IN THE MISSOURI SUPREME COURT

No. SC97631

GARY MITCHELL,

Appellant,

v.

KENNY JONES,

Respondent.

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

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY ARGUMENT

I.

UNDER PREVAILING MISSOURI LAW, STATUTORY ENACTMENTS OR AMENDMENTS CHANGING PAROLE ELIGIBILITY REQUIREMENTS TO THE BENEFIT OF PRISONERS APPLY RETROACTIVELY UNLESS THE LEGISLATURE EXPLICITLY MAKES THE LAW PROSPECTIVE IN APPLICATION.

As emphasized in appellant's opening brief, with one exception[1], Missouri's appellate courts have consistently applied "defendant-friendly" legislative enactments and amendments reducing mandatory minimum parole requirements retroactively to prisoners who have already started serving their sentences. *See State ex rel. Nixon v. Russell*, 129 S.W.3d 867, 870-871 (Mo. banc 2004). In the last fifteen years since the *Russell* decision issued, legislation relaxing parole restrictions has been universally applied to benefit Missouri's prisoners notwithstanding the retroactivity bar of § 1.160 RSMo (2010) because a change in parole eligibility does not alter the sentence imposed. *Id.*

Respondent, however, contends that the *Russell* line of cases are "inapposite" in situations involving new legislation that repeals or amends prior laws. (Resp. Br. 11). Respondent also argues that the *Russell* line of cases does not "apply to changes in laws creating offenses and defining sentencing." (*Id.*).

[1] *See Fields v. Missouri Board of Probation and Parole*, 559 S.W.3d 12 (Mo. App. W.D. 2012).

Respondent's first argument is foreclosed by the decision in *Talley v. Missouri Dep't. of Corrections*, 210 S.W.3d 212, 216 (Mo. App. W.D. 2006). As appellant noted in his opening brief, *Talley* applied *Russell* to a statutory amendment that removed armed criminal action from the list of dangerous felonies. *Id.* Even before *Russell*, this Court declined to apply § 1.160's retroactivity bar where a repealed parole statute was utilized by the state to extend a prisoner's term of parole. *Gallup v. Mo. Dept. of Corrections*, 733 S.W.2d 435, 436 (Mo. banc 1987).

Respondent's second argument also lacks merit. Although the recodification of § 195.223 into newly enacted § 579.068 did effect change to the parameters of eligible conduct and punishments for convictions for drug trafficking, Mr. Mitchell has never contended that he is entitled to any of the changes effected in the recodification of the statute defining the offense for which he was convicted. Instead, as in *Russell* and its progeny, Mr. Mitchell is merely seeking the benefit of a legislative act distinct from the statute defining the offense that provides him with the opportunity of an earlier release on parole.

Respondent's brief also places great emphasis upon the recent *Fields* decision to support its strained interpretations of § 1.160 and the *Russell* decision. As appellant noted in his opening brief and, as further amplified below, *Fields* cannot be reconciled with *Russell* and should not be followed.

The *Fields* decision rests upon a fundamental misreading of this Court's decision in *Russell*. The panel in *Fields* cites *Russell* as supporting the formulation of a two part test for applying § 1.160 to new legislation relaxing parole eligibility. *Fields*, 559 S.W.3d at 17-18. However, no such test was articulated by this Court in the *Russell* opinion. 129 S.W.3d at 870-871. Instead, as Judge Ahuja noted in his dissent in the *Woods* case, the actual holding in *Russell* and in subsequent cases, is simply that "statutory amendments relaxing the requirements for parole eligibility apply to previously convicted offenders." *Woods v. Mo. Dept. of Corrections*, W.D. 81266, (Ahuja, J., dissenting), slip. op. at 9.

The Court of Appeals in *Fields* also cited this Court's decision in *State v. Sumlin*, 820 S.W.2d 487, 490 (Mo. banc 1991) as authority for its view that only new legislative provisions, rather than repealed or amended provisions, are outside the scope of § 1.160. 559 S.W.3d at 17. The passage from *Sumlin* cited by *Fields* in support of this position makes no such distinction. In addressing the issue of whether a prisoner was entitled to have his sentence reduced under subsection two of § 1.160 that was repealed in 2005, this Court in *Sumlin* rejected the state's argument that the Court should draw a distinction between statutory repeals and amendments. 820 S.W.2d at 490. As Judge Benton noted: "The General Assembly typically repeals old provisions and enacts new provisions when it is in actuality amending the old provisions. A close look at the act indicates it to be a

comprehensive alteration of Missouri's drug laws that divided the many offenses previously contained in §195.020 (1986) among several new sections." *Id. See also Whardo v. State*, 859 S.W.2d 138 (Mo. banc 1993) (rejecting state's argument to overturn *Sumlin* and differentiate repeals from new laws in applying 1.160.). *Id.* at 140. S.B. 491 effected a similar restructuring of Missouri's drug laws.

The second prong of this test articulated by the Court in *Fields* also finds no support in the actual text of the *Russell* decision. 129 S.W.3d at 870-871. There is nothing in the passages cited by *Fields* from the *Russell* decision to support its view that a statutory repeal or amendment cannot be retroactive under § 1.160 if it "affects the prosecution, penalty, or punishment of the offense at issue." 559 S.W.3d at 17. This test, instead, appears to have been formulated from some of the language in § 1.160.

In *Russell*, this Court also relied on its previous 1972 decision in *McCauley v. State*, 486 S.W.2d 419 (1972) in determining that changes in parole laws are retroactive and beyond the reach of § 1.160. 129 S.W.3d at 870. The *McCauley* decision is also fundamentally at odds with the aspect of the *Fields* decision that a beneficial statutory change to a prisoner's parole eligibility affected the penalty or punishment.

In *McCauley*, this Court determined that McCauley's seven year sentence with judicial parole that was imposed after his two year sentence of imprisonment

was set aside, was a more severe sentence for purposes of determining whether this subsequent sentence violated due process under *North Carolina v. Pearce*, 395 U.S. 711 (1970). 486 S.W.2d at 422. As this Court stated: "it is clear that the sentence is the penalty—the confinement for a period of time or the fine—and does not include as part of its definition such conditional orders as the Court makes for amelioration of the punishment—probation or parole…The Court holds that probation or parole is not part of the sentence imposed upon a defendant." 486 S.W.2d at 423.

Prior caselaw from this Court interpreting the now repealed subsection two of § 1.160 also supports a finding of retroactivity in this case. This now repealed section contained the phrase "the law creating the offense." In considering whether a prisoner was entitled to have his sentence reduced under this subsection, this Court held that prisoners were not entitled for the benefit of § 1.160 based on amendments to statutes that did not change the law creating the offense. *See State ex rel. Nixon v. Kelly*, S.W.3d 513, 518 (Mo. banc 2001). These cases interpreting § 1.160.2 RSMo (2000) bolster the position that new laws addressing parole eligibility for a particular crime or class of crimes are not part of the "law creating the offense."

Here, Mr. Mitchell was, and still stands, convicted of drug trafficking in the second degree and will serve a fifteen year sentence. The elements of this offense

were 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.

Respondent also argues that the repeal of the prior drug offender statute should not apply retroactively under general retroactivity principles because the repealed statute, § 195.295, was substantive rather than procedural. (Resp. Br. 13-14). This argument neglects to mention the fact that both the Southern District and Western District Court of Appeals have found that amendments to parole provisions are procedural rather than substantive. *See Bantle v. Dwyer*, 195 S.W.3d 428, 432-434 (Mo. App. S.D. 2006); *Nieuwendaal v, Missouri Dep't of Corrections*, 181 S.W.3d 153, 154-155 (Mo. App. W.D. 2005).

Section 195.295, before its repeal, set forth the mandatory minimum prison terms required for prior drug offenders convicted under § 195.223. Its subsequent repeal did 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 past." *F.R. v. St. Charles Cnty. Sheriff's*

Dep't., 301 S.W.3d 56 (Mo. 2010) (quoting *Squaw Creek Drainage Dist. v. Turney*, 235 Mo. 80, 138 S.W. 12, 16 (1911)). A law relaxing parole eligibility is procedural because it is the "machinery by which minimum prison terms are determined." *Nieuwendaal*, 181 S.W.3d at 155. As a result, these general principles favoring retroactivity do not prohibit Mr. Mitchell from obtaining a parole hearing and being considered for parole due to the repeal of § 195.295.

Finally, respondent argues that this Court should not consider legislative intent because the plain language and applicability of § 1.160 in this context is clear. (Resp. Subst. Br. at 14-15). Appellant respectfully disagrees with this assessment and the arguments advanced by the parties and the opinions below in this case and in *Woods* underscore this fact. It is, however, remarkable to note that respondent did not dispute the fact that the primary sponsors of this legislation have publicly stated they intended this law to be retroactive.

Since 2004, there have been only two published decisions, except for *Fields*, where Missouri courts have held that statutory amendments relaxing parole requirements did not apply retroactively to prisoners who had already received their sentences. *See Stone v. Missouri Dep't. of Corrections*, 313 S.W.3d 158 (Mo. App. W.D. 2010); *Phillips v. Missouri Dep't. of Corrections*, 323 S.W.3d 790 (Mo. App. W.D. 2010). In both of these cases, the Court of Appeals held that Mr. Phillips and Mr. Stone were not entitled to the benefit of the 1994 amendments to

the dangerous offender law codified in § 558.019 RSMo, because subsection seven of this statutory amendment stated that "the provisions of this section shall apply only to offenses occurring on or after August 28, 1994." *Id.* at 793-794. Had this subsection seven not been included, it is apparent that the outcomes in these two appeals would have been different.

Because "the primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used,"[2] the critical question in this case is whether the legislature intended its repeal of the prior drug offender law to be retroactively applicable to drug offenders who had already begun serving their sentences. In reviewing issues of statutory construction and legislative intent, Judge Blackmar noted, in his concurring opinion in *Sumlin*, that the Missouri General Assembly in amending statutes, must be deemed to have been aware of the provisions of § 1.160 and the Missouri Supreme Court's prior decisions interpreting its scope. *Sumlin*, 820 S.W.2d at 494 (Blackmar, J., concurring). *See also State ex rel. Heartland Title v. Harrell*, 500 S.W.3d 239, 243 (Mo. banc 2016) (noting that General Assembly is presumed to know the law, including this Court's prior decisions, in enacting statutes).

In this case, it must be assumed that the sponsors of S.B. 491 were fully aware of this Court's *Russell* decision and other subsequent cases interpreting §

[2] *See In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005).

1.160 that have consistently held that new legislative enactments relaxing parole requirements are retroactive. If legislature had intended its repeal of the prior drug offender statute to be prospective only, it would have included a provision in this statutory amendment to express this intent as was done in the 1994 amendments to § 558.019 that were at issue in *Stone* and *Phillips*.

II.

APPELLANT'S CLAIM FOR RELIEF IS COGNIZABLE IN A DECLARATORY JUDGMENT ACTION

At the conclusion of his brief, respondent, almost as an afterthought, contends that appellant's claim for relief in this case involving his eligibility for parole is not cognizable in a declaratory judgment action. (Resp. Subst. Br. at 15-16). According to respondent, this case or controversy involves a challenge to a conviction and sentence in a criminal case that is only cognizable under Rule 29.15. (*Id.*).

Respondent did not raise this defense or any argument in this vein in prior proceedings before the Circuit Court or the Court of Appeals. (L.F. 8-10). In any event, this argument is squarely foreclosed by this Court's decision in *McDermott v. Carnahan*, 934 S.W.2d 285 (Mo. banc 1996).

In *McDermott*, a prisoner filed a declaratory judgment action contending that he was eligible for parole after serving three years for an armed criminal action

conviction under § 571.015.1 RSMo (1994). This Court held that the trial court erred in finding that this claim should have been brought in a post-conviction motion under Rule 24.035. *Id.* at 287. In finding that McDermott's claim was cognizable in a petition for declaratory judgment, this Court stated that: "A declaratory judgment action to determine when he is eligible for parole under the statutes and applicable regulations is not an attack on the validity of his sentence or conviction." *Id.*

CONCLUSION

For all the foregoing reasons, as well as the reasons advanced in appellant's substitute brief, the Circuit Court's judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That respondent's brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 2,224 words.

2. That on the 18th day of March, 2019, respondent's brief was electronically filed on case.net; and

3. That by electronically filing respondent's 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.

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