195.275 and § 195.295.3 RSMo (2000).

On July 10, 2013, a jury found appellant guilty of drug trafficking in the second degree. Appellant was sentenced on September 25, 2013 by Judge David C. Dally to fifteen years to be served without probation or parole, as a prior drug offender, in the Missouri Department of Corrections. *See State v. Mitchell*, 442 S.W.3d 923, 925, n.1 (Mo. App. S.D. 2014).

In 2014, the General Assembly passed Senate Bill 491, which became effective on January 1, 2017. This bill repealed the prior drug offender statute codified under § 195.295, which required prior drug offenders to serve their entire sentence without the possibility of parole.

On May 11, 2017, appellant filed a *pro se* petition for declaratory judgment in the Circuit Court of Cole County. (L.F. 3-6). In his petition, appellant argued that the repeal of § 195.295, pursuant to Senate Bill 491, applied retroactively. Therefore, he should be deemed eligible for parole on his fifteen year sentence. (*Id*.).

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On June 13, 2017, in response to appellant's petition for declaratory judgment, respondent filed a motion to dismiss. (L.F. 8-10). On August 14, 2017, Judge Daniel R. Green granted respondent's motion to dismiss and held that the repeal of § 195.295 does not apply retroactively to appellant's sentence under § 1.160 RSMo (*Id.* 12-13). The court entered judgment[1] and appellant filed a timely notice of appeal. (*Id.* 14-16). After undersigned counsel entered their appearance, appellant was granted leave to file a substitute brief.

After briefing and argument, the court of appeals, on January 8, 2019, issued an opinion affirming the circuit court's judgment. The court of appeals held that, pursuant to § 1.160, the repeal of § 195.295 does not apply retroactively to appellant's sentence. *Mitchell v. Jones*, WD81049. In support of its decision, the court prominently cited its recent decision in *Fields v. Missouri Board of Probation and Parole*, 559 S.W.3d 12 (Mo. App. W.D. 2018), which was issued after briefing was completed in appellant's case in the court below. As will be further amplified in the argument section below, the Missouri Court of Appeals' decision in *Fields* should be overruled because it conflicts with this Court's prior decisions and, in any event, § 1.160, as interpreted in *Fields*, does not prevent the retroactive application of the repeal of § 195.295 to appellant's case.

[1] It appears that the trial court signed verbatim a proposed judgment submitted by the attorney general on August 11, 2017. (L.F. 1-2).

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At the conclusion of its opinion, the Court of Appeals granted transfer to this Court pursuant to Rule 83.02. Transfer was also granted under Rule 83.02 by the Court of Appeals on the same date in a companion case, *Woods v. Missouri Dept. of Corrections*, SC97633. This appeal is now before this Court for its consideration.

## POINT RELIED ON

**THE COLE COUNTY CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS AND ENTERING JUDGMENT FOR RESPONDENT BECAUSE THE MISSOURI LEGISLATURE'S REPEAL OF THE PRIOR DRUG OFFENDER STATUTE, § 195.295 RSMO (2000), EFFECTED ON JANUARY 1, 2017 BY SENATE BILL 491, APPLIES RETROACTIVELY TO APPELLANT BECAUSE THIS NEW LEGISLATIVE ENACTMENT DID NOT ALTER THE LAW GOVERNING THE OFFENSE FOR WHICH APPELLANT WAS CONVICTED OR CHANGE HIS SENTENCE.**

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

*Talley v. Mo. Dept. of Corrections*, 210 S.W.3d 212 (Mo. App. W.D. 2006)

*Jones v. Fife*, 207 S.W.3d 614 (Mo. banc 2006)

§ 1.160 RSMo (2016)

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## ARGUMENT

**THE COLE COUNTY CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS AND ENTERING JUDGMENT FOR RESPONDENT BECAUSE THE MISSOURI LEGISLATURE'S REPEAL OF THE PRIOR DRUG OFFENDER STATUTE, § 195.295 RSMO (2000), EFFECTED ON JANUARY 1, 2017 BY SENATE BILL 491, APPLIES RETROACTIVELY TO APPELLANT BECAUSE THIS NEW LEGISLATIVE ENACTMENT DID NOT ALTER THE LAW GOVERNING THE OFFENSE FOR WHICH APPELLANT WAS CONVICTED OR CHANGE HIS SENTENCE.**

### STANDARD OF REVIEW

In reviewing a judgment sustaining a motion to dismiss, this Court's standard of review is *de novo*. *Stein v. Novus Equities Co.*, 284 S.W.3d 597, 601 (Mo. App. E.D. 2009). Because there are no facts in dispute, this Court reviews the trial court's judgment *de novo* because this appeal presents a purely legal issue. *Jones v. Fife*, 207 S.W.3d 614, 616 (Mo. banc 2006).

In an appeal from the grant of a motion to dismiss, the following standard of review applies:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause that might be adopted in that case.

*State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009) (quoting *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 464 (Mo. banc 2001)).

ANALYSIS

As a result of respondent's inaction and failure to remove the now defunct "no parole" restriction from appellant's sentence, appellant, along with approximately 120 other Missouri offenders, are imprisoned without parole eligibility for non-violent drug offenses based upon a sentencing enhancement statute that no longer exists. Due to respondent's failure to follow established Missouri case law, appellant is being held well past his parole eligibility date, which would have been after appellant had served twenty-five percent of his sentence. *See* 14 C.S.R. § 80-2.010(1)(c) (2013). Appellant has now served more than five years of his current fifteen year sentence.

Under the terms of the now repealed § 195.295 (2000), it is clear and undisputed that offenders convicted of drug trafficking in the second degree in violation of § 195.223 and sentenced under the procedural sentencing enhancement provision of § 195.295.3 (2000) were indeed required to serve their sentence without the possibility of parole consideration. *Id*. However, in 2014, Senate Bill 491 was passed and became law, with an effective date of January 1, 2017. Within Senate Bill 491, the Missouri Legislature repealed the prior and persistent drug offender statutes under §§ 195.295 - 195.296 and recodified the law under §



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579.170 RSMo Supp. (2017). Section 579.170 eliminated the "flat time" parole provisions for prior drug offenders convicted of trafficking charges under § 195.223, but retained other sentencing enhancement provisions.

Thereafter, respondent has elected to ignore and not abide by pertinent case law from this Court that mandates retroactively applying the repeal or amendment of a criminal statute "unless the statute: (a) reduces or increases the offender's sentence, or (b) alters the law creating the offense pursuant to which the offender was convicted." *See State ex rel. Nixon v. Russell*, 129 S.W.3d 867, 870-871 (Mo. banc 2004). *See also Irvin v. Kempker*, 152 S.W.3d 358, 361-362 (Mo. App. W.D. 2004).

Neither of these exceptions applies here. The repeal of the parole ineligibility provisions of § 195.295 did not alter a substantive law governing appellant's offense or shorten his sentence. Instead, retroactive application of its repeal would only result in a potential change in the location or circumstances under which appellant would serve the remainder of his sentence. Therefore, § 1.160 RSMo (2016) does not bar the retroactive application of the repeal of § 195.295 because this legislative act did not affect the prosecution, penalty, or punishment for the offense.



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This Court and this state's appellate courts have consistently held that statutes changing parole eligibility to the benefit of the prisoner are retroactive.[2] *See, e.g., Jones v. Fife*, 207 S.W.3d 614 (Mo. banc 2006); *Dudley v. Agniel*, 207 S.W.3d 617 (Mo. banc 2006); *Talley v. Mo. Dep't of Corrections*, 210 S.W.3d 212, 216 (Mo. App. W.D. 2006) (holding that *Russell* and subsequent case law "makes it clear that any changes in the law with regard to the minimum prison term can be retroactively applied" to previously convicted offenders); *Carlyle v. Mo. Dep't of Corrections*, 184 S.W.3d 76, 79 (Mo. App. W.D. 2005); *Bantle v. Dwyer*, 195 S.W.3d 428, 432 (Mo. App. S.D. 2006); *Ridinger v. Mo Bd. of Prob. & Parole*, 189 S.W.3d 658, 663 (Mo. App. W.D. 2006); *Nieuwendaal v. Mo. Dep't of Corrections*, 181 S.W.3d 153, 154-155 (Mo. App. W.D. 2005) (finding § 559.115.7, a parole eligibility statute, is procedural and applies retroactively); *Irvin v. Kempker*, 152 S.W.3d 358, 362 (Mo. App. W.D. 2004); *Powell v. Mo. Dep't of Corrections*, 152 S.W.3d 363, 366 (Mo. App. W.D. 2004).

In *Jones*, after recognizing that § 1.160 did not apply, this Court held that the rationale of the *Russell* case was controlling. 207 S.W.3d at 615. As a result, because the more favorable parole eligibility provisions of § 559.115.7 and § 217.362.5 Cum. Supp. (2004) did not alter a substantive law governing Jones'

[2] A change in a statute adversely affecting a prisoner's parole status could not be applied retroactively without running afoul of the *ex post facto* clause of the Constitution. *See State v. Lawhorn*, 762 S.W.2d 820, 824-826 (Mo. banc 1988).

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offense or shorten his sentence, the prisoner was entitled to their benefit. Instead, the retroactive application of these statutes would only result in a potential change in the location or the circumstances under which Jones would serve the remainder of his sentence. Therefore, § 1.160 did not bar retroactive application of the parole eligibility provisions of § 559.115.7 and § 217.362.5. 207 S.W.3d at 616.

While this appeal was pending before the court below, the Court of Appeals issued its opinion in *Fields v. Missouri Dept. of Corrections*, 559 S.W.3d 12 (Mo. App. W.D. 2018). In *Fields*, a prisoner, acting *pro se* [3], appealed from the circuit court's denial of his declaratory judgment action that contended that the repeal of the mandatory minimum provision that required prisoners serve 85% of their sentences for involuntary (vehicular) manslaughter under § 565.024 RSMo Cum. Supp. (2008), was retroactively applicable to him under this Court's decision in *Russell*. The Court of Appeals rejected Fields' argument by noting that this legislative action totally repealed the prior involuntary manslaughter law and reclassified it from a "B" to a "C" felony and also changed the culpable mental state. *Id.* at 17. Alternatively, the Court in *Fields* held that retroactive application of this repeal was barred by § 1.160. *Id.* at 17-19. In this case, *Fields* was the primary authority relied upon by the Court of Appeals below in reaching its

[3] Unfortunately, Mr. Fields failed to file a timely application for transfer after rehearing was denied, and the mandate issued in *Fields* before this case was argued in the court below.

decision.

Because the *Fields* decision cannot be reconciled with this Court's decision in *Russell* and its progeny, this Court should overrule that decision in this appeal. *Fields* is an aberration, in light of the fact that, in the wake of the *Russell* decision, Missouri courts have consistently held that convicts must receive the benefits of new statutory enactments and amendments that relaxed requirements for parole eligibility.

Even if this Court declines to explicitly overrule the *Fields* decision, appellant can still prevail in this appeal because the facts the court confronted in *Fields* are clearly distinguishable from the circumstances surrounding the repeal of the prior drug offender law. In this case, there is no retroactivity bar under § 1.160 because the repeal of § 195.295 did not involve a change to the substantive law governing appellant's offense.

This Court held in *Russell* that § 1.160 only "applies to retroactive applications of substantive laws governing offenses." 129 S.W.3d at 870. This Court has distinguished the "substantive law governing the offense" from statutes which specify criminal sentences and from statutes which specify parole eligibility. *Jones*, 207 S.W.3d at 616 (new enactments "do not alter a substantive law governing Jones' offense *or* shorten his sentence") (emphasis added); *Russell*, 129 S.W.3d at 870 (new statutory enactment "does not shorten [the defendant's]



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sentence, *nor* does it alter the law creating the offense") (emphasis added). Therefore, the "substantive law governing the offense" is defined as the statute which actually specifies the substantive elements of the offense and the corresponding classification of that offense.

Here, appellant was, and still stands, convicted of drug trafficking in the second degree. The elements of this offense are set forth in § 195.223.2. The only impact of § 195.295 was to specify that "if the court finds the defendant is a prior drug offender" then the defendant's sentence "shall be served without probation or parole." This separate statute cannot "create the offense" of second degree drug trafficking because it does not affect all offenders convicted of second degree drug trafficking. It only applies to prior drug offenders. Thus, § 195.295 clearly does not create the offense of second degree drug trafficking.

Second, the facts presented in appellant's case are readily distinguishable from those at issue in *Fields*. In *Fields*, the minimum-term provision appeared in the same statute as the one which specified the elements of the offense under which the defendant was convicted and in the same subsection that specified the classification of the offense. As a result, the Court in *Fields* noted its decision was limited to the question of whether § 1.160's retroactivity bar applies where the relaxed parole eligibility provisions are within the statute defining the offense. 559 S.W.3d at 18-19.



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In appellant's case, however, the sentencing enhancement provision of § 195.295 was not located within § 195.223, the statute which specified the elements of the offense of second degree drug trafficking. Therefore, unlike *Fields*, the statutory amendment here only affected the parole eligibility statute and did not in any way affect the offense under which appellant was convicted and sentenced. Therefore, *Fields* is not controlling under the facts presented here and § 1.160 does not bar the retroactive application of § 195.295 under *Russell*.

The opinion of the court of appeals below also erroneously limited the holding in *Russell* to situations where a new statutory provision, rather than a statutory repeal or amendment, alters parole eligibility to the benefit of a prisoner. This finding is inconsistent with several cases issued both by this Court and the court of appeals, after *Russell*, that applied the holding in that case to repeals and amendments to statutes.

Both *Jones* and *Dudley* involved legislation which had the effect of amending § 559.115.7's definition of a prison commitment by excluding participation in a 120 day program from the definition which reduced the mandatory minimum sentence those prisoners were required to serve under § 558.019 RSMo (2000). 207 S.W.3d at 615-616. The court of appeals also applied *Russell* in addressing the same issue in *Carlyle*. 184 S.W.3d at 78-80.

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In *Talley*, the same court of appeals also applied *Russell* to a statutory amendment that removed armed criminal action from the list of dangerous felonies set forth under § 556.061.8. The 1994 statutory amendment at issue in *Talley* removed the requirement that persons convicted of armed criminal action serve a minimum of 80% of their sentence. 210 S.W.3d at 215-216 (holding "any changes in the law with regard to the minimum prison term" are retroactive under *Russell*). Therefore, it is clear that *Russell* is applicable to the repeal or amendment of previously existing statutes, not just new statutory provisions.

It is beyond dispute that the Missouri Legislature intended and succeeded in removing an unwise and unproductive law from the criminal code. In fact, two of the leading sponsors of this repeal of the prior drug offender law have publicly stated that they intended this provision to apply to all prior drug offenders whether or not they were convicted before or after 2017. See Tony Messenger, *A Judge Set Former Drug Dealer Free, but the Missouri Supreme Court Might Lock Him Up Again*, St. Louis Post Dispatch (Jan. 13, 2019).

Even if there is uncertainty as to whether the parole eligibility provision of § 195.295 falls within the ambit of § 1.160, the rule of lenity requires that any ambiguity be resolved in appellant's favor. *See e.g.*, *State v. Graham*, 204 S.W.3d 655, 656 (Mo. banc 2006). ("If statutory language is subject to more than one reasonable interpretation, then the statute is ambiguous.") In such situations, the

rule of lenity resolves "doubts in the enforcement of a penal code against the imposition of a harsher punishment." *State v. Liberty*, 370 S.W.3d 537, 549 (Mo. banc 2012) (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955). And, as noted above, the application of the rule of lenity here would be entirely consistent with the clear intent of this legislation.

Sections 558.019 and 559.115.7, that were at issue in *Jones*, and 195.295 serve nearly identical purposes. Both statutes established mandatory minimum parole eligibility requirements for prisoners with prior convictions. The repeal of § 195.295 neither repeals nor amends any previously existing statute defining appellant's crime or alters his term of imprisonment. This repeal did not lengthen or shorten appellant's sentence. Appellant will still serve a fifteen year sentence for his crime under § 195.223. Accordingly, *Russell* and its progeny requires this Court to order respondent to apply the repeal of § 195.295 retroactively to allow appellant to be considered for parole under current law.

## CONCLUSION

For all the foregoing reasons, this Court should reverse the circuit court's judgment and remand the case with directions to enter declaratory judgment in favor of appellant.

Respectfully submitted,
*/s/ Kent E. Gipson/Taylor L. Rickard*
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## CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That appellant's substitute brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 3,481 words.

2. That on the 13th day of February, 2019, appellant's substitute brief was electronically filed on case.net; and

3. That by electronically filing appellant's substitute brief, a copy will automatically be sent to all counsel of record.

4. That a true and correct copy was delivered via email to Olivea.myers@ago.mo.gov.

*/s/ Kent E. Gipson/Taylor L. Rickard*
ATTORNEYS FOR APPELLANT