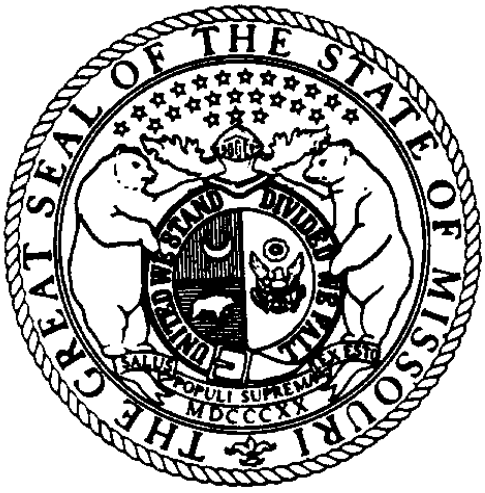
Report

of the

Joint Interim Committee

on the

Missouri Criminal Code



November 2012

Missouri General Assembly

November 2012

The Honorable Robert Mayer
President Pro Tem
Missouri Senate
Jefferson City, Missouri

The Honorable Timothy Jones
Speaker
Missouri House of Representatives
Jefferson City, Missouri

Dear Mr. President and Mr. Speaker:

Pursuant to your charge and the provisions of Senate Concurrent Resolution 28, your Joint Interim Committee on the Missouri Criminal Code heard testimony from a variety of prosecutors, public defenders and other criminal defense attorneys, criminal offenders, victims, and advocacy groups over the course of six hearings held in September and October of 2012.

The committee expresses its gratitude to all the parties who provided vital information and assistance during the committee's examination of the Criminal Code. Enclosed is our report and recommendations.

Sincerely,

Senator Jolie Justus, Co-Chair

Representative Stanley Cox, Co-Chair

REPORT OF THE
JOINT INTERIM COMMITTEE
ON THE
MISSOURI CRIMINAL CODE

We, the undersigned members of the Joint Interim Committee on the Missouri Criminal Code, do hereby respectfully submit our report to the Honorable Robert Mayer, President Pro Tem of the Missouri Senate, and the Honorable Timothy Jones, Speaker of the Missouri House of Representatives.

COMMITTEE MEMBERS

Senator Jolie Justus

Representative Stanley Cox

Senator Bob Dixon

Representative Jay Barnes

Senator Mike Parson

Representative Rory Ellinger

REPORT OF THE
JOINT INTERIM COMMITTEE ON THE MISSOURI CRIMINAL CODE

Committee Members

Senator Jolie Justus
District 10

Representative Stanley Cox
District 118

Senator Bob Dixon
District 30

Representative Jay Barnes
District 114

Senator Mike Parson
District 28

Representative Rory Ellinger
District 72

Committee Staff

Meghan Luecke, Senate Research
Melissa Denton, House Research

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I. INTRODUCTION

The Joint Interim Committee on the Missouri Criminal Code was formed to study a proposal that represents the first large-scale revision of the Missouri Criminal Code since 1979. Seeing a need to improve the cohesiveness and consistency of the Missouri Criminal Code following 33 years of legislation, court decisions, and changing social values, criminal law practitioners under the direction of the Missouri Bar Association met over the past four years to compile a legislative proposal to update and improve the Missouri Criminal Code. Those efforts culminated in the introduction of Senate Bill 872 by Senator Jolie Justus and House Bill 1897 by Representative Stanley Cox during the 2012 legislative session. Because of the immensity of the legislative proposal, the Missouri General Assembly passed Senate Concurrent Resolution No. 28, which authorized the establishment of the Joint Interim Committee on the Missouri Criminal Code. The resolution directed the committee to conduct a comprehensive review of the Missouri Criminal Code and the Missouri Bar Association's recommendations for revising the Code, examine any other relevant issues, and recommend ways to improve the cohesiveness, consistency, and effectiveness of the state's criminal laws. The resolution also directed the committee to deliver a report of its findings and recommendations to the General Assembly by November 15, 2012.

II. COMMITTEE MEMBERSHIP

Pursuant to Senate Concurrent Resolution No. 28, the Speaker of the House of Representatives appointed Representative Stanley Cox, Representative Jay Barnes, and Representative Rory Ellinger. The President Pro Tem of the Senate appointed Senator Jolie Justus, Senator Bob Dixon, and Senator Mike Parson. Senator Justus and Representative Cox served as co-chairs of the committee.

III. COMMITTEE MEETINGS

After its establishment, the Joint Interim Committee on the Missouri Criminal Code met six times. The committee's public hearings took place on the following dates at the State Capitol Building in Jefferson City:

September 11, 2012
September 18, 2012
September 25, 2012
October 2, 2012
October 9, 2012
October 16, 2012

At the first four meetings, the committee heard presentations by attorneys who participated in the process of drafting the revision of the Missouri Criminal Code for the Missouri Bar Association. The agendas for these meetings listed chapters in the Revised Missouri Statutes and the presenters went through House Bill 1897 page-by-page reviewing the proposed amendments affecting those chapters. At the two meetings held in October, the committee received oral and written testimony from a variety of interest groups and individuals in support of various methods to improve the criminal statutes, including the sex offender registry provisions. The committee held a final meeting on November 9, 2012 via telephone conference to determine what to include in its list of recommendations. The following pages include a summary of the relevant testimony and the committee's recommendation.

A. SEPTEMBER 11, 2012

Eric Wilson of the Missouri Bar Association spoke briefly, noting that the legislative proposal embodied in Senate Bill 872 and House Bill 1897 had been unanimously endorsed in 2011 by the Missouri Bar Association's governing board. Next, the committee heard a presentation by two attorneys who worked extensively on the Missouri Bar Association's legislative proposal – Jason Lamb of the Missouri Office of Prosecution Services and Gwenda Renee Robinson of the Missouri State Public Defender's Office.

Mr. Lamb said the group of criminal law practitioners who worked on the proposal did not seek to create new crimes or decriminalize any actions. Rather, the goal was to make the language in the Code more consistent and less antiquated, to make the Code a user-friendly, easy-to-understand manual for practitioners, and to establish modern approaches to criminal activity that reflect current social values and mores.

A main part of the proposal included the creation of a new class E felony. Mr. Lamb testified that the goal of the new class E felony was to close the gap between class B and C felonies. Currently, a class B felony allows a prison term of five to fifteen years and a class C felony allows a term of one to seven years. Under the proposed revision, the term of imprisonment for a class C felony would be three to ten years and the term for a class D felony would be the current penalty for a class C felony. The class E felony would then contain the penalty that is now provided for a class D felony.

Mr. Lamb went on to discuss how the proposal would enact a number of grammatical changes to the Criminal Code, such as replacing the word "crime" with the word "offense" in order to be more inclusive of infractions, changing the names of crimes, and replacing the word "person" with "defendant". Statutes would also be amended to make them gender neutral.

Proposed revisions to the definitions in chapter 556 were discussed as were proposals to move criminal provisions into the Missouri Criminal Code chapters. An example of such a change includes moving the criminal provisions in chapter 195 to a new chapter 579.

Mr. Lamb spoke about merging drug-related persistent and prior offender provisions with

provisions that relate to all other criminal offenses. Mr. Lamb stated that prior and persistent drug-related crimes are currently being treated more harshly than other crimes and that the proposal would end the disparity.

Proposed revisions to chapter 558 included consolidating the statutes that set out fines and terms of imprisonment, increasing fines, and creating a single standard of enhancement for all prior and persistent offenders.

According to Mr. Lamb, there were no substantive changes proposed for chapter 559, probation; chapter 561, collateral consequences of conviction; chapter 563, defense of justification; or chapter 564, inchoate offenses, except chapter 564 was moved into chapter 562. He did note any attempt to commit a crime would be punished one level lower than the crime itself.

B. SEPTEMBER 18, 2012

The agenda for the second meeting included a list of the following chapters - 565, crimes against persons; 455, adult and child abuse orders; 569, robbery, arson, burglary, and related offenses; 570, stealing and related offenses; and 571, weapons offenses. Jason Lamb presented along with Dunklin County Prosecuting Attorney Stephen Sokoloff.

Mr. Lamb outlined the major changes to these chapters, including the proposed consolidation of assault crimes, the repeal of current types of assault against special victims, the addition of a sentencing enhancement for assault against those special victims, and changes to the minimum value of property that is the threshold between misdemeanor and felony offenses involving stealing and property damage. Currently, property values differ among the criminal statutes. Mr. Lamb suggested making them more consistent.

In response to the property values issue, the committee asked why the proposal would insert an amount that will have to be changed every few years to keep up with inflation. Mr. Lamb responded that methods to allow for automatic adjustments are complicated and prevent crime victims from knowing definitively how the offender will be prosecuted.

Mr. Sokoloff then spoke about the attempt in the proposal to repeal designer crimes. He mentioned that three classes of assault had multiplied into 24 classes over the years. He also noted that the current sentencing enhancements that apply to victims who work in certain specified occupations were modified in the proposal so that the enhancements would only apply if the victim was injured or killed while on the job. He said it was not fair for a person who assaults an off-duty police officer to receive an enhancement if the offender had no way of knowing the victim was a police officer.

It was asked whether any bills were passed this year adding to the list of occupations in the special assault sections. Mr. Lamb responded that utility workers were added to the list and that House Bill 1897 does not reflect this recent change to the law.

Mr. Sokoloff continued testifying about the proposal's creation of a new fourth degree classification of assault to close the gap between first degree assault and third degree assault. He explained that the current third degree assault would become the new fourth degree assault under the proposal and that the new third degree assault would contain the elements of knowingly causing physical injury. Under current law, knowingly causing physical injury is not covered under the assault crimes. Recklessly causing physical injury is covered under third degree assault, which is a misdemeanor. The new third degree assault would be a felony. Mr. Sokoloff also noted that the definition of "physical injury" would be modified. Current law provides that "physical injury" means "physical pain, illness, or any impairment of physical condition" and the proposal would change it to "slight impairment of any function of the body or temporary loss of use of any part of the body."

Mr. Sokoloff and Mr. Lamb then talked about how the enhancements for domestic assault offenses would be expanded to include all assault offenses, but the domestic assault statutes themselves would be kept separate from the other assault offenses. Mr. Lamb explained that the domestic assault offenses would not be merged because they involve very different dynamics than assaults by strangers. For instance, domestic assault offenders are more likely to injure their victims through actions such as strangulation.

The discussion then turned to the first degree murder statute and two recent United States Supreme Court decisions that have invalidated Missouri's current law as it applies to juvenile offenders. Mr. Lamb noted that the proposal raises the age at which a person may be put to death for first degree murder from 16 to 18 in response to the Court's decision in *Roper v. Simmons*. The committee members asked about the more recent decision in *Miller v. Alabama,* which prohibited mandatory life sentences for juveniles. Because the decision came out this summer and after House Bill 1897 was drafted, the proposal does not contain a suggestion for making the statute compliant with the *Miller* decision. It was asked what other states are doing to bring their statutes in line with the *Miller* decision. Mr. Sokoloff replied that most states that are in compliance with the decision sentence juvenile first degree murderers to life sentences with the possibility for parole.

Next, Mr. Sokoloff testified that certain regulatory provisions would be moved outside the code from chapter 565 into other chapters that directly deal with the specific state agency and topic. An example includes the movement of statutes requiring certain types of people to report abuse or neglect. In addition, various offenses involving the act of kidnapping would be renamed "kidnapping" in the proposal and classified into various degrees so they become lesser included offenses of one another, allowing greater flexibility for prosecutors and defense attorneys to negotiate charges. Also, enhancements would be provided if the kidnapping involved a sexual offense.

Issues with the stalking provisions were raised next. Mr. Sokoloff testified that the structure of the stalking provision is problematic because the penalty is currently in the definitions section. In the proposal, the stalking provision would be rewritten to mirror the structure currently present in most other criminal provisions. In addition, the word "harasses" would be replaced by

"disturbs" in the elements for stalking. Committee members asked whether the use of the word "disturbs" would capture the nature of the action as well as the term "harasses" currently does. Mr. Lamb testified the proposal would replace the word harass because there is a separate crime of harassment. Mr. Lamb suggested a better term could be agreed upon.

The discussion moved on to chapter 455. Mr. Lamb testified that the chapter on adult and child protective orders would not be moved into the Criminal Code because of the vast amount of information in the current chapter detailing how to create an order.

Only a couple issues were raised in response to changes proposed for chapter 569 - the repeal of section 569.094, which provides that computer printouts can be competent evidence and the movement of certain provisions into chapter 569 from other chapters of the Criminal Code. The reason behind the repeal of 569.094 was because such materials are already considered evidence under established law. The reason behind the movement of the other provisions was because they fit better under the title of the chapter.

One example of a statute being moved is a provision making it a crime to enter or deface a cave without permission. Committee members questioned why general statutes such as burglary would not apply to keep people out of caves. Mr. Sokoloff answered that caves are not considered structures, and thus, a person could not be charged with burglary for entering a cave. Mr. Sokoloff also mentioned that first degree arson would be modified to repeal a provision stating that a person commits arson by starting a fire to produce methamphetamine. The reason given for the repeal was that a person producing meth should not be charged with the intentional act of arson because the person does not intend to start a fire.

The discussion on chapter 570 focused on the stealing provision under section 570.030. Section 570.040 currently provides that a person found guilty of a third stealing offense within ten years must be charged with a felony stealing offense. Under the proposal, the three strikes provision would be merged into 570.030 and, rather than providing for a felony upon a third offense, the proposal would require a felony charge for the fourth offense. Also, the felony enhancement would only apply if the offender received a sentence of 10 days or more in jail for each prior offense. In addition, Mr. Sokoloff testified that the proposal suggests adding a new provision in the stealing section, making it a class D misdemeanor for a first-time offense of stealing property valued at less than $150. Class D misdemeanors are penalized by fine only, not jail time. Mr. Sokoloff testified that the change is aimed at alleviating the burden on the public defender system, which only represents offenders facing jail time. Under current law, stealing property valued at less than $500 is a class A misdemeanor unless the property falls under a list of certain specified types of property.

A couple issues were raised by the committee, including whether a person who steals a candy bar on multiple occasions could be charged with a felony and whether a person pleading guilty to the class D misdemeanor offense of stealing would be informed of the consequences of repeat offenses if the person is not represented by an attorney. Mr. Sokoloff and Mr. Lamb noted that the changes in the proposal would require a greater number of stealing offenses to increase the

penalty to a felony than what is currently allowed under the law and argued that the enhanced penalty under the proposal would likely only apply to career criminals. In addition, the first offense of a class D misdemeanor would not count toward the enhancement provision because it does not carry jail time.

Mr. Lamb then testified that crimes involving passing bad checks and check kiting that are class C felonies under current law would be reduced to class E felonies under the proposal because of a change in thinking about the severity of such crimes. He noted that involuntary manslaughter is currently a class C felony.

The proposal suggests repealing various stealing crimes that focus on penalizing those who steal very specific items because the general stealing statute can be used to prosecute offenders. One example is theft of library materials. It was asked why the proposal leaves intact other stealing-related crimes, such as cable theft and stealing intellectual property. Mr. Sokoloff responded that the stealing statute is already too large and that the theft of items such as intellectual property occurs in a way that differs greatly from theft of more tangible property.

The final chapter of discussion, chapter 571, contains weapons offenses. According to Mr. Lamb, the chapter, in its current form, is difficult for practitioners to read, especially the unlawful use of weapons provision. That provision would be divided into eight separate statutes to make it easier to read. In addition, sections on concealed carry permits would be moved outside of the Criminal Code and into chapter 319 because they are regulatory in nature.

C. SEPTEMBER 25, 2012

Missouri Public Defender Ellen Flottman and Assistant Prosecuting Attorney for St. Louis County Kathi Alizadeh presented chapter 566, sexual offenses; chapter 567, prostitution; chapter 568, offenses against the family; and chapter 573, pornography. The discussion began with various proposed changes to definitions. For instance, the proposal suggests the addition of a definition for “aggravated sexual offense.” An aggravated sexual offense would involve serious injury, a dangerous weapon, offenses by two or more offenders, a ritual, or an offense committed by a person who has previously been found guilty of certain sexual offenses. Under current law, the above aggravators are included under the statute for each sex offense as a sentencing enhancement. Under the proposal, the aggravators are included in the section of definitions that is published at the beginning of the chapter, and each statute setting out a sex offense references the definition.

In addition, the proposal suggests changing the term “male or female sex organ” to “penis or vagina” in the definitions for “sexual intercourse” and “deviate sexual intercourse”. The attorneys testified that the Bar Association has changed its position on the matter and now wants to use the term “female genitalia” in place of the term “vagina” because of concerns that vagina only refers to internal parts. The definition of “sexual contact” would be modified under the proposal to include contact “for the purpose of terrorizing the victim”. Right now it is only sexual contact if the purpose is to arouse or gratify the sexual desire of any person. Ms. Alizadeh

testified that it is difficult for prosecutors to prove sexual gratification in some cases and noted that the terrorizing the victim provision has already been added to the definition of "deviate sexual intercourse".

Next, the discussion turned toward renaming and reorganizing crimes to makes certain crimes "lesser included" crimes of others. Missouri Supreme Court Rule 29.01 allows defendants to be found guilty of offenses that are necessarily included in the offense charged. According to testimony by Jason Lamb from the Missouri Office of Prosecution Services, one way to make an offense a lesser included crime is by renaming it. For instance, current law has forcible rape, which penalizes forced sexual intercourse. There is a separate crime of sexual assault, which encompasses sexual intercourse without consent. Mr. Lamb testified that sexual assault is not a lesser included crime of forcible rape under current law, so the proposal would rename sexual assault "second degree rape" and make forcible rape "first degree rape" in order to make sexual assault a lesser included offense of rape. Mr. Lamb testified that crime victims can be harmed if prosecutors do not have the flexibility of having lesser included offenses available. In addition, sexual misconduct, which penalizes subjecting a person to sexual contact without that person's consent, would be renamed second degree sexual abuse under the proposal. The current sexual abuse section penalizes forcibly subjecting a person to sexual contact.

The proposal also recommends dividing the current first and second degree child molestation provisions into four degrees of child molestation. Under current law, first degree child molestation is a class B felony and second degree child molestation is a class A misdemeanor, with both sections allowing enhanced penalties if certain circumstances are present. In order to decrease the gap in penalties and simplify the provisions, the proposal calls for four degrees of child molestation. In addition, the proposal suggests adding a so-called "Romeo and Juliet" window so that young adults, who may still be teenagers themselves, do not face prosecution for engaging in consensual sexual conduct with other teenagers. For instance, current second degree child molestation prohibits sexual contact with a person under the age of 17. As a result, an 18-year-old could be prosecuted for engaging in consensual sexual contact with his 16-year-old girlfriend. The statutes would be amended under the proposal to provide that, in cases of consensual sexual contact, the age of the offender does not matter if the victim is less than 14-years-old, but that only a person age 21 years old or older can be prosecuted for consensual sexual contact with a victim who is 14, 15, or 16 years old.

Sexual misconduct involving a child in section 566.083 would be modified to change the age of the victim to less than 14 years of age from the current age of less than 15 years old. The reason stated was to make it consistent with other similar crimes.

The witnesses noted that the proposal suggests expanding the crime of sexual contact with a student to apply to private schools. Currently, the section only applies to public schools, and the witnesses said there was no reason why the provision should not apply to private schools as well. Additionally, the statute would be amended to specify that consent is not a defense to the crime.

Ms. Alizadeh then explained the proposal would repeal a provision in a statute that currently

prohibits offenders guilty of sexual conduct with an animal from living with animals for two years. The provision was described as unenforceable if the person is not on probation.

Further, section 566.145, sexual conduct with a prisoner or offender, would be expanded to include sexual contact, and not just sexual or deviate sexual intercourse.

Ms. Alizadeh also noted that many sections allowing penalty enhancements if the offender was previously found guilty of violating other provisions in chapter 566 would be expanded to include prior violations of similar types of crimes committed in other states.

The committee asked questions about the scope of a provision prohibiting an owner or employee of a nursing facility from having sexual, or deviate sexual, intercourse with a resident. It was asked why the provision does not cover visitors or vendors to a nursing facility. Mr. Lamb explained that the provision is limited because the provision does not allow consent of the victim to be a defense and that the provision is aimed at situations in which the offender is in a position of authority over the victim. He said it would be problematic to prohibit nursing facility residents from having consensual relations with anyone.

The committee also asked why the provision is limited to only certain nursing facilities. Ms. Alizadeh said she had encountered situations as a prosecutor in which a victim was not covered by the statute because the facility was not covered under the statute.

The testimony then moved on to prostitution offenses. Under current law, the criminal elements of prostitution are set forth in the definition section. The criminal statute then states that prostitution is when one commits prostitution. Under the proposal, the elements would be moved from the definition section to the substantive prostitution statute to align with how the other criminal statutes are structured. Other crimes that would be similarly restructured include patronizing prostitution and promoting prostitution.

The committee asked why references to convictions and pleas of guilt would be repealed under the proposed changes. Mr. Lamb explained that the term “found guilty” includes convictions, guilty pleas, and suspended impositions of sentences, so all the possible ways one can be found guilty do not need to be listed throughout the Code as they are under current law.

Next, committee members asked about a provision in current law requiring anyone arrested a second or subsequent time for a prostitution-related offense to take an HIV test before being eligible to post bond. It was asked whether there are any other offenses in the Criminal Code that require such testing. Ms. Alizadeh answered that there are no other statutes requiring such testing for bond.

Mr. Lamb spoke about the proposed changes to the endangering the welfare of a child provisions, which included adding new enhancements for killing or seriously injuring a child to the first degree provision. He said those enhancements were added in the proposal because they were included in the child abuse provision that was in effect in 2011. The child abuse statute was

substantially amended during the 2012 legislative session, but those changes were not discussed during the hearing. Mr. Lamb also mentioned that driving while intoxicated with a child would be moved under the proposal from second degree endangering the welfare of a child to the offense of driving while intoxicated. He explained that prosecutors can currently only charge someone who drives while intoxicated with a child in the car with either driving while intoxicated or endangering the welfare of a child. There are a number of sentencing enhancements for being a prior offender of driving while intoxicated that do not apply if the person is sentenced under the child endangerment provision. Also, there are no lesser included crimes in the child endangerment provisions that involve intoxicated driving.

At the end of the hearing Ms. Alizadeh mentioned a need to add the mens rea of "knowing of its content and character" to various provisions dealing with child pornography to avoid constitutionality issues. The mens rea had been removed from these provisions by House Bill 62 (2009). These changes were not included in House Bill 1897 (2012).

D. OCTOBER 2, 2012

This hearing contained the greatest number of chapters on the agenda, including chapter 195, drug regulations; chapter 577, public safety offenses; chapter 572, gambling; chapter 574, offenses against public order; chapter 575, offenses against the administration of justice; chapter 576, offenses against government; chapter 578, miscellaneous offenses, and all the chapters that are outside of the Criminal Code. Jason Lamb of the Missouri Office of Prosecution Services and Gwenda Renee Robinson of the Missouri State Public Defender System presented.

Ms. Robinson briefly outlined the proposed changes to chapter 195, noting that penalty provisions would be moved into a new chapter 579, the mens rea of "knowingly" would be added to several crimes that currently do not have a mens rea listed, statutes would be consolidated and made gender neutral, the format of certain crimes would be changed to align with how other criminal provisions are formatted, and statutes would be grouped based on the conduct being criminalized.

She said the Bar Association reviewed chapter 195 for two years.

It was asked why the penalty provisions would be moved into chapter 579. Ms. Robinson replied that the move is meant to make it easier for defense attorneys and prosecutors to reference the provisions since they only need the criminal provisions and not the regulatory provisions, which would remain in chapter 195.

The committee also asked how the legislature can keep up with changes being made to synthetic marijuana and bath salt formulas by people seeking to get around the drug laws. Mr. Lamb testified that legislators need to talk to chemists and crime lab practitioners about how to best deal with the issue.

Mr. Lamb discussed the lowering of penalties for drug possession after the Bar Association

Committee compared the sentences for other crimes with drug possession crimes. He noted that involuntary manslaughter is a class C felony and so is drug possession.

Committee members asked about the lowering of criminal penalties for drug possession. Mr. Lamb responded that first time drug possession cases are almost always disposed of with a fine and that the current penalty structure does not reflect the reality of how the crimes are being punished.

It was also asked if the addition of an affirmative defense to drug possession for having a valid prescription would have the unintended effect of legalizing marijuana; that was left as an unresolved issue.

Ms. Robinson proceeded to talk about some of the consolidated and streamlined provisions dealing with manufacturing, delivering, and distributing controlled substances, including streamlining all distances in the provisions prohibiting drug-related activities within so many feet of certain types of buildings. The distance would be 1,000 feet under the proposal.

Ms. Robinson closed the drug law portion of the testimony by stating that section 579.110, regarding the state's ability to present expert testimony, was repealed because the Bar Association Committee felt it just restated current law allowing such testimony.

Next, the witnesses presented on the intoxication-related driving, boating, and flying offenses - the criminal penalty portion of which would be moved into chapter 577 under the proposal while the regulatory provisions would remain outside the Code. Mr. Lamb spoke about a new category of repeat offender called the "habitual offender", which would be the greatest level of repeat offender. The habitual offender is recommended to be a dangerous felon under the proposal and, as such, a person convicted of being a habitual offender would be required to serve 85 percent of any sentence imposed. Mr. Lamb testified that a big part of the restructuring of driving while intoxicated was graduating the levels of punishment by the levels of injury caused. Under current law, causing death by DWI and causing physical injury are both classified as class C felonies. Under the proposal, causing death would be a new class C felony and causing physical injury would be a class E felony.

Committee members asked about enhancements within the intoxicated driving provisions for injuring law enforcement officers or emergency personnel. Mr. Lamb discussed how the enhancements were taken from the special victim assault provisions to be repealed under the proposal, but noted they do not include all the special victims that are covered under current law, including highway workers. He said the idea is that law enforcement and emergency personnel are more likely to be exposed to drunk drivers than the other special victims.

It was asked whether all counties have DWI treatment programs in reference to a provision that prohibits DWI offenders from receiving a suspended imposition of sentence unless the offender completes at least two years of probation or a DWI treatment program. Mr. Lamb responded that not every circuit has a treatment program.

Mr. Lamb moved quickly through chapter 572, noting that most of the changes were not substantive except for making gambling an infraction rather than a crime.

One issue arose in chapter 574, regarding section 574.075, which prohibits drunkenness or drinking in a public place. The proposal would provide an exception to the law for bar associations. It was questioned whether the whole statute should be repealed as being antiquated.

The committee next questioned why the term "adequate" was removed in the animal neglect section. Concern was expressed that, because the term "adequate" is defined by statute, the change might be construed as an attempt to criminalize more activity. Mr. Lamb responded that the brackets appeared to be a drafting error.

Finally, Mr. Lamb noted the number of criminal provisions that would remain outside the Code and suggested that they may all be rolled into the Code.

E. OCTOBER 9, 2012

Colleen Coble, CEO of the Missouri Coalition Against Domestic and Sexual Violence, began the first day of public testimony for the committee. She started by addressing the proposal to change the element of "harass" in the stalking provision to "disturb". She said she spoke with law enforcement officers and learned that Missouri's stalking statute is used as a model for other states and is highly regarded. She said she found no desire among the law enforcement community to change the stalking statute. Representative Cox asked Ms. Coble if there were any specific concerns about changing the statute. Ms. Coble responded that there was concern the amendment could change the nature of proof required by the courts.

Ms. Coble suggested that the proposal include provisions in SB 871 (2012), which contained technical changes to the domestic violence laws. She also urged the committee to reference the definition of "family or household member" that is currently codified in section 455.010 rather than redefining the term in various sections. Ms. Coble suggested that referring to the definition would make it easier to update the definition if needed because only one section would need to be amended.

Next, Ms. Coble testified about how the current forcible rape and sodomy provisions only allow for incapacitation by act of the offender and not incapacitation for other reasons. She also mentioned that there should be a definition of "consent" in chapter 566. In addition, she suggested an examination of the defense of mistake as to whether a victim was incapacitated in section 566.020 to see if it aligns with current views about sexual assault.

Finally, Ms. Coble noted that current law does not consider forced penetration of a male victim by another male to be rape. Rather, the conduct is criminalized under deviate sexual intercourse. She said the experience of the male victim is of being raped and that deviate sexual intercourse makes the conduct seem lesser than rape even though the injury is the same.

Lisa Keithley, a resident of Greene County, testified next about being sexually assaulted while being hospitalized in January of this year. She said that while she was sedated, a man came into her room and subjected her to unwanted sexual contact. The event was captured on video tape. The man was charged with sexual misconduct, which is a class A misdemeanor, rather than sexual abuse, a class C felony, because sexual abuse requires proof of forcible compulsion. Because Ms. Keithley consented to the sedation that left her incapacitated, prosecutors could not prove forcible compulsion. She noted that he does not have to register as a sex offender and urged the committee to change the law regarding incapacitation.

Emily van Schenkhof, Deputy Director of Missouri Kids First, then testified, saying that she agreed with Ms. Coble's testimony. She said the average age of a child who arrives in an abuse center is six and a person does not need to use force to rape a six-year-old. She said the differentiation between forcible rape and rape without consent is based on a myth that most rapes occur by strangers. Ms. Van Schenkhof testified that, in reality, the vast majority of rapes do not involve force. She also noted that children are often raped multiple times while rapes by strangers usually occur only once and that it is more traumatizing for a child to be raped by a family member than by a stranger. She said the Code should not penalize an offender more harshly for forcible rape because the penalty does not reflect the reality of the crimes. She also suggested that incest be included as an aggravator.

Dr. James Anderst, a pediatrician at Children's Mercy Hospital in Kansas City, testified about the proposed change to "vagina" from "female sex organ" in the definitions for sexual and deviate sexual intercourse. He said children do not differentiate between the outside and inside of their genitals and there is often no physical evidence after a sexual assault. He also noted that the psychological trauma is the same regardless of whether penetration occurs. The committee asked the doctor if he thought "female genitalia" would encompass both internal and external parts and alleviate his concern. Dr. Anderst replied that such a term would encompass both internal and external parts and thereby alleviate his concerns.

Next, Christine Woody of the Missouri Association for Social Welfare testified. She urged the committee to look at other ways to be smarter on crime, such as changing the mandatory minimum sentences and enhancement provisions, providing more opportunities for parole, amending the sex offender registry, and placing a moratorium on the death penalty.

Eric Zahnd, Platte County Prosecuting Attorney and President of the Missouri Association of Prosecuting Attorneys, testified that House Bill 1897 was a good start at a task that is overdue. He listed four things not currently in the Code he said the committee ought to address - making restitution collection statutes uniform, criminalizing a refusal to provide a breath or blood sample during an investigation of an intoxication-related driving offense, addressing funding challenges in the criminal justice system, and allowing propensity evidence to be used to prosecute repeat sex offenders.

In reference to the restitution provisions, Mr. Zahnd said the restitution provisions that currently apply to passing bad checks should be applied to all crimes. He said the penalty for refusing to

provide a breath or blood sample should be the same as the penalty for the underlying offense.

Mr. Zahnd was asked if Missouri law already allows propensity evidence. He responded that the exception to the evidence rules that allows propensity evidence under current law is so narrow that it is rendered useless.

Mr. Zahnd then testified that funding issues currently present challenges for crime labs, prosecutors, the criminal courts, and the public defenders. He criticized the Missouri State Public Defender System for asking for millions of dollars, suggesting the state consider contracting out low-level felony and misdemeanor cases currently handled by the public defenders to private attorneys. He explained the private attorneys would have to bid on a contract to represent the clients for a certain class of cases, such as all misdemeanors. He mentioned a recent story in Missouri Lawyers Weekly about another state's use of private attorneys for indigent defense.

Mr. Zahnd was then asked if prosecutors would be open to decriminalizing crimes in order to lessen the number of people that must be represented by a public defender. Mr. Zahnd said he did not see support for decriminalization.

The final witness was Redditt Hudson of the American Civil Liberties Union of Eastern Missouri. He suggested the legislature repeal criminal laws found unconstitutional because keeping them on the books makes it difficult for law enforcement officers to know the laws are invalid. He mentioned a case in which an officer is being sued for arresting a man for violating a provision prohibiting flag burning that is still in the Criminal Code, despite having been found unconstitutional. It was asked whether a law could be re-validated if a court were to reverse its previous decision to declare the law unconstitutional. Mr. Hudson responded that he did not know the answer to that question because he is not an attorney.

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On the second day of public testimony, Emily van Schenkhof, Deputy Director of Missouri Kids First, testified about the effectiveness of various programs for sex offenders, listing imprisonment as the most effective tool to protect children. She said the sex offender registry and treatment programs are not effective. She said she believes recidivism rates for sex offenders are not as high as reported because sex offenses involving children are difficult to prosecute and children are not likely to report sex offenses. She also noted that the registry often does not accurately portray the dangerousness of offenders, providing an example of a man who pled down from first degree child molestation to sexual misconduct. She said the state needs to do a better job of gauging the risk of each particular sex offender to reoffend.

Ms. Van Schenkhof then testified that juveniles who commit sex offenses should be treated differently than adults because they have a greater ability to be rehabilitated. She said juveniles should never be placed on a sex offender registry.

The committee asked the witness for her opinion on the tiering system in House Bill 1700

(2012). Ms. Van Schenkhof said the tiering system is not going to make children safer. She noted the case disposition often does not reflect the severity of the crime charged, therefore the tier may not reflect the seriousness of the crime. She said anyone convicted of a sex offense involving a child should be in the top tier.

Judy Burke of St. Louis County then testified that she is on the sex offender registry because, while she was employed as a teacher, one of her students falsely accused her of inappropriate touching. At the advice of her attorney, she pleaded guilty to misdemeanor child molestation, which meant lifetime registration on the sex offender registry. She said she worked at a retail store until a local newspaper started an investigation on sex offenders' employment. The newspaper contacted the store and she was fired. Her next job also fired her and she has since divorced. She said the sex offender registry has prohibited her from being able to work and has forced her to obtain welfare benefits to survive. She urged the committee to reform the registry provisions.

The next person to testify is also on the sex offender registry. Lonnie Story testified that, as a 21-year-old West Point cadet, he went to a party and was accused of sexual misconduct with an adult. He was convicted in a military court and was incarcerated. Since then he said he has completed treatment and has been determined not to be a threat. He has been fired for his past criminal record and testified that he would like a chance to start over. He testified that those individuals who are not a threat to society should not remain on the registry for life.

Christian Flesner also is on the sex offender registry for a sex offense he said he committed when he was 19-years-old with a consenting 17-year-old. He testified that he is now married with four children and cannot go to their school to participate in their activities. He said he was also barred from visiting his newborn baby at the hospital after the baby's birth and was not allowed to take the baby home.

Rachel Wilson and DeAnn Wilson then testified. Rachel said she was sexually abused by her brother who is now on the registry. She said she believes the registry can present invasion of privacy issues for the victim as well, noting that in her own case, her brother's crime was listed as incest, essentially exposing her as his victim. She also said she believes her brother has been reformed, does not believe he is a risk, and does not belong on the sex offender registry.

DeAnn, who testified as mother to the victim and the offender, testified that her son served six years of his sentence and was raped while incarcerated. He is not allowed to work at the University of Missouri-St. Louis where he is a student and remains unemployed. She testified that the sex offender registry did not protect her daughter, nor would it protect the majority of sex offense victims who know their offenders.

Matthew Radefeld, a criminal defense attorney, testified next, saying a disparity exists among the counties in Missouri with regard to how sex offense cases are handled. He said some prosecutors charge high in order to negotiate down. He urged the committee to make a registry system that assigns people to tiers based on the specific person's risk level rather than on the

conviction. Mr. Radefeld was asked if he knew of another state's law that could serve as a model for Missouri. Mr. Radefeld said either Wyoming or Idaho has a good system of reviewing offenders for removal from the registry.

Sharie Keil of Missouri Citizens for Reform then testified in support of adopting a tiered system for the sex offender registry in which offenders on the first two tiers would not be publicly listed. She suggested using a risk assessment for each offender that is similar to the risk assessment performed for probation and parole purposes for drunk drivers. She also urged the committee to adopt a simple process for people to petition to get off the registry that offenders can complete without needing to hire an attorney. Ms. Keil testified against the registry restrictions, saying the restrictions do not work and can cause more crime when offenders cannot live with family and have an unemployment rate of fifty percent.

Mary Ann McGivern of the Missouri Association for Social Welfare then testified about the Board of Probation and Parole, saying the board has too much discretion and not enough oversight. She suggested adopting a point system in which offenders would be assigned points that would allow offenders to know why they were not released. Ms. McGivern said the legislature ought to give the board the power to commute sentences and to review the sentences of first time offenders, offenders older than 55-years-old, and offenders who were juveniles at the time of their crimes. She also urged more transparency for the board, which she says tends to work behind closed doors.

Next, two students at the Washington University School of Law in the Civil Justice Clinic testified on the impact of the U.S. Supreme Court decision, *Miller v. Alabama,* on Missouri's first degree murder statute and offered suggestions for redrafting the provision. Lance Bonner and Jack Luze said the legislature ought to apply the penalty for a current class A felony to juveniles who commit first degree murder and make first degree murder a dangerous felony, which requires an offender to serve 85 percent of his or her sentence prior to being eligible for parole.

John Chasnoff of the American Civil Liberties Union of Eastern Missouri testified about three issues – the work of the Sentencing Advisory Commission, aggravating circumstances for the death penalty, and mandatory reporting of crimes against inmates. Mr. Chasnoff urged the committee to expand the review of the Sentencing Advisory Commission, which is currently tasked with examining death sentencing disparities among economic and social classes, to include disparities among different races, genders, and ethnicities. In regard to the aggravating factors for death sentences, Mr. Chasnoff testified that the circumstance that allows for a death sentence when an offender has a prior record of "serious assaultive criminal convictions" should be limited to a prior record of class A assault offenses. Finally, Mr. Chasnoff testified that employees of county and city jails should be required to report abuse of prisoners just as Corrections Department employees are required to report abuse that occurs in state prisons. He noted that the endangering a corrections employee statute was expanded in the proposal to include local jails and argued the mandatory reporting provision ought to be similarly expanded.

Jackson County Prosecutor Jean Peters Baker then testified on behalf of the Missouri Association of Prosecuting Attorneys. She began her testimony by saying life without parole is still a viable sentencing option for juveniles found guilty of first degree murder under *Miller v. Alabama* so long as the law has safeguards. She suggested Missouri's legislature look to Michigan for guidance in modifying the first degree murder statute to comply with *Miller v. Alabama*. She noted that Michigan's plan is to give the judge the discretion to sentence juvenile offenders to life without parole or a term of 45 years with the possibility of parole. Next, Ms. Baker said there should be no automatic removal of offenders from the sex offender registry, but she said she supports allowing judicial review of individual offenders who seek to be removed. She also said the legislature should never make any tier of offenders invisible to the courts, prosecutors, or law enforcement.

Jeff Stack of Missourians for Alternatives to the Death Penalty, testified about an American Bar Association study of Missouri's criminal laws relating to capital punishment. He noted the ABA report provided more than two dozen reforms for lawmakers to consider to prevent innocent executions and proceeded to testify about some of the recommendations, such as minimizing the number of aggravating circumstances that can result in a person being sentenced to death.

Next, Elizabeth Carlyle, a criminal defense attorney from Kansas City, testified on behalf of the Missouri Association of Criminal Defense Lawyers. She urged the committee to move quickly on amending the first degree murder statute in light of the *Miller v. Alabama* decision, saying there is no constitutional sentence provided under the current statute. She said she believes allowing life without parole to be an optional sentence under the new statute for juvenile offenders would make sentencing more complicated, noting the U.S. Supreme Court, in its decision, stated that sentences of life without parole for juvenile offenders ought to be rare. She also argued that sentences of life with parole do not mean the parole board has to release the offender prior to completing his or her sentence. In addition, Ms. Carlyle suggested the committee add first degree murder to the list of dangerous felonies, so such offenders must complete 85 percent of their sentence prior to being eligible for parole.

Lance Riddle, a criminal defense attorney in Warrensburg, testified about a provision of current Missouri law, which specifies that anyone required to register as a sex offender under federal law must register on the Missouri sex offender registry. He noted state law only requires misdemeanor offenders to register if the offense involved a minor, however, federal law requires registration of these offenders regardless of whether a minor is involved, thereby rendering Missouri's limitation meaningless. Mr. Riddle said the federal guidelines dilute the registry because misdemeanor offenders are not the types of sex offenders that pose the greatest risk. He said he supports a tiered system that allows for the ability to petition for removal and for closing records.

Dan Viets, a criminal defense attorney from Columbia, was the final person to testify. He also testified on behalf of the Missouri Association of Criminal Defense Lawyers. Mr. Viets urged the committee to expand the expungement laws to allow for the expungement of misdemeanor

offenses. He noted that driving while intoxicated and minor in possession offenses may be expunged under current law, but not offenses such as marijuana and paraphernalia possession.

The Association for the Treatment of Sexual Abusers, the Office of the Ohio Public Defender, and a number of sex offender treatment providers submitted written testimony to the committee in lieu of attending the hearing to express support for reforming the sex offender registry. The Kansas City Criminal Justice Task Force submitted written testimony in favor of legislation to allow parole for low-risk inmates who are serving sentences of more than fifteen years.

IV. RECOMMENDATIONS

After review of all the information received by the committee during its public hearings, the committee has determined that the General Assembly should enact legislation to update the Missouri Criminal Code. House Bill 1897 (2012) and Senate Bill 872 (2012) may provide a starting point for possible legislation, however, these bills will likely need to be amended based on issues raised during the hearings of the committee. The committee, as a whole, does not endorse or reject any specific proposal to update the Code.