No. SC97633

In the

Supreme Court of Missouri

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant,

v.

DIMETRIOUS WOODS,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri,
The Honorable Daniel R. Green, Judge

SUBSTITUTE REPLY BRIEF

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Argument

I. Section 1.160 applies to bar retroactive application of the 2017 criminal code amendments to reduce Woods's punishment for second-degree drug trafficking.

Section 1.160 ensures that amended criminal statutes cannot apply to reduce any punishment, penalty, or forfeiture that Woods received for second-degree drug trafficking. Missouri law requires Woods to continue serving the punishment prescribed by law at the time of his offense: an "authorized term of imprisonment for a class A felony, which term shall be without probation or parole." § 195.295, RSMo. (2000).

This Court, the Missouri Court of Appeals, the United States Supreme Court, and other federal courts have held that specific bars to parole eligibility are part of the punishment for an offense. *State v. Lawhorn,* 762 S.W.2d 820, 826 (Mo. 1988); *Fields v. Missouri Board of Probation and Parole,* 559 S.W.3d 12, 19 (Mo. App. W.D. 2018). *Warden, Lewisburg Penitentiary v. Marrero,* 417 U.S. 653, 659 (1974); *Weaver v. Graham,* 450 U.S. 24, 35–36 (1981); *Yamamoto v. U.S. Parole Com'n*, 794 F.2d 1295, 1300–1301 (8th Cir. 1986); *United States*

ex rel. Graham v. United States Parole Commission, 629 F.2d 1040, 1043 (5th Cir. 1980); *Rodriquez v. United States Parole Commission,* 594 F.2d 170, 175–76 (7th Cir. 1979); *Maggard v. Moore,* 613 F.Supp. 150, 152 (W.D. Mo. 1985).

In *Lawhorn,* this Court found that new laws requiring a higher mandatory minimum prison term increased an offender's punishment and could not be applied to him retroactively. *Lawhorn,* 762 S.W.2d at 826. This Court noted that courts around the country consider bars to parole eligibility to be punishment in the ex post facto context. *Id.* (citing *Warden v. Marrero,* 417 U.S. 653, *Maggard v. Moore,* 613 F. Supp. at 152, and *Yamamoto v. U.S.,* 794 F.2d at 1300). This Court should take the same view of statutes barring parole eligibility to Woods as part of the punishment for his offense. *Prapotnik v. Crowe,* 55 S.W.3d 914, 918 (Mo. App. W.D. 2001) (Section 1.160 is designed to have an "ex post facto" effect on behalf of the State to avoid claims that an offender is entitled to the benefit of changes in the law after the offense).

If the situation were reversed, and the General Assembly sought to retroactively bar drug offenders from receiving parole, Woods would argue under these cases that the bar to parole ineligibility increased the punishment for his offense and could not be applied retroactively. It cannot be the law that parole ineligibility provisions only affect an offender's punishment when it would be beneficial to the offender.

Woods seeks to limit § 1.160 to bar only retroactive application of laws that increase or decrease an offender's sentence, but there is no support for that principle in the text of § 1.160. Section 1.160 uses broad language to prohibit legislative amendments from affecting fines, penalties, forfeitures, prosecutions, trials, and punishments for criminal offenses. § 1.160, RSMo. The text of the statute makes clear that the General Assembly did not seek to prevent only changes to criminal sentences, but changes to *any* consequence resulting from a criminal offense.

Woods's argument that his parole ineligibility is not part of the punishment for his offense also ignores the function of parole ineligibility periods in criminal sentencing. Under § 195.295.3 (2000), which governed Woods's sentence, Woods was sentenced to twenty-five years' imprisonment without parole. The parole prohibition in § 195.295.3 is implicit in Woods's sentence and cannot be separated from it. *Fields,* 559 S.W.3d at 19. Woods's parole-ineligible sentence is similar to a sentence for first-degree murder under § 565.020.2.

The punishment for first-degree murder is death or life imprisonment without the possibility of parole. § 565.020.2, RSMo. (2016). The prohibition against parole for first-degree murder is contained in the statute that governs the sentence and is announced at the time of the sentence. The parole prohibition for first-degree murder is a substantial part of the punishment. *See*

Montgomery v. Louisiana, 136 S.Ct. 718, 732–34 (2016) (the Constitutional bar to life without parole sentences for juveniles is a substantive rule because of the risk that juvenile offenders will face "a *punishment* that the law cannot impose upon [them]"); *State ex rel. Carr v. Wallace,* 527 S.W.3d 55, 60 (Mo. 2017) (life without parole for fifty years was the "harshest *penalty* other than death.").

Woods could not plausibly argue that a sentence of life without parole is the same punishment as a parole-eligible life sentence. Nor can he seriously argue that his sentence of twenty-five years' imprisonment without parole is the same punishment as a normal twenty-five-year sentence. The parole ineligibility provision of § 195.295.3 is a substantial part of the punishment for Wood's offense, and it cannot be silently amended by changes to the criminal code. *Montgomery v. Louisiana,* 136 S.Ct. at 732–34. *State v. Lawhorn,* 762 S.W.2d at 826; *Fields v. Missouri Board of Probation and Parole,* 559 S.W.3d at 19.

The cases Woods relies on do not support his arguments to construe § 1.160 to apply only to laws that change sentences of imprisonment. Woods principally relies on *State ex rel. Nixon v. Russell,* 129 S.W.3d, 867 (Mo. 2004), *Jones v. Fife*, 207 S.W.3d 614 (Mo. 2006), and other cases applying those rules in narrow situations that are unlike the one presented in this case. *Russell* dealt with a new general parole statute that allowed non-violent offenders to

petition to serve the remainder of their sentence on parole. *Russell,* 129 S.W.3d at 869, n.4. *Jones* dealt with a new provision governing the calculation of prior commitments for the purposes of general recidivism statutes. *Jones,* 207 S.W.3d at 615–616. Neither case dealt with a substantive change in criminal law where an offender sought to apply new criminal statutes to reduce the punishment for his specific offense.

Under the plain language of § 1.160 and the standard announced in *Russell*, Woods cannot seek to benefit from new drug laws passed along with other major revisions to Missouri's criminal code. *Russell,* 129 S.W.3d at 870; *Fields,* 559 S.W.3d at 17; *Woods v. Department of Corrections,* case no. WD81266, *slip op.* at 8 (Mo. App. W.D. 2018). The other cases Woods relies on were largely applying the rule of *Russell* to a similar or identical situation, often without any further analysis. (Resp. Br. at 7) (citing e.g. *Talley v. Mo. Dep't of Corrections*, 210 S.W.3d 212 (Mo. App. W.D. 2006; *Carylyle v. Mo. Dep't of Corrections,* 184 S.W.3d 76, 79 (Mo. App. W.D. 2005); *Ridinger v. Mo. Bd. of Prob. & Parole,* 189 S.W. 3d 658, 663 (Mo. App. W.D. 2006)). Those cases are distinguishable and should not persuade this Court.

Woods's reliance on the rule of lenity is similarly misplaced; the rule has no application here where the language of § 1.160 is clear. "The rule of lenity applies to interpretation of statutes only if, after seizing everything from which aid can be derived, the court can make no more than a guess as to what the

legislature intended." *State v. Liberty,* 370 S.W.3d 537, 547 (Mo. 2012) (cleaned up). Here, the General Assembly used multiple terms to signify § 1.160's broad application in prohibiting retroactive effect to the consequences of a criminal offense. The Court's analysis of § 1.160 should begin and end with its plain text, and the plain text of the statute applies to the parole ineligibility that Woods received as a punishment for his offense. *State ex rel. Goldsworthy v. Kanatzar,* 543 S.W.3d 582, 585 (Mo. 2018) (the legislative intent is "most clearly evidenced by the plain text of the statute."); *U.S. v. Wiltberger,* 18 U.S. 76, 95–96 (1820) (Chief Justice Marshall wrote that the rule of lenity does not allow laws to be construed to defeat the obvious intent of the legislature and that, "Where there is no ambiguity in the words, there is no room for construction.").

The purpose of the rule of lenity is also inapplicable to this case. The rule applies to ensure that criminal defendants are not punished with ambiguous laws that would leave them guessing as to what conduct is prohibited or what sentence would result. *U.S. v. Wiltberger,* 18 U.S. at 95 (the rule of lenity is intended to ensure that the legislature, not courts, defines crime and ordains its punishment). Here, the laws in place at the time of Woods's offense were clear and he does not dispute that. Instead, he seeks to retroactively apply new statutes to defeat the punishment that was clearly in place for his crime. The purpose of the rule of lenity does not apply in interpreting § 1.160.

On the contrary, the Court should give § 1.160 broad effect. Consistent enforcement of § 1.160 is important because that section allows the General Assembly to amend and improve criminal statutes without requiring legislators to consider potential retroactive effects. The importance of limiting retroactive application of criminal amendments is further demonstrated by the General Assembly's 2005 amendment to § 1.160, which eliminated the provision allowing for retroactive application of sentencing changes that would benefit criminal defendants. *Compare* §1.160, RSMo. (1993) *with* §1.160, RSMo. (2005). The General Assembly has made it clear that changes to criminal laws cannot be retroactively applied to benefit criminals who offended under older provisions. This Court should follow the General Assembly's clear mandate and require Woods to serve the punishment for his crime.

Conclusion

For these reasons, the Court should reverse the circuit court's judgment and enter declaratory judgment in favor of the Missouri Department of Corrections.

Respectfully submitted,

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Certificates of Service and Compliance

I hereby certify that a copy of the above was filed electronically through Missouri Case.Net on March 29, 2019. Counsel for Respondent will be served through the Missouri Case.Net system on the same day.

The undersigned also certifies that the foregoing brief complies with the limitations in Rule 84.06(b) and that the brief contains 1,583 words.

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