

FIRST REGULAR SESSION

SENATE BILL NO. 335

90TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR CASKEY.

Read 1st time January 25, 1999, and 1,000 copies ordered printed.

TERRY L. SPIELER, Secretary.

S0643.03I

AN ACT

To repeal sections 217.760, 556.061, 569.025, 569.035 and 571.015, RSMo 1994, and sections 558.019 and 559.115, RSMo Supp. 1998, relating to various sentencing provisions, and to enact in lieu thereof six new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 217.760, 556.061, 569.025, 569.035 and 571.015, RSMo 1994, and sections 558.019 and 559.115, RSMo Supp. 1998, are repealed and six new sections enacted in lieu thereof, to be known as sections 195.297, 217.760, 556.061, 558.019, 559.115 and 571.015, to read as follows:

195.297. The provisions of sections 195.285 to 195.296 shall not apply if the court, in its discretion and after consideration of all relevant factors, finds the resulting sentence unjust or inappropriate, and instead finds that the interests of justice and public safety are served by a lesser sentence. If the court so finds, it shall order:

- (1) Seizure of any assets related to the commission of the offense; and**
- (2) An approved program of treatment for the offender while in custody of the department of corrections and after release from custody.**

217.760. 1. In all felony cases and class A misdemeanor cases, the basis of which misdemeanor cases are contained in chapters 565, 566, and 570, RSMo, and section 577.023, RSMo, at the request of a circuit judge of any circuit court, the board shall assign one or more state probation and parole officers to make an investigation of the person convicted of the crime or offense before sentence is imposed.

2. The report of the presentence investigation or preparole investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial

EXPLANATION--Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

condition, his social history, [and] the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, **the recommended sentence established by the sentencing advisory commission and all available regional alternatives to incarceration including opportunities for restorative justice**, as well as a recommendation by the probation and parole officer. The officer shall secure such other information as may be required by the court and, whenever it is practicable and needed, such investigation shall include a physical and mental examination of the defendant.

556.061. In this code, unless the context requires a different definition, the following shall apply:

(1) **"Abusive felony", means the felonies of voluntary manslaughter, assault on a law enforcement officer in the first or second degree, promoting prostitution in the first degree, burglary in the first degree, promoting child pornography in the first degree, elder abuse in the first or second degree, and the following felonies when they constitute a class B felony: child molestation in the first degree, sexual abuse, abuse of a child, use of a child in a sexual performance and arson in the second degree;**

(2) "Affirmative defense" has the meaning specified in section 556.056;

[(2)] (3) "Burden of injecting the issue" has the meaning specified in section 556.051;

[(3)] (4) "Commercial film and photographic print processor", any person who develops exposed photographic film into negatives, slides or prints, or who makes prints from negatives or slides, for compensation. The term "commercial film and photographic print processor" shall include all employees of such persons but shall not include a person who develops film or makes prints for a public agency;

[(4)] (5) "Confinement":

(a) A person is in confinement when he is held in a place of confinement pursuant to arrest or order of a court, and remains in confinement until:

- a. A court orders his release; or
- b. He is released on bail, bond, or recognizance, personal or otherwise; or
- c. A public servant having the legal power and duty to confine him authorizes his release without guard and without condition that he return to confinement;

(b) A person is not in confinement if:

- a. He is on probation or parole, temporary or otherwise; or
- b. He is under sentence to serve a term of confinement which is not continuous, or is serving a sentence under a work-release program, and in either such case is not being held in a place of confinement or is not being held under guard by a person having the legal power and duty to transport him to or from a place of confinement;

[(5)] (6) "Consent": Consent or lack of consent may be expressed or implied. Assent does not constitute consent if:

(a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or

(b) It is given by a person who by reason of youth, mental disease or defect, or intoxication, is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) It is induced by force, duress or deception;

[(6)] (7) "Criminal negligence" has the meaning specified in section 562.016, RSMo;

[(7)] (8) "Custody", a person is in custody when he has been arrested but has not been delivered to a place of confinement;

[(8)] (9) "Dangerous felony" means the felonies of arson in the first degree, assault in the first degree, forcible rape, forcible sodomy, kidnapping, murder in the second degree and robbery in the first degree;

[(9)] (10) "Dangerous instrument" means any instrument, article or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury;

[(10)] (11) "Deadly weapon" means any firearm, loaded or unloaded, or any weapon from which a shot, readily capable of producing death or serious physical injury, may be discharged, or a switchblade knife, dagger, billy, blackjack or metal knuckles;

[(11)] (12) "Felony" has the meaning specified in section 556.016;

[(12)] (13) "Forcible compulsion" means either:

(a) Physical force that overcomes reasonable resistance; or

(b) A threat, express or implied, that places a person in reasonable fear of death, serious physical injury or kidnapping of himself or another person;

[(13)] (14) "Incapacitated" means that physical or mental condition, temporary or permanent, in which a person is unconscious, unable to appraise the nature of his conduct, or unable to communicate unwillingness to an act. A person is not "incapacitated" with respect to an act committed upon him if he became unconscious, unable to appraise the nature of his conduct or unable to communicate unwillingness to an act, after consenting to the act;

[(14)] (15) "Infraction" has the meaning specified in section 556.021;

[(15)] (16) "Inhabitable structure" has the meaning specified in section 569.010, RSMo;

[(16)] (17) "Knowingly" has the meaning specified in section 562.016, RSMo;

[(17)] (18) "Law enforcement officer" means any public servant having both the power and duty to make arrests for violations of the laws of this state, and federal law enforcement officers authorized to carry firearms and to make arrests for violations of the laws of the United States;

[(18)] (19) "Misdemeanor" has the meaning specified in section 556.016;

[(19)] (20) "Offense" means any felony, misdemeanor or infraction;

[(20)] (21) "Physical injury" means physical pain, illness, or any impairment of physical

condition;

[(21)] **(22)** "Place of confinement" means any building or facility and the grounds thereof wherein a court is legally authorized to order that a person charged with or convicted of a crime be held;

[(22)] **(23)** "Possess" or "possessed" means having actual or constructive possession of an object with knowledge of its presence. A person has actual possession if he has the object on his person or within easy reach and convenient control. A person has constructive possession if he has the power and the intention at a given time to exercise dominion or control over the object either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of an object, possession is sole. If two or more persons share possession of an object, possession is joint;

[(23)] **(24)** "Public servant" means any person employed in any way by a government of this state who is compensated by the government by reason of his employment. It includes, but is not limited to, legislators, jurors, members of the judiciary and law enforcement officers. It does not include witnesses;

[(24)] **(25)** "Purposely" has the meaning specified in section 562.016, RSMo;

[(25)] **(26)** "Recklessly" has the meaning specified in section 562.016, RSMo;

[(26)] **(27)** "Ritual" or "ceremony" means an act or series of acts performed by two or more persons as part of an established or prescribed pattern of activity;

[(27)] **(28)** "Serious emotional injury", an injury that creates a substantial risk of temporary or permanent medical or psychological damage, manifested by impairment of a behavioral, cognitive or physical condition. "Serious emotional injury" shall be established by testimony of qualified experts upon the reasonable expectation of probable harm to a reasonable degree of medical or psychological certainty;

[(28)] **(29)** "Serious physical injury" means physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body;

[(29)] **(30)** "Sexual conduct" means acts of human masturbation; deviate sexual intercourse; sexual intercourse; or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or the breast of a female in an act of apparent sexual stimulation or gratification;

[(30)] **(31)** "Sexual contact" means any touching of the genitals or anus of any person, or the breast of any female person, or any such touching through the clothing, for the purpose of arousing or gratifying sexual desire of any person;

[(31)] **(32)** "Sexual performance", any performance, or part thereof, which includes sexual conduct by a child who is less than seventeen years of age;

[(32)] **(33)** "Voluntary act" has the meaning specified in section 562.011, RSMo.

558.019. 1. This section shall not be construed to affect the powers of the governor under article IV, section 7, of the Missouri Constitution. This statute shall not affect those provisions of section 565.020, RSMo, **section** 558.018 or **section** 571.015, RSMo, which set minimum terms of sentences, or the provisions of section 559.115, RSMo, relating to probation.

2. The provisions of this [section] **subsection** shall [be applicable to all classes of felonies except those set forth in chapter 195, RSMo, and those otherwise excluded in subsection 1 of this section] **apply to abusive felonies as defined in section 556.061, RSMo.** For the purposes of this section, "prison commitment" means and is the receipt by the department of corrections of a defendant after sentencing. For purposes of this section, prior prison commitments to the department of corrections shall not include commitment to a regimented discipline program established pursuant to section 217.378, RSMo. Other provisions of the law to the contrary notwithstanding, any defendant who has pleaded guilty to or has been found guilty of a felony other than a dangerous felony as defined in section 556.061, RSMo, and is committed to the department of corrections shall be required to serve the following minimum prison terms:

(1) If the defendant has one previous prison commitment to the department of corrections for a felony offense, the minimum prison term which the defendant must serve shall be forty percent of his sentence or until the defendant attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first;

(2) If the defendant has two previous prison commitments to the department of corrections for felonies unrelated to the present offense, the minimum prison term which the defendant must serve shall be fifty percent of his sentence or until the defendant attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first;

(3) If the defendant has three or more previous prison commitments to the department of corrections for felonies unrelated to the present offense, the minimum prison term which the defendant must serve shall be eighty percent of his sentence or until the defendant attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first.

3. Other provisions of the law to the contrary notwithstanding, any defendant who has pleaded guilty to or has been found guilty of a dangerous felony as defined in section 556.061, RSMo, and is committed to the department of corrections shall be required to serve a minimum prison term of eighty-five percent of the sentence imposed by the court or until the defendant attains seventy years of age, and has served at least forty percent of the sentence imposed, whichever occurs first.

4. For the purpose of determining the minimum prison term to be served, the following calculations shall apply:

(1) A sentence of life shall be calculated to be thirty years;

(2) Any sentence either alone or in the aggregate with other consecutive sentences for crimes committed at or near the same time which is over seventy-five years shall be calculated to

be seventy-five years.

5. For purposes of this section, the term "minimum prison term" shall mean time required to be served by the defendant before he is eligible for parole, conditional release or other early release by the department of corrections. Except that the board of probation and parole, in the case of consecutive sentences imposed at the same time pursuant to a course of conduct constituting a common scheme or plan, shall be authorized to convert consecutive sentences to concurrent sentences, when the board finds, after hearing with notice to the prosecuting or circuit attorney, that the sum of the terms results in an unreasonably excessive total term, taking into consideration all factors related to the crime or crimes committed and the sentences received by others similarly situated.

6. (1) A sentencing advisory commission is hereby created to consist of eleven members. One member shall be appointed by the speaker of the house. One member shall be appointed by the president pro tem of the senate. One member shall be the director of the department of corrections. Six members shall be appointed by and serve at the pleasure of the governor from among the following: the public defender commission; private citizens; a private member of the Missouri Bar; the board of probation and parole; and a prosecutor. Two members shall be appointed by the supreme court, one from a metropolitan area and one from a rural area. All members of the sentencing commission appointed prior to August 28, 1994, shall continue to serve on the sentencing advisory commission at the pleasure of the governor.

(2) The commission shall study sentencing practices in the circuit courts throughout the state for the purpose of determining whether and to what extent disparities exist among the various circuit courts with respect to the length of sentences imposed and the use of probation for defendants convicted of the same or similar crimes and with similar criminal histories. The commission shall also study and examine whether and to what extent sentencing disparity among economic and social classes exists in relation to the sentence of death and if so, the reasons therefor. It shall compile statistics, examine cases, draw conclusions, and perform other duties relevant to the research and investigation of disparities in death penalty sentencing among economic and social classes.

(3) The commission shall establish a system of recommended sentences, within the statutory minimum and maximum sentences provided by law for each felony committed under the laws of this state. This system of recommended sentences shall be distributed to all sentencing courts within the state of Missouri. The recommended sentence for each crime shall take into account, but not be limited to, the following factors:

- (a) The nature and severity of each offense;
- (b) The record of prior offenses by the offender;
- (c) The data gathered by the commission showing the duration and nature of sentences imposed for each crime; and

(d) The resources of the department of corrections and other authorities to carry out the punishments that are imposed.

(4) The commission shall publish and distribute its system of recommended sentences on or before July 1, 1995. The commission shall study the implementation and use of the system of recommended sentences until July 1, 1998, and return a final report to the governor, the speaker of the house of representatives, and the president pro tem of the senate. Following the July 1, 1998, report, the commission may revise the recommended sentences every three years.

(5) The governor shall select a chairperson who shall call meetings of the commission as required or permitted pursuant to the purpose of the sentencing commission.

(6) The members of the commission shall not receive compensation for their duties on the commission, but shall be reimbursed for actual and necessary expenses incurred in the performance of these duties and for which they are not reimbursed by reason of their other paid positions.

(7) The circuit and associate circuit courts of this state, the office of the state courts administrator, the department of public safety, and the department of corrections shall cooperate with the commission by providing information or access to information needed by the commission. The office of the state courts administrator will provide needed staffing resources.

7. The recommended sentence established by the commission shall be considered by a court of this state in determining any sentence. Courts shall retain discretion to lower or exceed the recommended sentence, and to order restorative justice methods, when applicable.

8. In all cases involving violations of chapter 195, RSMo, a judge shall make written findings stating the reasons for any deviation from the recommended sentence. The written findings shall be for statistical purposes only, and shall not be used as the basis for any appeal of the offender's conviction of sentence. The written findings shall be transmitted by the court to the board of probation and parole, and shall be made part of the offender's records with the board. Failure to comply with this subsection shall authorize the board of probation and parole to adjust the offender's sentence in order to bring it into compliance with the sentence recommended by the commission.

9. If the imposition or execution of a sentence is suspended, the court may consider ordering any or all of the following restorative justice methods, or any other method that the court finds just or appropriate:

(1) Restitution to any victim for costs incurred as a result of the offender's actions;

(2) Offender treatment programs;

(3) Mandatory community services;

(4) Work release programs in local facilities; and

(5) Community based residential and nonresidential programs.

10. The provisions of this section shall apply only to offenses occurring on or after August 28, 1994.

559.115. 1. Neither probation nor parole shall be granted by the circuit court between the time the transcript on appeal from the defendant's conviction has been filed in appellate court and the disposition of the appeal by such court.

2. A circuit court only upon its own motion and not that of the state or the defendant shall have the power to grant probation to a defendant anytime up to one hundred twenty days after such defendant has been delivered to the custody of the department of corrections but not thereafter. The court may request information and a recommendation from the department concerning the defendant and such defendant's behavior during the period of incarceration. Except as provided in this section, the court may place the defendant on probation in a program created pursuant to section 217.777, RSMo, or may place the defendant on probation with any other conditions authorized by law.

3. Except when the defendant has been found to be a predatory sexual offender pursuant to section 558.018, RSMo, the court shall request that the defendant be placed in the sexual offender assessment unit of the department of corrections if the defendant has pleaded guilty to or has been found guilty of sexual abuse when classified as a class B felony.

4. The circuit court shall notify the state in writing when the court intends to grant probation to the defendant pursuant to the provisions of this section. The state may, in writing, request a hearing within ten days of receipt of the court's notification that the court intends to grant probation. Upon the state's request for a hearing, the court shall grant a hearing as soon as reasonably possible. If the state does not respond to the court's notice in writing within ten days, the court may proceed upon its own motion to grant probation.

5. Notwithstanding any other provision of law, probation may not be granted pursuant to this section to defendants who have been convicted of murder in the second degree pursuant to section 565.021, RSMo; forcible rape pursuant to section 566.030, RSMo; forcible sodomy pursuant to section 566.060, RSMo; statutory rape in the first degree pursuant to section 566.032, RSMo; statutory sodomy in the first degree pursuant to section 566.062, RSMo; child molestation in the first degree pursuant to section 566.067, RSMo, when classified as a class B felony; a defendant who has been found to be a predatory sexual offender pursuant to section 558.018, RSMo; or any offense in which there exists a statutory prohibition against either probation or parole. **Defendants convicted for statutory rape in the first degree or statutory sodomy in the first degree who have no prior convictions for either crime shall be eligible to be assessed for a program of treatment, education and rehabilitation designed for perpetrators of sexual offenses.**

[569.025. 1. A person commits the crime of pharmacy robbery in the first degree

when he forcibly steals any controlled substance from a pharmacy and in the course thereof he, or another participant in the crime:

- (1) Causes serious physical injury to any person;
- (2) Is armed with a deadly weapon;
- (3) Uses or threatens the immediate use of a dangerous instrument against any person; or
- (4) Displays or threatens the use of what appears to be a deadly weapon or dangerous instrument.

2. For purposes of this section the following terms mean:

(1) "Controlled substance", a drug, substance or immediate precursor in schedules I through V as defined in sections 195.005 to 195.425, RSMo;

(2) "Pharmacy", any building, warehouse, physician's office, hospital, pharmaceutical house or other structure used in whole or in part for the sale, storage or dispensing of any controlled substance as defined by sections 195.005 to 195.425, RSMo.

3. Pharmacy robbery in the first degree is a class A felony, but, notwithstanding any other provision of law, a person convicted pursuant to this section shall not be eligible for suspended execution of sentence, parole or conditional release until having served a minimum of ten years of imprisonment.]

[569.035. 1. A person commits the crime of pharmacy robbery in the second degree when he forcibly steals any controlled substance from a pharmacy.

2. For purposes of this section the following terms mean:

(1) "Controlled substance", a drug, substance or immediate precursor in schedules I through V as defined in sections 195.005 to 195.425, RSMo;

(2) "Pharmacy", any building, warehouse, physician's office, hospital, pharmaceutical house or other structure used in whole or in part for the sale, storage or dispensing of any controlled substance as defined by sections 195.005 to 195.425, RSMo.

3. Pharmacy robbery in the second degree is a class B felony, but, notwithstanding any other provision of law, a person convicted pursuant to this section shall not be eligible for suspended execution of sentence, parole or conditional release until having served a minimum of five years of imprisonment.]

571.015. 1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the department of corrections and human resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. [No

person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.】

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. 【No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.】

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the department of corrections and human resources for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. 【No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.】

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

✓