V.A.M.S. 558.019

Vernon's Annotated Missouri Statutes Currentness
Title XXXVIII. Crimes and Punishment; Peace Officers and Public Defenders
Chapter 558. Imprisonment (Refs & Annos)
**558.019. Previous remands for felony offenses, minimum prison terms--calculation of term--sentencing advisory commission--restitution**

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 subsections 2 to 5 of this section 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. For the purposes of this section, **"prison commitment"** means and is the receipt by the department of corrections of an offender 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 offender 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 offender has one previous prison commitment to the department of corrections for a felony offense, the minimum prison term which the offender must serve shall be forty percent of his or her sentence or until the offender attains seventy years of age, and has served at least thirty percent of the sentence imposed, whichever occurs first;

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

(3) If the offender 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 offender must serve shall be eighty percent of his or her sentence or until the offender 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 offender 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 offender 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 offender before he or she is eligible for parole, conditional release or other early release by the department of corrections.

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 shall be appointed to a four-year term. 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 offenders 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 sentences are comparable to other states, if the length of the sentence is appropriate, and the rate of rehabilitation based on sentence. 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 study alternative sentences, prison work programs, work release, home-based incarceration, probation and parole options, and any other programs and report the feasibility of these options in Missouri.

(5) The commission shall publish and distribute its recommendations on or before July 1, 2004. The commission shall study the implementation and use of the recommendations until July 1, 2005, and return a report to the governor, the speaker of the house of representatives, and the president pro tem of the senate. Following the July 1, 2005, report, the commission shall revise the recommended sentences every two years.

(6) 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.

(7) 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.

(8) 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. Courts shall retain discretion to lower or exceed the sentence recommended by the commission as otherwise allowable by law, and to order restorative justice methods, when applicable.

8. If the imposition or execution of a sentence is suspended, the court may order 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 or a statutorily created fund for costs incurred as a result of the offender's actions;

(2) Offender treatment programs;

(3) Mandatory community service;

(4) Work release programs in local facilities; and

(5) Community-based residential and nonresidential programs.

9. The provisions of this section shall apply only to offenses occurring on or after August 28, 2003.

10. Pursuant to subdivision (1) of subsection 8 of this section, the court may order the assessment and payment of a designated amount of restitution to a county law enforcement restitution fund established by the county commission pursuant to section 50.565, RSMo. Such contribution shall not exceed three hundred dollars for any charged offense. Any restitution moneys deposited into the county law enforcement restitution fund pursuant to this section shall only be expended pursuant to the provisions of section 50.565, RSMo.

11. A judge may order payment to a restitution fund only if such fund had been created by ordinance or resolution of a county of the State of Missouri prior to sentencing. A judge shall not have any direct supervisory authority or administrative control over any fund to which the judge is ordering a defendant to make payment.

12. A defendant who fails to make a payment to a county law enforcement restitution fund may not have his or her probation revoked solely for failing to make such payment unless the judge, after evidentiary hearing, makes a finding supported by a preponderance of the evidence that the defendant either willfully refused to make the payment or that the defendant willfully, intentionally, and purposefully failed to make sufficient bona fide efforts to acquire the resources to pay.

CREDIT(S)

(L.1986, H.B. No. 1098, § 1, eff. Jan. 1, 1987. Amended by L.1988, H.B. Nos. 1340 & 1348, § A; L.1989, S.B. Nos. 215 & 58, § A; L.1990, H.B. No. 974, § A; L.1993, H.B. No. 562, § A; L.1994, S.B. No. 763, § A; L.1998, S.B. No. 766, § A, eff. April 27, 1998; L.1998, H.B. No. 1508, § A, eff. May 20, 1998; L.2003, S.B. No. 5, § A, eff. June 27, 2003; L.2004, H.B. No. 1055, § A; L.2005, H.B. No. 353, § A.)

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update.

2003 Legislation

L.2003, S.B. No. 5, § A, in subsec. 2, in the first sentence, following “provisions of”, inserted “subsections 2 to 5 of”; in subsec. 2(1), following “at least”, substituted “thirty” for “forty”; in subsec. 6(1), inserted the sentence, “All members shall be appointed to a

four-year term."; in subsec. 6(2), following "reasons therefor", inserted "sentences are comparable to other states, if the length of the sentence is appropriate, and the rate of rehabilitation based on sentence"; inserted a new subsec. 6(4); redesignated former subsecs. 6(4) to 6(7) as subsecs. 6(5) to 6(8); in the new subsec. 6(5), in the first sentence, substituted "recommendations" for "system of recommended sentences" and substituted "2004" for "1995"; in the second sentence, substituted "recommendations" for "system of recommended sentences" and substituted "2005" or "1998"; in the last sentence, substituted "2005" for "1998", substituted "shall" for "may", and substituted "two" for "three"; added a new subsec. 7; added subsec. 8; redesignated former subsec. 7 as subsec. 9 and substituted "2003" for "1994"; throughout the section, substituted "offender" for "defendant" and made gender-neutral changes in the text.

2004 Amendment

L.2004, H.B. No. 1055, § A, in subsec. 8(1), following "any victim", inserted "or a statutorily created fund"; and added subsecs. 10, 11, and 12.

2005 Legislation

L.2005, H.B. No. 353, § A, in subsec. 5, deleted the second sentence, which prior thereto read, "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."

1999 Main Volume

The 1988 amendment, in the first sentence of subsec. 2, inserted a reference to ch. 564, and inserted "and dangerous felonies as defined in subdivision (8) of section 556.061 RSMo".

The 1989 amendment modified statutory references in subsec. 1.

The 1990 amendment, in subsec. 1, substituted "559.115" for "217.775"; and added subsec. 8.

The 1993 amendment, in subsec. 2, in the first sentence, inserted "and any felonies that have been in any manner enhanced by operation of law to class A or B felonies for the purpose of sentencing", in the second sentence, deleted "of not less than one hundred twenty days" following "served time of imprisonment" and deleted "the calculation of which shall include any jail time credit and has been committed to the department of corrections as a prior offender, persistent offender, or class X offender" following "department of corrections, or federal prison", in subd. (1), substituted "has one prior

felony conviction" for "is a prior offender", in subd. (2), substituted "has two prior felony convictions committed at different times" for "is a persistent offender", and in subd. (3), substituted "has three or more prior felony convictions committed at different times" for "is a class X offender"; in subsec. 3, substituted "has no prior felony convictions" for "is not a prior offender, persistent offender, or class X offender"; rewrote subsec. 4; in subsec. 5, substituted "have prior convictions" for "be a prior offender, a persistent offender, or a class X offender" in the second sentence; in subsec. 6, substituted "considered to have a prior felony conviction" for "classified as a prior offender"; and in subsec. 7, added the second sentence.

The 1994 amendment rewrote the section, which formerly provided:

"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 sections 195.275 to 195.296, RSMo, 565.020, RSMo, 558.018 or 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 shall be applicable only to class A and B felonies committed under the following Missouri laws: chapters 195, 491, 564, 565, 566, 567, 568, 569, 570, 571, 573, 575, RSMo, and dangerous felonies as defined in subdivision (8) of section 556.061, RSMo, and any felonies that have been in any manner enhanced by operation of law to class A or B felonies for the purpose of sentencing. Other provisions of the law to the contrary notwithstanding, any defendant who has pleaded guilty to or has been found guilty of a felony and served time of imprisonment in the department of corrections, or in a penal institution in another state which is equivalent to the department of corrections, or a federal prison shall be required to serve the following minimum prison terms:

"(1) If the defendant has one prior felony conviction, the minimum prison term which the defendant must serve shall be forty percent of his sentence;

"(2) If the defendant has two prior felony convictions committed at different times, the minimum prison term which the defendant must serve shall be sixty percent of his sentence;

"(3) If the defendant has three or more prior felony convictions committed at different times, the minimum prison term which the defendant must serve shall be eighty percent of his sentence.

"3. If the defendant has no prior felony convictions and has pleaded guilty to or has been found guilty of a felony and sentenced to life imprisonment, the minimum prison term which the defendant must serve shall be fifteen years.

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

"(1) A sentence of life shall be calculated to be fifty 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. Prior pleas of guilty and prior findings of guilty shall be pled and proven in the same manner as required by the provisions of section 558.021. The final judgment and sentence of anyone found to have prior convictions shall reflect such finding.

"6. If a period of twenty-five years or more has passed between a prior plea of guilty, finding of guilty, or any type of release from the department of corrections, whichever is later, and the present felony and accompanying commitment to the department, then the defendant shall not be considered to have a prior felony conviction for purposes of this section.

"7. 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 probation, parole, conditional release or other early release by the department of corrections. Except that the board of probation and parole, in the case of concurrent sentences, shall be authorized to otherwise determine an appropriate time for parole eligibility when the board finds, after hearing, 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.

"8. (1) A sentencing commission is hereby created to consist of nine 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. Five members shall be appointed by the governor from among the following: the public defender commission; citizens' organizations; the board of probation and parole; and prosecutors. Two members shall be appointed by the supreme court.

"(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 sentencing disparity among economic and social classes in relation to the sentence of death. 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 deliver its report to the governor, the speaker of the house of representatives, and the president pro tem of the senate no later than January fifteenth of each year after August 28, 1990, but no report shall be required after January 16, 1995.

"(4) The commission shall elect a chairperson who shall call meetings of the commission as required or permitted pursuant to the purpose of the sentencing commission.

"(5) 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.

"(6) 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."

L.1998, S.B. No. 766, § A and L.1998, H.B. No. 1508, § A, in subsec. 2, inserted the second sentence, and substituted "prison commitment" for "remands" throughout the section.

Title of Act:

An Act relating to the imprisonment of certain felons, with an effective date. L.1986, H.B. No. 1098.

LIBRARY REFERENCES

1999 Main Volume

Criminal Law 1200 to 1203.32.
Westlaw Topic No. 110.
C.J.S. Criminal Law §§ 1638 to 1659.

RESEARCH REFERENCES

2009 Electronic Update.

ALR Library

8 ALR 4th 660, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Plea Bargaining.

10 ALR 4th 8, Adequacy of Defense Counsel's Representation of Criminal Client Regarding Guilty Pleas.

167 ALR 845, Effect, as to Prior Offenses, of Amendment Increasing Punishment for Crime.

89 ALR 295, Reduction by Appellate Court of Punishment Imposed by Trial Court.

83 ALR 1362, Constitutionality of Statute Which Makes Specified Punishment or Penalty Mandatory and Permits No Exercise of Discretion on Part of Court or Jury.

79 ALR 1337, Rule of Reasonable Doubt as Applicable to Proof of Previous Conviction for Purpose of Enhancing Punishment.

Treatises and Practice Aids

19 MO Practice Series § 24:4, Range of Punishment.

19 MO Practice Series § 24:8, Prior, Persistent or Dangerous Offenders.

19 MO Practice Series § 26:2, Eligibility for Probation.

19 MO Practice Series § 24:14, Satisfaction of Sentence of Imprisonment.

27 MO Practice Series § 8.6, Sentence Form.

27 MO Practice Series § 12.8, Petition for Parole Eligibility Hearing.

27 MO Practice Series § 8.11, Motion Challenging Prosecutor's Characterization of Defendant as a Prior Offender.

28 MO Practice Series § 33:5, Consecutive or Concurrent Sentences.

28 MO Practice Series § 33:7, Discretion of the Court and Sentencing Guidelines.

28 MO Practice Series § 37:2, Varieties of Probation.

28 MO Practice Series § 37:3, Terms and Conditions of Probation.

28 MO Practice Series § 33:10, Practice and Procedure Notes.

28 MO Practice Series § 33:11, Prior Offenders and Minimum Terms.

32 MO Practice Series § 3.1, Felony.

32 MO Practice Series § 21.2, Robbery First Degree.

32 MO Practice Series § 25.4, Enhancement of Punishment.

32 MO Practice Series § 42.2, Cumulative Punishment.

32 MO Practice Series § 56.4, Consecutive or Concurrent Sentences.

32 MO Practice Series § 56.6, Discretion of the Court.

32 MO Practice Series § 58.1, Evolution and Promulgation of Missouri Sentencing Guidelines.

32 MO Practice Series § 58.6, Discretion of the Court.

32 MO Practice Series § 56.11, Prior Offenders and Minimum Terms--In General.

32 MO Practice Series § 56.14, Prior Drug Offenders.

32 MO Practice Series § 56.15, Dangerous Felonies and Dangerous Offenders.

20A MO Practice Series § 15:10, Arrest Records.

UNITED STATES SUPREME COURT

Sentencing, violent felony repeat offenders, predicate offenses, civil rights restored exemption, misdemeanor battery convictions, see Logan v. U.S., 2007, 128 S.Ct. 475, 169 L.Ed.2d 432.

NOTES OF DECISIONS

1. Validity

Inmate, who sought declaration that Board of Probation and Parole could not apply statute governing minimum prison terms on basis of previous commitments for felony offenses, to sentences inmate was then serving, so as to require him to serve 80% of those sentences before he was eligible for parole, was denied due process by trial court's sustaining of Board's motion for summary judgment without having required Board to make prima facie case; facts on which Board would have been entitled to summary judgment were not alleged in Board's motion so as to put inmate on notice as to what facts he had to dispute in order to defeat Board's motion. Cody v. Missouri Bd. of Probation and Parole (App. W.D. 2003) 111 S.W.3d 547. Constitutional Law 4820; Judgment 184; Judgment 189

Defendant's initial incarceration for a 120-day callback program could not be considered a "previous prison commitment" for purpose of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments; section of statute governing probation clearly indicated that it was only offender's first incarceration that could not be considered a previous prison commitment for purpose of determining minimum prison term. Gilles v. Missouri Dept. of Corrections (App. W.D. 2006) 200 S.W.3d 50, rehearing and/or transfer denied. Pardon And Parole 50

Existence of dispute between state and inmate concerning applicability of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments did not render statute void for vagueness. Star v. Burgess (Sup. 2005) 160 S.W.3d 376, rehearing denied. Constitutional Law 4710; Sentencing And Punishment 1210

Application of statute that required service of minimum percentage of prison term before being eligible for parole based on existence of prior prison commitment was not constitutionally prohibited ex post facto application of law, even though conviction and sentence that resulted in mandatory prison commitment occurred prior to effective date of challenged minimum term provision of statute, where intent of legislature in enacting minimum term provisions was not to increase or enhance punishment received by inmate for prior conviction, but to increase or enhance inmate's punishment for present conviction by requiring him or her to serve certain percentage of sentence thereon before being eligible for parole. Bailey v. Board of Probation and Parole (App. W.D. 2000) 36 S.W.3d 13, rehearing and/or transfer denied. Constitutional Law 2823; Pardon And Parole 49

Defendant has no liberty interest in determination of his eligibility for early release; therefore statutory minimum sentencing scheme based on repeat offenses does not offend

due process. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Constitutional Law 4729

Consecutive 20-year sentences for second-degree burglary as class X offender were not disproportionate and did not violate Eighth Amendment in light of 14 prior felony convictions, even though victims were not at home at time of offenses. State v. Williams (App. W.D. 1996) 936 S.W.2d 828. Sentencing And Punishment 1508

Inmate failed to allege equal protection rights violation from statutory amendment changing life sentence classification for parole, conditional release or other early release program eligibility from 50 to 30 years for offenses committed after August 28, 1994; he committed offense of conviction before effective date of amendment and did not plead specific facts to show that other defendants who committed offenses before that date were treated differently. Kennedy v. Missouri Atty. Gen. (App. W.D. 1996) 922 S.W.2d 68. Constitutional Law 3821; Sentencing And Punishment 1825; Pardon And Parole 43

2. In general

Statute setting forth minimum prison terms that certain convicted felons may be required to serve before becoming eligible for parole, conditional release, or other early releases by Department of Corrections (DOC) did not apply to increase prisoner's minimum sentence for armed criminal action from three years to 11.2 years; armed criminal action was specifically identified as exception to general minimum prison term requirements set forth in statute, and statute provided that general minimum prison terms shall not "affect" minimum prison terms for armed criminal action, but 80 percent general minimum prison term could not be applied to offense of armed criminal action because it would increase minimum sentence such as to have a material affect. Johnson v. Missouri Dept. of Corrections (App. W.D. 2005) 166 S.W.3d 110. Prisons 245(3); Pardon And Parole 49

Defense counsel's misinformation to defendant, that statute requiring certain defendants to serve 85% of prison term applied to charges against him, did not prejudice defendant and, thus, could not amount to ineffective assistance of counsel, although defendant claimed that he refused State's plea offer because of the misinformation, where counsel initially properly informed defendant that the law was inapplicable, and defendant failed to accept the offer. Collins v. State (App. S.D. 2007) 231 S.W.3d 861. Criminal Law 1920

Board of Probation and Parole's use of parole statute enacted after inmate committed offense did not violate prohibition against ex post facto laws, where statute did not increase punishment beyond that allowed by old parole statute in effect at time of

offense. Epperson v. Missouri Bd. Of Probation And Parole (App. W.D. 2002) 67 S.W.3d 729, withdrawn from bound volume, republished at 81 S.W.3d 540, rehearing and/or transfer denied.

Habitual offender statutes do not punish a defendant for his prior convictions, but rather they punish him as a repeat offender for his latest offense on the basis of a demonstrated propensity for misconduct. Irvin v. Missouri Bd. of Probation and Parole (App. W.D. 2000) 34 S.W.3d 202, transfer denied. Sentencing And Punishment 1205

Statutory minimum prison term constitutes collateral consequence of guilty plea as to which defendant need not be advised by court. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Criminal Law 273.1(4)

For purposes of repeat offender statute, Department of Corrections, not trial court, calculates how often particular person has been placed within its custody. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Sentencing And Punishment 1305

Guilty plea to first-degree robbery was not rendered involuntary and unintelligent by plea court's failure to inform defendant on the record that by entering plea he would be required to serve 85 percent of first-degree-robbery sentence under dangerous-felony statute, where record of plea hearing showed that defendant was aware of the possible consequences of his plea. Turner v. State (App. W.D. 1998) 969 S.W.2d 300. Criminal Law 273.1(4)

To establish due process violation, plaintiff must show deprivation of liberty or property interest. Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Constitutional Law 3869

Defendant had no liberty interest in determination of his eligibility for early release under minimum prison term statute, and thus he was not entitled, under due process clauses of State and Federal Constitutions, to have sentencing court, rather than Department of Corrections, determine existence of previous remands to Department as factor in determination of eligibility for early release, nor was defendant entitled to have notice and hearing before such determination. Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Constitutional Law 4838; Prisons 244; Prisons 283

Due process did not preclude legislature from terminating statutory entitlement to trial court determination of existence of previous remands to Department of Corrections, as factor in determining eligibility for early release under minimum prison term statute.

Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Constitutional Law 4830; Prisons 245(3)

In determining eligibility for early release under minimum prison term statute, there is no requirement that person must be a "defendant" at time of determination of number of person's previous remands to Department of Corrections. Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Prisons 245(3)

Entry of order nunc pro tunc was necessary to correct amended trial court judgment that referred to defendant as "prior offender, only" instead of referring to defendant's sentencing as prior and persistent offender in original judgment, and that cited statutory section that no longer employed terms "prior offender" or "persistent offender." State v. Williams (App. W.D. 1997) 956 S.W.2d 942. Sentencing And Punishment 1399

Lack of evidence to support finding of persistent offender status required that defendant's sentence as prior and persistent offender be vacated, despite State's contention that defendant was not prejudiced by erroneous sentencing because persistent offender's maximum sentence for class A felony was not increased beyond ranges already set for class A felony; State ignored other possible ramifications of sentencing as persistent offender, such as possible affect on future parole. State v. Halk (App. E.D. 1997) 955 S.W.2d 216. Criminal Law 1181.5(9)

3. Retroactivity

Amendment to state statute which changed the statutory scheme for determining recidivist status from prior convictions to prior remands to the Department of Corrections did not apply to defendant, whose offenses occurred before date specified in amendment. Griffin v. Dormire, E.D.Mo.1998, 26 F.Supp.2d 1179. Sentencing And Punishment 1219

Statute providing that an offender's first time incarceration in a 120-day callback program does not count as a prior prison commitment, for purposes of section requiring offender who has three or more prior commitments to serve 80% or more of his sentence, is procedural and, thus, applies retroactively. Garvis v. Agniel (App. W.D. 2006) 2006 WL 1195520, Unreported, modified on denial of rehearing, transferred to mo.s.ct., transferred to mo.s.ct. 207 S.W.3d 617. Pardon And Parole 42.1

Statutory amendment under which time defendant spent in custody of Department of Corrections under a 120-day callback program could not be considered a "prior commitment" for purposes of calculating defendant's parole eligibility applied retroactively to defendant who was sentenced prior to enactment of amendment;

amendment did not shorten defendant's sentence or alter the law creating the offense. Irvin v. Kempker (App. W.D. 2004) 152 S.W.3d 358, rehearing and/or transfer denied. Pardon And Parole 42.1

Legislature intended for application of minimum term provisions of statute that required service of minimum percentage of prison term before eligibility for parole based on existence of prior prison commitment to be limited only to sentences for crimes occurring on or after effective date of statute, and on which defendant is seeking parole, but did not intend to limit those prior prison commitments that could be considered to determine eligibility for parole to only those occurring after effective date of statute. Bailey v. Board of Probation and Parole (App. W.D. 2000) 36 S.W.3d 13, rehearing and/or transfer denied. Pardon And Parole 49

Sentencing defendant as recidivist, based on prior felony convictions that occurred before effective date of recidivist sentencing statute, was proper, in light of unambiguous language of recidivist statute, and fact that, in enacting recidivist statute, legislature intended that it provide for minimum prison terms only on sentences for crimes occurring on or after effective date of statute, not that statute only apply to cases in which predicate offenses counted as prior remands occurred on or after effective date. Irvin v. Missouri Bd. of Probation and Parole (App. W.D. 2000) 34 S.W.3d 202, transfer denied. Sentencing And Punishment 1218

Application of habitual offender statute to defendant did not violate ex post facto clauses of United States and Missouri constitutions, even though offenses for which he was previously remanded to Department of Corrections (DOC) occurred before effective date of statute, where he was not being punished for crimes that he committed prior to date statute took effect, but rather he was being punished for offense that occurred after effective date of statute on basis of demonstrated propensity for misconduct. Irvin v. Missouri Bd. of Probation and Parole (App. W.D. 2000) 34 S.W.3d 202, transfer denied. Constitutional Law 2815; Sentencing And Punishment 1218

Eight of the nine offenses of which defendant was convicted occurred after amendments to sentencing statute became effective, and thus application of amendments did not violate constitutional prohibition against ex post facto laws with respect to those eight offenses. U.S.C.A. Const. Art. 1, § 10, cl. 1; Nylon v. Missouri Bd. of Probation and Parole (App. W.D. 1997) 940 S.W.2d 3. Constitutional Law 2815; Sentencing And Punishment 17(1)

Defendant was not disadvantaged by application of sentencing statute amendment to crime that was committed prior to effective date of amendment, and thus application of amendment was not an ex post facto violation; even if defendant's parole eligibility date for that conviction would have arrived more quickly without application of amendment,

defendant had been convicted on eight other charges that were subject to amendment. Nylon v. Missouri Bd. of Probation and Parole (App. W.D. 1997) 940 S.W.2d 3. Constitutional Law 2823; Sentencing And Punishment 17(1)

Prior to being sentenced as a persistent offender, defendant was not entitled to benefit of amendment requiring prosecution to show that defendant had been remanded to Department of Corrections on two different occasions; amendment explicitly stated that it applied only to offenses committed after effective date, and defendant committed crimes prior to that date. State v. Moore (App. E.D. 1996) 930 S.W.2d 464. Sentencing And Punishment 1219

Defendant's retrial sentence of five concurrent 40-year sentences for sodomy was not more severe than his original sentences of five concurrent 20-year sentences for sodomy to be served consecutively to one 20-year sentence for rape, due to enactment of statute allowing parole board to convert consecutive sentences to concurrent sentences, since defendant's offenses occurred before date after which statute applied. State v. Sexton (App. W.D. 1996) 929 S.W.2d 909, rehearing and/or transfer denied, denial of habeas corpus affirmed 278 F.3d 808, rehearing and rehearing en banc denied, certiorari denied 123 S.Ct. 129, 537 U.S. 886, 154 L.Ed.2d 145, rehearing denied 123 S.Ct. 960, 537 U.S. 1150, 154 L.Ed.2d 860. Sentencing And Punishment 115(4)

Defendant who had pleaded guilty to four prior felonies was subject to sentencing under former statute requiring 80% minimum prison term for offenders who had three or more prior felony convictions, rather than amended statute that required minimum term for offenders who had three or more previous remands to Department of Corrections, where offense for which defendant was being sentenced had been committed prior to effective date of amendment. Smith v. State (App. E.D. 1996) 926 S.W.2d 563. Sentencing And Punishment 1219

Application of prior minimum term offender statute to defendant did not constitute ex post facto violation, as statute was in effect when defendant committed offense for which he was tried. State v. Harper (App. W.D. 1993) 855 S.W.2d 474. Constitutional Law 2816; Sentencing And Punishment 1216

Removal of offense from operation of repeat offender statute reduces or lessens penalty or punishment within meaning of statute setting forth effect of repeal of a penal statute, and, thus, a defendant whose conviction for possession of cocaine was pending on appeal at time Comprehensive Drug Control Act was enacted which reclassified cocaine possession from Class A felony to Class C felony was entitled to less onerous sentencing provisions brought into effect by the new statute, in that he was entitled to be relieved of repeat offender status. State v. Williams (App. W.D. 1992) 844 S.W.2d 562. Sentencing And Punishment 1408

Sentencing defendant under statute which became effective after date crime occurred violated prohibition against ex post facto laws. State v. Sanders (App. E.D. 1992) 842 S.W.2d 170, rehearing and/or transfer denied. Constitutional Law 2815; Sentencing And Punishment 14

Sentencing defendant as a prior and persistent offender, pursuant to a statute which became effective subsequent to defendant's current offense and which established new Sentencing Guidelines which clearly disadvantaged defendant, violated ex post facto provisions. State v. Jolly (App. E.D. 1991) 820 S.W.2d 734. Constitutional Law 2817; Sentencing And Punishment 1217

Sentencing under statute as amended to mandate minimum amounts of time offender with prior convictions must serve before being eligible for parole, rather than statute in effect at time of crime, had ex post facto effect on defendant. Mays v. State (App. W.D. 1990) 810 S.W.2d 68. Constitutional Law 2823; Pardon And Parole 42.1

This section requiring defendant to serve 40% of his sentence was ex post facto as applied to defendant who committed crimes prior to its effective date. State v. Stepter (Sup. 1990) 794 S.W.2d 649. Constitutional Law 2816; Sentencing And Punishment 1217

Application of habitual offender statute [V.A.M.S. § 558.019] which became effective on Jan. 1, 1987 in sentencing of defendant for robbery which occurred on Dec. 17, 1981 was retrospective application of law and violated the ex post facto clause, constituting plain error. State v. Humphrey (App. E.D. 1990) 789 S.W.2d 186. Constitutional Law 2816; Sentencing And Punishment 1217; Criminal Law 1042.5

Retroactive application of minimum prison term for class X offender violated prohibition against ex post facto law. State v. Lewis (App. W.D. 1990) 785 S.W.2d 656. Constitutional Law 2816; Sentencing And Punishment 1216

Considering felonies committed by defendant prior to effective date of this section in certifying defendant as a class X offender did not violate constitutional ex post facto provisions, where crime for which defendant was sentenced occurred after effective date. State v. Frederick (App. W.D. 1990) 783 S.W.2d 469, denial of post-conviction relief affirmed 818 S.W.2d 677, rehearing and/or transfer denied. Constitutional Law 2816; Sentencing And Punishment 1218

Retroactive application of this section changing parole eligibility of repeat offenders to defendant for crimes committed before its effective date violated constitutional provisions against ex post facto laws and required remand for resentencing. State v. Fitzgerald (App. E.D. 1989) 781 S.W.2d 174, denial of habeas corpus affirmed 963 F.2d 1062, certiorari denied 113 S.Ct. 266, 506 U.S. 893, 121 L.Ed.2d 195. Constitutional Law 2823; Criminal Law 1181.5(8); Pardon And Parole 42.1

This section defining class X offenders who must be given minimum prison term could not be applied to offenses occurring before its effective date without running afoul of constitutional prohibition against ex post facto laws. State v. Gentile (App. E.D. 1989) 781 S.W.2d 169. Constitutional Law 2816; Sentencing And Punishment 16

This section establishing punishment for Class X offender could not be applied to defendant convicted of crime committed before effective date of this section in light of constitutional prohibition against ex post facto laws. State v. Russell (App. E.D. 1989) 780 S.W.2d 126. Constitutional Law 2815; Sentencing And Punishment 15

Defendant in murder, robbery and arson case was improperly sentenced as class X offender, in violation of his right to not be subject to ex post facto laws, where sentence was imposed under this section which became effective after he allegedly committed crimes in question. State v. Loggins (App. E.D. 1989) 778 S.W.2d 783. Sentencing And Punishment 1217

Trial court's application of V.A.M.S. § 558.019 to offenses which occurred before statute's effective date of enactment violated ex post facto clause. State v. Jordan (App. E.D. 1989) 778 S.W.2d 283, post-conviction relief granted 792 S.W.2d 698. Constitutional Law 2815; Sentencing And Punishment 12

Defendant could not be sentenced as class X offender where crime occurred in August 1986, before class X offender status became effective. Owen v. State (App. E.D. 1989) 776 S.W.2d 467. Sentencing And Punishment 14

Retroactive application of V.A.M.S. § 558.019 violated ex post facto clause of both State [V.A.M.S. Const. Art. 1, § 13] and Federal [U.S.C.A. Const. Art. 1, § 10, cl. 1] Constitutions. State v. Martin (App. E.D. 1989) 775 S.W.2d 196. Constitutional Law 2816; Sentencing And Punishment 1217

This section creating class X offender and providing that defendant categorized as class X offender must serve at least 80% of his sentence was ex post facto as to defendant who committed forcible sodomy, rape, burglary and kidnapping prior to effective date of this

section. State v. Wiley (App. E.D. 1989) 766 S.W.2d 700, denial of post-conviction relief reversed 823 S.W.2d 146. Constitutional Law 2816; Sentencing And Punishment 1217

Sentencing defendant convicted of robbery offenses committed in October 1986 under V.A.M.S. § 558.019 that became effective in January 1987 and requires defendant to serve at least 40 percent of sentence as prior offender amounted to application of ex post facto law and constituted plain error by removing existing right of defendant to apply for parole after serving one year of sentence barring misconduct, under the law applicable when offenses were committed. State v. West (App. E.D. 1989) 766 S.W.2d 103. Constitutional Law 2823; Criminal Law 1042.5; Sentencing And Punishment 1217

Retroactive application of sentencing enhancement guidelines which postdated defendant's offense disadvantaged him and violated ex post facto clause; under new guidelines, defendant was not eligible for parole until 40% of his sentence had been served while prior guidelines left parole determinations to discretion of parole board. State v. Lawhorn (Sup. 1988) 762 S.W.2d 820. Constitutional Law 2823; Sentencing And Punishment 664(5)

This section could not be applied without violating ex post facto prohibition to defendant who committed offense prior to this section's effective date, in order to prevent defendant from becoming eligible for parole until he had served at least 80% of sentence. State v. Pruitt (App. E.D. 1988) 755 S.W.2d 309. Constitutional Law 2823; Sentencing And Punishment 1217

Even though trial court erroneously entered finding that defendant was prior offender, absence of reference to this section in judgment meant that that this section was not applicable, and defendant was properly sentenced as prior and persistent offender under two other statutes [V.A.M.S. §§ 557.036 and 558.016]. State v. Dickens (App. E.D. 1988) 755 S.W.2d 18. Sentencing And Punishment 1397

Class X offender law [V.A.M.S. § 558.019], relating to multiple offenders, was an ex post facto law as applied to defendant who committed offenses prior to date law went into effect. State v. McCoy (App. E.D. 1988) 748 S.W.2d 809, post-conviction relief denied 784 S.W.2d 854. Constitutional Law 2816; Sentencing And Punishment 1217

This section, which became effective after date of crimes and before trial, was ex post facto law as applied to defendant, even though defendant would have been subject to life imprisonment without this section and was subject to parole at discretion of parole board,

whether or not this section was applied; this section foreclosed defendant's ability to apply for parole after serving one year of sentence and required him to serve 40 years as class X offender before becoming eligible for parole. State v. Hillis (App. E.D. 1988) 748 S.W.2d 694. Constitutional Law 2823; Sentencing And Punishment 1217; Pardon And Parole 43

Under this section which became effective after defendant committed offense, defendant was not eligible for parole until he had served eight years of his sentence, while under V.A.M.S. § 217.690, in effect when defendant committed offense, defendant would have been eligible for parole after maximum for two years, and thus because defendant was seriously disadvantaged by reason of a law enacted after crime was committed, minimum prison terms under this section were invalid as ex post facto law and defendant was entitled to have his parole determined under law existing at time of his commission of crime. State v. Pollard (App. E.D. 1988) 746 S.W.2d 632. Constitutional Law 2823; Pardon And Parole 22

3.5. Mandatory minimum penalty

Armed criminal action sentence is not subject to the general minimum prison term provisions of sentencing statute setting forth minimum prison terms that certain convicted felons may be required to serve before becoming eligible for parole. Talley v. Missouri Dept. of Corrections (App. W.D. 2006) 210 S.W.3d 212, rehearing and/or transfer denied. Pardon And Parole 50

Defendant was required to serve mandatory minimum term of 50 percent of his instant sentence prior to being eligible for parole by virtue of his previous prison commitments, notwithstanding fact that his prior offenses upon which his prison record was established occurred prior to the express effective date of mandatory-minimum statute; although legislature intended for minimum-term provisions to apply only to sentences for crimes occurring on or after effective date of statute, statute did not contain limitations on previous prison commitments that could be used to determine parole eligibility. Davison v. Missouri Dept. of Corrections (App. W.D. 2004) 141 S.W.3d 506. Pardon And Parole 50

"Mandatory minimum penalty," of which defendant pleading guilty must be advised, does not refer to parole eligibility, but refers instead to the low end of the range of punishment for the offense proper. Reynolds v. State (Sup. 1999) 994 S.W.2d 944, rehearing denied, certiorari denied 120 S.Ct. 944, 528 U.S. 1120, 145 L.Ed.2d 820. Criminal Law 273.1(4)

4. Right to parole

Inmate was not entitled to declaration that he was eligible for parole, where Board of Probation and Parole did not classify inmate as ineligible for parole or deny him parole based on ineligibility, rather Board determined that inmate should not be released on parole because release would depreciate seriousness of his offense. Epperson v. Missouri Bd. Of Probation And Parole (App. W.D. 2002) 67 S.W.3d 729, withdrawn from bound volume, republished at 81 S.W.3d 540, rehearing and/or transfer denied.

Prisoner stated justiciable claim in petition for judgment declaring that Department of Corrections violated prisoner's constitutional and statutory rights by denying parole. Wright v. Department of Corrections (App. W.D. 2001) 48 S.W.3d 662. Declaratory Judgment 314

Sentencing court had no power to exclude consideration of persistent offender from parole consideration after service of minimum sentence. State v. Finch (App. W.D. 1988) 746 S.W.2d 607. Pardon And Parole 54

5. Nolo contendere pleas

Defendant's three Florida felony convictions based on nolo contendere pleas could be considered in determining whether defendant was a Class X offender, even though such pleas were not recognized in Missouri. State v. Jennings (App. E.D. 1989) 778 S.W.2d 294. Sentencing And Punishment 98

5.5. Guilty plea

Defendant's plea of guilty to two counts of first degree murder was voluntary, despite failure of defendant's counsel to explain to defendant that his guilty plea meant he would "die in prison"; although defendant allegedly relied on the language of statute stating that the minimum prison term to be served on a life sentence was calculated to be 30 years as well as the representations made by other inmates that a life sentence meant 30 years in prison, trial court clearly and carefully apprised defendant that the results of his plea would be a sentence of life without probation or parole. Allen v. State (App. E.D. 2007) 233 S.W.3d 779. Criminal Law 273.1(4)

Application of statute requiring dangerous felons to serve at least 85% of sentence before becoming eligible for parole to defendant convicted of robbery and armed criminal conduct did not modify his minimum mandatory penalties and, thus, rule requiring trial court to ascertain that defendant understands any mandatory minimum and maximum penalties did not require court to advise defendant about statute's applicability before accepting his guilty plea. McClain v. Department of Corrections (App. W.D. 1999) 8 S.W.3d 210. Criminal Law 273.1(4)

Lack of advisement that defendant had to serve minimum prison term before becoming eligible for parole, prior to his pleading guilty to tampering as prior and persistent offender, did not render plea involuntary. Reynolds v. State (Sup. 1999) 994 S.W.2d 944, rehearing denied, certiorari denied 120 S.Ct. 944, 528 U.S. 1120, 145 L.Ed.2d 820. Criminal Law 273.1(4)

6. Prior convictions

Revocation of probation following a statutorily excluded "shock" or rehabilitation program counts as a prior commitment, for purposes of calculating minimum time served prior to parole or early release eligibility, only if commitment on the revocation occurred prior to the current commitment. Furey v. Missouri Dept. of Corrections (App. W.D. 2006) 2006 WL 1675332. Pardon And Parole 50

Amended parole eligibility statute stating that prior 120-day treatment adjudications were not to be considered "prior commitments" for purposes of calculating parole eligibility applied retroactively, prohibiting Missouri Department of Corrections from considering prisoner's prior 120-treatment as a prior commitment even though the treatment occurred before the amendments. Harrell v. Missouri Dept. of Corrections (App. W.D. 2006) 207 S.W.3d 690. Pardon And Parole 42.1

Confinement for tampering conviction constituted a "previous prison commitment," for purposes of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments, even though defendant was on house arrest for prior forgery convictions at time of conviction for tampering; although on house arrest for forgery convictions, state Department of Corrections received defendant anew after tampering conviction. Star v. Burgess (Sup. 2005) 160 S.W.3d 376, rehearing denied. Sentencing And Punishment 1286

Assault and forgery convictions resulted in a "previous prison commitment," for purposes of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments, where state Department of Corrections received defendant after sentencing. Star v. Burgess (Sup. 2005) 160 S.W.3d 376, rehearing denied. Sentencing And Punishment 1286

Application of statute that required service of 50 percent of prison term before parole eligibility based on prior prison record did not violate defendant's right of protection against ex post facto application of law, even though conviction and sentence that resulted in mandatory prison commitment occurred prior to effective date of challenged minimum-term provision of statute, since statute operated to enhance defendant's punishment for present offense rather than prior convictions. Davison v. Missouri Dept.

of Corrections (App. W.D. 2004) 141 S.W.3d 506. Constitutional Law 2823; Pardon And Parole 43

Defendant subject to application of repeat offender statute was not entitled to notice of prior convictions state intended to use nor chance to confront any evidence thereof; calculation of minimum prison term was done by Department of Corrections and did not implicate any liberty or property interest of defendant. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Sentencing And Punishment 1361; Sentencing And Punishment 1384

In applying repeat offender statute, state need not plead and prove prior offenses, and trial court need not make findings concerning prior offenses and determine eligibility for early release. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Sentencing And Punishment 1371; Sentencing And Punishment 1392

Trial court erred in sentencing defendant as Class X offender, as state failed to introduce sufficient evidence that crime occurred at different times and places beyond reasonable doubt, where evidence consisted merely of three guilty pleas, two of which were entered two days apart in same division. State v. Pickett (App. E.D. 1996) 926 S.W.2d 872. Sentencing And Punishment 1381(4)

For purposes of determining whether defendant has been convicted of three previous felonies committed at different times such that defendant qualifies as Class X offender, if inference is clear that previous crimes were committed at different times, state is not required to negative every possibility without some evidence by defendant that crimes were committed at same time. State v. Pickett (App. E.D. 1996) 926 S.W.2d 872. Sentencing And Punishment 1381(4)

Respective dates upon which defendant pleads guilty to or is found guilty of three prior felonies are not determinative in applying class X offender statute for enhancing sentence. State v. Franklin (App. W.D. 1993) 854 S.W.2d 438, rehearing and/or transfer denied. Sentencing And Punishment 1300

Convictions obtained without assistance of counsel cannot be used to enhance punishment. State v. Givens (App. E.D. 1993) 851 S.W.2d 754. Sentencing And Punishment 100

Sentencing court could use defendant's prior convictions to increase length of sentence imposed and to increase minimum term of imprisonment defendant would be required to serve on sentence, even though defendant did not receive assistance of counsel during

prior conviction proceedings; guilty plea transcript reflected voluntary, knowing, and intelligent waiver of counsel in one proceeding, and defendant admitted on cross-examination at sentencing hearing that he had waived counsel at other proceeding. State v. Givens (App. E.D. 1993) 851 S.W.2d 754. Sentencing And Punishment 100

Generally, invalid convictions may not be used to enhance punishment. McDaris v. State (Sup. 1992) 843 S.W.2d 369. Sentencing And Punishment 100

Remand was required for evidentiary hearing on issue of whether prior convictions used to classify defendant as "class X offender" were invalid due to lack of representation by attorney and whether prior postconviction court had so held. McDaris v. State (Sup. 1992) 843 S.W.2d 369. Criminal Law 1181.5(9)

Evidence presented by State was insufficient to show that two offenses, upon which defendant's status as class X offender for purposes of sentencing was based, were committed at different times; crimes were committed on same date and businesses burglarized were on same highway; inference that two crimes were committed at different times was not clear, and thus State did not meet its burden of proof beyond reasonable doubt. State v. Williams (App. E.D. 1990) 800 S.W.2d 118. Sentencing And Punishment 1381(4)

For purpose of determining whether defendant was properly sentenced under enhanced penalty provision, evidence introduced to prove that defendant was the person convicted in three prior felonies was substantial and proved prima facie that defendant committed those felonies, despite two-year variance of recorded birth dates on Texas certified and exemplified records; defendant's fingerprints and those of convicted person in each of the three prior felony cases were identical and defendant's picture was part of one set of records. State v. Williams (App. W.D. 1990) 797 S.W.2d 734, rehearing and/or transfer denied, denial of post-conviction relief affirmed 76 F.3d 383. Sentencing And Punishment 1381(6)

7. Class X offender

An information adding a count charging the defendant under the persistent offender statute is not an additional or different offense, under the rule allowing a new information to be filed prior to the verdict so long as it does not include an additional or different offense, and the defendant's rights are not prejudiced. State v. Dunmore (App. W.D. 2007) 227 S.W.3d 524. Sentencing And Punishment 1366

Trial court exceeded its jurisdiction in classifying defendant as class X offender with respect to forcible rape convictions, and thus, defendant was entitled to habeas relief, as

offense of forcible rape was unclassified felony and statutory provisions in effect at time of offense did not permit enhancement of unclassified felonies. Thomas v. Kemna (App. W.D. 2001) 55 S.W.3d 487. Habeas Corpus 509(1); Sentencing And Punishment 1236

Reference to defendant as "class X offender" had to be deleted from judgment, as term was deleted from statute before offense was committed. State v. Guyon (App. E.D. 1997) 954 S.W.2d 15. Sentencing And Punishment 1426

When defendant is properly charged and proven to be repeat (class X) offender and sentencing court makes findings to that effect, court's failure to repeat this at oral pronouncement of sentence should not negate effect of sentencing enhancement provisions; rather, appropriate remedy should, at most, be resentencing. State v. Maddix (App. W.D. 1996) 935 S.W.2d 666, rehearing and/or transfer denied. Criminal Law 1177.5(1); Criminal Law 1181.5(9)

Trial court could find defendant to be Class X offender under statute governing minimum prison terms and calculation of terms, even though such statute did not contain procedures for finding defendant to be Class X offender, provided that trial court followed procedures that afforded due process to defendant. State v. Hilton (App. S.D. 1996) 929 S.W.2d 280. Sentencing And Punishment 1355

Statute granting defendant benefit of lesser sentence whenever there is alteration of law creating the offense that lessens or reduces punishment prior to sentencing had no application to amendment to statute which merely classified defendants for sentencing purposes and was not offense creating statute, even though amendment eliminated class X offender sentencing treatment. State v. Beers (App. E.D. 1996) 926 S.W.2d 215. Sentencing And Punishment 1219

Statutory amendment eliminating class X offender classification was not applicable to offense committed before its effective date. State v. Beers (App. E.D. 1996) 926 S.W.2d 215. Sentencing And Punishment 1219

Defendant's nonaggravated sodomy conviction rendered defendant eligible for sentencing as class X offender; even though statutory crime of nonaggravated sodomy was unclassified felony carrying its own non-Code punishment, separate statute classified it as class A felony for purposes of applying statutory minimum prison term provisions. State v. Edwards (App. W.D. 1996) 918 S.W.2d 841, rehearing and/or transfer denied, post-conviction relief granted 1998 WL 87399, transferred to mo.s.ct., transferred to mo.s.ct. 983 S.W.2d 520, rehearing denied, grant of habeas corpus reversed 59 S.W.3d 515. Sentencing And Punishment 1236

Trial court correctly sentenced defendant as a Class X offender under statute in effect at time of burglary and robbery offenses requiring defendant to serve 80% of his 30-year sentences, rather than under recently enacted statute requiring defendant to serve 40% of his 30-year sentences. State v. Harris (App. E.D. 1995) 908 S.W.2d 912. Sentencing And Punishment 1217

Written sentence as Class X offender was improper as material change from orally pronounced sentence omitting Class X status, even though trial court found defendant to be Class X offender prior to any questioning of defendant or discussion of plea agreement. McCaine v. State (App. E.D. 1994) 891 S.W.2d 419, rehearing and/or transfer denied, transferred to mo.s.ct., retransferred to mo. ct. of appeals, opinion adopted and reinstated after retransfer. Sentencing And Punishment 1139

Defendant was not placed in double jeopardy when he was given an enhanced penalty range for second-degree robbery as a prior and persistent offender and then given a longer minimum term of imprisonment as a class X offender. State v. Tucker (App. E.D. 1993) 866 S.W.2d 932. Double Jeopardy 30

Counsel's advice to defendant to plead guilty was sound in view of fact that defendant received concurrent terms of ten years for first-degree burglary, three years for armed criminal action, and one year for stealing under $150, that in return for guilty plea, state chose not to prosecute defendant as prior offender or Class X offender, and that had defendant proceeded to trial, he could have received thirty years for first-degree burglary and life imprisonment for armed criminal action and court may have required defendant to serve 80% of his sentence before parole. Kelley v. State (App. E.D. 1993) 866 S.W.2d 879, rehearing and/or transfer denied. Criminal Law 1920

Defendant's admission under oath that he had pleaded guilty to two separate burglary charges supported inference that the burglaries were committed at different times and supported use of them to convict defendant as Class X offender. Morgan v. State (App. E.D. 1993) 865 S.W.2d 791, rehearing and/or transfer denied. Sentencing And Punishment 1381(3); Sentencing And Punishment 1381(4)

Double jeopardy clause is not violated by using same prior convictions to enhance sentence as prior and persistent offender and to subject defendant to minimum term of prison as Class X offender. Morgan v. State (App. E.D. 1993) 865 S.W.2d 791, rehearing and/or transfer denied. Double Jeopardy 30

No evidentiary hearing was required on defendant's motion for postconviction relief to reprove defendant's three prior convictions as record refuted his allegation that he should not have been sentenced as Class X offender, and defendant was not entitled to relief on his claim that counsel was ineffective in failing to object to Class X offender finding as sufficient proof supported finding and any objection would have been useless. Gilliehan v. State (App. E.D. 1993) 865 S.W.2d 752. Criminal Law 1655(6)

In determining whether defendant is "Class X offender," fact that two crimes were committed on same date does not mean that they could not have been committed at different times; "Class X offender" is one who has been convicted of three previous felonies committed at different times. Gilliehan v. State (App. E.D. 1993) 865 S.W.2d 752. Sentencing And Punishment 1308

Defendant was properly sentenced as Class X offender, despite his claim that two of his prior felony convictions must be counted as one since they were committed at same time, where his record established that he had been convicted of three previous felonies committed at different times; even though first conviction for receiving stolen property, color television, occurred on same day as second conviction for receiving stolen property, automobile engine, they were in fact committed at different times. Gilliehan v. State (App. E.D. 1993) 865 S.W.2d 752. Sentencing And Punishment 1308

Any error by trial court in "stacking" sentence enhancements when sentencing defendant convicted of attempted rape as both class X offender and persistent sexual offender, both enhancements being predicated on same prior offense, was harmless; defendant would serve 40 years of life sentence due to class X status and, thus, his minimum 30-year sentence as persistent sexual offender was mere surplusage. State v. Williams (App. E.D. 1993) 860 S.W.2d 364, rehearing and/or transfer denied. Criminal Law 1177.5(1)

Possession of cocaine is not a class A, B, or dangerous felony to which class X offender provision, requiring offender to serve 80% minimum prison term of his or her sentence, applies. State v. Simms (App. E.D. 1993) 859 S.W.2d 943. Sentencing And Punishment 1235

Defendant who was convicted of robbery could properly be classified as class X offender, even though third foundational felony used to classify defendant as class X offender occurred after date of robbery. State v. Franklin (App. W.D. 1993) 854 S.W.2d 438, rehearing and/or transfer denied. Sentencing And Punishment 1301

Denial of request for postconviction relief would be reversed, and cause would be remanded to sentencing court for hearing to determine whether movant was class X offender, where motion court had concluded that state proved and that movant admitted

three prior convictions, while record showed that state identified only two prior convictions in support of class X charge and that movant did not admit truth of allegations in amended petition. Carrothers v. State (App. E.D. 1992) 851 S.W.2d 1, transferred to mo.s.ct., rehearing denied, retransferred to mo. ct. of appeals, certiorari denied 114 S.Ct. 323, 510 U.S. 922, 126 L.Ed.2d 269. Criminal Law 1181.5(8)

Trial court properly determined that defendant was class X offender based on four circuit court files containing prior convictions of defendant, although files were never actually entered into evidence. State v. Hurst (App. E.D. 1993) 845 S.W.2d 669. Sentencing And Punishment 1381(5)

Fact that state did not allege in information that defendant had benefit of counsel for three prior felony convictions did not preclude sentencing of defendant as class X offender; state's exhibits indicated that defendant was represented by counsel for all three prior convictions, listing defendant's attorney by name for each conviction, and state pleaded the date, felony, court, and case number of the prior convictions. State v. McGreevey (App. W.D. 1992) 832 S.W.2d 929. Sentencing And Punishment 1367

Errors in spelling of defendant's name in exhibits relating to prior felony convictions did not preclude sentencing of defendant as class X offender. State v. McGreevey (App. W.D. 1992) 832 S.W.2d 929. Sentencing And Punishment 1381(6)

Trial counsel was not ineffective for failing to challenge the application of Class X offender status to charge of second-degree burglary, where Class X offender status applied to all statutorily defined “dangerous felonies” and burglary was included within this definition. State v. Scott (App. E.D. 1992) 829 S.W.2d 120. Criminal Law 641.13(2.1)

Defendant was not prejudiced by being sentenced as class X offender on all three counts, even though he was only charged as class X offender on one count, where information did charge that defendant had been convicted of three prior felonies, thus putting defendant on notice that he could be charged as class X offender, and defendant did not show he would have done anything different if he had been charged as class X offender on all three counts; cause would be remanded for limited purpose of amending information and making appropriate finding. State v. Hutton (App. E.D. 1992) 825 S.W.2d 883, rehearing and/or transfer denied. Criminal Law 1177.5(1); Criminal Law 1181.5(9)

Trial court did not lack statutory authority to sentence defendant to minimum term of 80% of his sentence for armed criminal action, even though at time of offense armed criminal action had not been classified for purpose of applying statute requiring minimum

prison term for class X offender; court had authority to sentence defendant to minimum term prior to enactment of statute requiring it. State v. Hutton (App. E.D. 1992) 825 S.W.2d 883, rehearing and/or transfer denied. Sentencing And Punishment 1424

Defendant who pled guilty to charge of second-degree burglary could be sentenced as Class X offender (one previously guilty of three felonies), although second-degree burglary was labeled as a Class C felony; statutory definition of "dangerous felonies" included burglary. McPherson v. State (App. E.D. 1991) 818 S.W.2d 708, rehearing and/or transfer denied. Sentencing And Punishment 1238

A criminal defendant can be classified as a "class-X offender" upon his conviction of three felonies committed at different times and upon serving a total of 120 days of imprisonment. State v. Gilmore (App. W.D. 1990) 797 S.W.2d 802. Sentencing And Punishment 1251; Sentencing And Punishment 1306

Defendant was properly classified as "class X" offender for sentencing purposes, where evidence established that defendant had three prior felony convictions, and that defendant spent more than 120 days in penal institution of another state equivalent to department of corrections and human resources for at least one felony conviction. State v. Williams (App. W.D. 1990) 797 S.W.2d 734, rehearing and/or transfer denied, denial of post-conviction relief affirmed 76 F.3d 383. Sentencing And Punishment 1272; Sentencing And Punishment 1306

Provisions of this section do not require that convicted person must have been incarcerated at least 120 days for each of three prior felony convictions in order to classify that person as "class X" offender; instead, statutory provisions read together state that person who previously pleaded guilty or who was found guilty of three felonies committed at different times and who served time of imprisonment of not less than 120 days in a qualifying penal institute qualifies as "class X" offender. State v. Williams (App. W.D. 1990) 797 S.W.2d 734, rehearing and/or transfer denied, denial of post-conviction relief affirmed 76 F.3d 383. Sentencing And Punishment 1251

No manifest injustice or miscarriage of justice resulted from sentencing defendant as class X offender, even though information did not specifically charge him as class X offender, where information charged him as "prior and persistent offender" and information listed his eight prior felony convictions, committed at six different times; information pleaded all of essential facts warranting finding that defendant was class X offender and sole deficiency was state's use of term "prior and persistent offender" without reference to "class X offender." State v. Tivis (App. W.D. 1997) 948 S.W.2d 690, rehearing and/or transfer denied. Criminal Law 1042.5

Sentencing court's failure to state that defendant was being sentenced as prior, persistent and Class X offender at time of formal pronouncement of sentence did not preclude sentencing as prior, persistent and Class X offender; sentencing court was not obligated to repeat at sentencing a previous finding or to mention those findings during sentencing hearing. State v. Jordan (App. W.D. 1997) 947 S.W.2d 95. Sentencing And Punishment 1392

Failure of circuit court in orally pronouncing sentence to designate defendant as a prior, persistent, and Class X offender did not invalidate sentence, where state had charged defendant as a prior, persistent, and Class X offender and circuit court found in its written order that defendant was such an offender. State v. Young (App. W.D. 1997) 943 S.W.2d 794, rehearing and/or transfer denied. Sentencing And Punishment 1396

Written sentence that sentenced defendant as class X offender was required by law and was not materially different from oral sentence, which did not mention defendant's class X offender status, and thus, defendant was not entitled to relief from class X offender status, even assuming that oral sentence would ordinarily be controlling. State v. Parker (App. E.D. 1997) 941 S.W.2d 759. Sentencing And Punishment 1395

8. Foreign convictions

Defendant's return to prison following a probation violation, after completing 120-day callback program, was a commitment for purposes of calculating defendant's minimum sentence, and thus defendant had two previous commitments when he was convicted of stealing and first-degree tampering, and three previous commitments when he was subsequently convicted of forgery, and was required to serve at least 50% of his sentence for the stealing and first-degree tampering convictions, and at least 80% of his sentence for forgery. Canale v. Department of Corrections, State of Missouri (App. W.D. 2006) 194 S.W.3d 364. Sentencing And Punishment 1338

Prior Florida conviction could be used for purposes of sentence enhancement, notwithstanding that it was based on plea of nolo contendere which is not recognized in Missouri prior offender provisions. State v. Vizcaino-Roque (App. W.D. 1990) 800 S.W.2d 22, rehearing and/or transfer denied. Sentencing And Punishment 1292

9. Prior offender

Record established that habeas petitioner was properly sentenced as prior offender, despite any absence of findings showing that he had served 120 days in jail, as record established that defendant was not sentenced as prior offender under Missouri statute imposing 120-day requirement but, rather, petitioner was sentenced as prior offender under statute which only required finding that defendant had been found guilty or pleaded

guilty to felony; petitioner had pleaded guilty to prior felony. Wheadon v. Higgins, E.D.Mo.1993, 835 F.Supp. 1107, affirmed 51 F.3d 278. Habeas Corpus 725

The Missouri Department of Corrections was not aggrieved by trial court's declaratory ruling that the Department could not consider prisoner's prior 120-day treatment adjudication as a "prior commitment" for purposes of calculating when prisoner would be eligible for parole, and therefore, the Department was precluded from bringing an appeal; the trial court specifically reserved for the Department the power to determine when prisoner would be eligible for parole. Harrell v. Missouri Dept. of Corrections (App. W.D. 2006) 207 S.W.3d 690. Declaratory Judgment 392.1

Statutory provision stating that an offender's first commitment to a long-term drug treatment program should not count as a prior incarceration for purposes of calculating the minimum portion of a subsequent sentence to be served in prison did not apply only to commitments occurring after statute was amended to add the provision; provision contained no language making its application conditional on the timing of the commitment to drug treatment. Bantle v. Dwyer (App. S.D. 2006) 195 S.W.3d 428, rehearing and/or transfer denied. Sentencing And Punishment 1287

Statutory provision stating that an offender's first commitment to a long-term drug treatment program should not count as a prior incarceration for purposes of calculating the minimum portion of a subsequent sentence to be served in prison did not require that the placement in drug treatment program also be the offender's first incarceration in the Department of Corrections (DOC); clear and unambiguous language of provision stated that it applied to an offender's first incarceration "pursuant to this section," and provision made no mention of prior incarcerations under other sections. Bantle v. Dwyer (App. S.D. 2006) 195 S.W.3d 428, rehearing and/or transfer denied. Sentencing And Punishment 1287

Confinement for tampering conviction constituted a "previous prison commitment," for purposes of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments, even though defendant was on house arrest for prior forgery convictions at time of conviction for tampering; although on house arrest for forgery convictions, state Department of Corrections received defendant anew after tampering conviction. Star v. Burgess (Sup. 2005) 160 S.W.3d 376, rehearing denied. Sentencing And Punishment 1286

Assault and forgery convictions resulted in a "previous prison commitment," for purposes of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments, where state Department of Corrections received defendant after sentencing. Star v. Burgess (Sup. 2005) 160 S.W.3d 376, rehearing denied. Sentencing And Punishment 1286

Nunc pro tunc order was necessary to remove reference to statute in judgment that found defendant to be "prior offender" pursuant to provisions of that statute, where statute stated that its provisions were not applicable to felonies set forth in chapter containing offenses of which defendant was convicted, and statute no longer employed term "prior offender." State v. Rollie (App. W.D. 1998) 962 S.W.2d 412. Criminal Law 1181.5(1)

Counsel's advice to defendant to plead guilty was sound in view of fact that defendant received concurrent terms of ten years for first-degree burglary, three years for armed criminal action, and one year for stealing under $150, that in return for guilty plea, state chose not to prosecute defendant as prior offender or Class X offender, and that had defendant proceeded to trial, he could have received thirty years for first-degree burglary and life imprisonment for armed criminal action and court may have required defendant to serve 80% of his sentence before parole. Kelley v. State (App. E.D. 1993) 866 S.W.2d 879, rehearing and/or transfer denied. Criminal Law 1920

In sentencing defendant as prior offender, court was required to use same prior offender statutes as those under which state charged defendant. State v. King (App. W.D. 1993) 865 S.W.2d 845. Sentencing And Punishment 1400

Trial court committed plain error in sentencing defendant as prior offender subject to minimum prison term of 60% in prosecution for possession of controlled substance, despite enhancement of conviction under statute governing extended terms for recidivism; enhancement did not change underlying conviction, which remained class C felony. State v. Mason (App. E.D. 1993) 862 S.W.2d 519. Criminal Law 1042.5; Sentencing And Punishment 1235

Defendant could be sentenced as prior offender to reflect single prior drug offense but not as persistent offender, absent any evidence that defendant had been convicted of two felonies at different times. State v. Ivy (App. E.D. 1993) 851 S.W.2d 71. Sentencing And Punishment 1306

With regard to trial court's improper reference in judgment to defendant as prior offender in case in which defendant was not charged as prior offender and there was no prior finding of prior offender status, proper remedy was not to remand case to permit prosecution to amend information and conduct hearing on prior offender status; rather, proper remedy was to strike "prior offender" reference from judgment. State v. Elliott (App. S.D. 1993) 845 S.W.2d 115. Criminal Law 1181.5(9)

"Prior offender," for purposes of statute stating that conviction over 25 years old cannot be used to classify defendant as prior offender, did not include "persistent offender" or "class X offender"; terms "prior offender," "persistent offender," and "class X offender" were terms of art and had only meaning given them by statute; overruling *State v. Lucas*, 809 S.W.2d 54. McDaris v. State (Sup. 1992) 843 S.W.2d 369. Sentencing And Punishment 1213

Prima facie case of prior offender status, for purposes of criminal sentence enhancement statutes, is made by identifying the name of the person charged in the record of the prior conviction. State v. Scott (App. E.D. 1992) 829 S.W.2d 120. Sentencing And Punishment 1381(6)

Conviction that was more than 25 years old could not be used in classifying defendant as prior offender, but could be used in sentencing defendant as persistent offender. State v. Lucas (App. E.D. 1991) 809 S.W.2d 54, rehearing and/or transfer denied. Sentencing And Punishment 99; Sentencing And Punishment 1297

10. Persistent offender

Trial judge had no discretion to determine whether defendant should serve his sentence as a persistent offender; statutory language is clear and it is mandatory and, once defendant is found to be a persistent offender, enhancement provision is automatic. Johnson v. State (Sup. 1997) 938 S.W.2d 264. Sentencing And Punishment 1207; Sentencing And Punishment 1213

Sentencing of defendant as persistent offender to 300 years' imprisonment on each count of three counts of forcible rape exceeded statutory range of punishment; maximum sentence defendant could receive on each count of unclassified forcible rape was life imprisonment, which equals 50 years. State v. Davis (App. W.D. 1993) 867 S.W.2d 539, rehearing and/or transfer denied. Rape 64

Defendant's point that trial court erred in finding him a persistent offender was moot, where defendant was not adjudged a persistent offender under statute requiring persistent offender to serve specified minimum prison term. State v. LaRue (App. S.D. 1991) 811 S.W.2d 40. Criminal Law 1134.26

11. Remote convictions

Sentencing court could use two convictions, both of which were more than 25 years old, for purposes of prior and persistent offender enhancement of minimum prison term defendant would be required to serve as part of total sentence; limitation period for

convictions to be used applied only to offenders who had committed only one prior offense. State v. Givens (App. E.D. 1993) 851 S.W.2d 754. Sentencing And Punishment 1297

Determination that defendant was a prior offender could not be based on felony conviction that was more than 25 years old. State v. Askew (App. E.D. 1991) 822 S.W.2d 497, rehearing and/or transfer denied. Sentencing And Punishment 1297

Defendant was properly found to be prior and persistent offender based on prior convictions 34 and 39 years old, even though statute precludes finding of prior offender status based on convictions more than 25 years old; 25-year-limitation did not apply to finding of persistent offender, and legislature could provide for lesser minimum term of imprisonment for defendant who committed one crime more than 25 years ago than for defendant who committed two or more felonies at different times, no matter how ancient they may be. State v. Miller (App. E.D. 1991) 821 S.W.2d 553, denial of post-conviction relief affirmed 856 S.W.2d 76. Sentencing And Punishment 1297

12. Class A and B felonies

Parole ineligibility provisions of statute governing sentencing of Class X offenders did not apply to defendant's conviction of involuntary manslaughter, where involuntary manslaughter was neither a Class A or B felony nor "dangerous felony" as statutorily defined. Harry v. Kemna (App. W.D. 2002) 81 S.W.3d 635, rehearing and/or transfer denied. Pardon And Parole 44

Statute authorizing reclassification of offenses "outside this code" did not authorize reclassification of offense of possession of concealable firearm defined as class C felony, and, thus, defendant was not subject to minimum prison term. State v. Wolf (App. E.D. 1996) 930 S.W.2d 484. Criminal Law 28

Tampering in the first degree was a class C felony not categorized as "dangerous," and defendant convicted of that offense could not be sentenced as prior offender. State v. Seals (App. E.D. 1996) 930 S.W.2d 73. Sentencing And Punishment 1238

Statute providing minimum prison term for certain repeat offenders was inapplicable to offense of stealing over $150, as that offense is not class A, class B, or dangerous felony. Hubbard v. State (App. W.D. 1994) 875 S.W.2d 221. Sentencing And Punishment 1238

Repeat offender statute does not apply to Class C felonies, but only to Class A and B felonies. State v. Williams (App. W.D. 1992) 844 S.W.2d 562. Sentencing And Punishment 1234

Although postconviction motion court should have corrected error, Court of Appeals would correct judgment and sentence setting minimum incarceration periods for felonies excluded from application of statute imposing such minimum periods; remand for resentencing was not required. Hight v. State (App. S.D. 1992) 841 S.W.2d 278. Criminal Law 1181.5(8); Criminal Law 1184(4.1)

Defendant who had been convicted of possession of controlled substance and unlawful use of weapon, which were class C and D felonies and were not dangerous crimes, was improperly sentenced as class X offender, as such status was applicable only if defendant had committed class A or B felonies or dangerous felonies. State v. Flenoid (App. E.D. 1992) 838 S.W.2d 462. Sentencing And Punishment 1235; Sentencing And Punishment 1237

Habitual offender statute providing for minimum prison terms does not apply to defendant who is convicted of class C felony of possession of controlled substance and who receives class B felony sentence as prior and persistent drug offender; statute applies only to defendants convicted of class A or B felonies. State v. Richardson (App. E.D. 1992) 838 S.W.2d 122, rehearing and/or transfer denied. Sentencing And Punishment 1235

Defendant's 1954 Mann Act conviction could not be considered in determining whether defendant was a prior offender, since conviction was not for specified classes A or B felony or for a dangerous felony as defined by statute. State v. Askew (App. E.D. 1991) 822 S.W.2d 497, rehearing and/or transfer denied. Sentencing And Punishment 1276

Unclassified felony offense of sodomy committed by having deviate sexual intercourse with person less than 14 years old to whom defendant is not married carries punishment of up to life imprisonment, and thus, by operation of statute, is class A felony for purposes of prior and persistent offender sentence enhancement. State v. Greenlee (App. E.D. 1997) 943 S.W.2d 316. Sentencing And Punishment 1236; Sentencing And Punishment 1254

Defendant who was convicted of felony of stealing was not subject to enhancement statute requiring defendant with three or more prior felony convictions to serve at least 80 percent of sentence, as enhancement statute applies only to Class A and B felonies, dangerous felonies, and felonies enhanced by operation of law, and defendant's

conviction was for crime defined by criminal code and was not subject to enhancement. State v. Fenton (App. W.D. 1997) 941 S.W.2d 810. Sentencing And Punishment 1238

13. Dangerous felonies

Parole ineligibility provisions of statute governing sentencing of Class X offenders applied to defendant's conviction of armed criminal action, where armed criminal action was a "dangerous felony" within scope of Class X offender sentencing statute. Harry v. Kemna (App. W.D. 2002) 81 S.W.3d 635, rehearing and/or transfer denied. Pardon And Parole 44

Alteration in definition of "dangerous felony" to exclude any degree of burglary was not "alteration of the law creating the offense" of second-degree burglary, within meaning of statute providing that penalty or punishment shall be assessed according to amendatory law if penalty or punishment is reduced or lessened by any alteration of law creating offense prior to original sentencing; thus, defendant was not entitled to use of amended definition of "dangerous felony" which occurred after he committed underlying offense, for purpose of determining whether he was subject to sentencing enhancement. State v. Tivis (App. W.D. 1996) 933 S.W.2d 843, rehearing and/or transfer denied. Burglary 49

Application of 1988 amendment to Class X offender statute, pursuant to which defendant's offense would be considered dangerous felony and he would not be eligible for parole until he had served 80% of his sentence, would result in ex post facto violation; occurred after defendant's commission of crime, and parole eligibility was part of punishment. Collins v. State (App. W.D. 1994) 887 S.W.2d 442. Constitutional Law 2823; Sentencing And Punishment 16

Persistent offender sentencing statute did not apply to defendant's conviction for stealing property with value of at least $150 which is Class C felony; statute only applied to Class A and B felonies and dangerous felonies. State v. Rice (App. W.D. 1994) 887 S.W.2d 425, rehearing and/or transfer denied. Sentencing And Punishment 1238

Trial court properly sentenced defendant as a class X offender based on conviction for burglary, a "dangerous felony." Risalvato v. State (App. W.D. 1993) 856 S.W.2d 370. Sentencing And Punishment 1238

Application of class X designation to second-degree burglary sentence was not error, notwithstanding defendant's contention that second-degree burglary is not a "dangerous felony" for purposes of class X designation; legislature intended to include all burglaries within definition of "dangerous felony." Johnson v. State (App. E.D. 1993) 854 S.W.2d 539, rehearing and/or transfer denied. Burglary 49

It was error to apply class X designation sentence for felony stealing, since offence is class C felony not included in definition of dangerous felonies. Johnson v. State (App. E.D. 1993) 854 S.W.2d 539, rehearing and/or transfer denied. Larceny 88

Amendment to statutory definition of "dangerous felony" did not affect statute defining offense of second-degree burglary and, thus, defendant was not entitled to benefit of alteration at sentencing, despite his claim that amendment to definitional section made stricter minimum sentence provisions inapplicable. State v. Tivis (App. W.D. 1997) 948 S.W.2d 690, rehearing and/or transfer denied. Sentencing And Punishment 1219

Statutory amendment removing burglary from definition of "dangerous felony" did not reduce that portion of sentence that defendant needed to serve to be eligible for parole where substantive provisions for sentencing of repeat offenders did not change, even though legislature no longer used term "class X offender." State v. Tivis (App. W.D. 1997) 948 S.W.2d 690, rehearing and/or transfer denied. Pardon And Parole 50

Offense of sodomy committed by having deviate sexual intercourse with person less than 14 years old to whom defendant is not married is not "dangerous felony," within meaning of statute providing minimum prison terms for prior and persistent offenders in dangerous felony cases; that offense is unclassified. State v. Greenlee (App. E.D. 1997) 943 S.W.2d 316. Sentencing And Punishment 1236

14. Correctional institution offenses

Remand was unnecessary to correct erroneous sentencing of inmate as prior and persistent offender convicted of possession of weapon at correctional facility; Court of Appeals had ability to correct sentencing errors. State v. Baker (App. E.D. 1993) 850 S.W.2d 944. Criminal Law 1184(4.1); Criminal Law 1181.5(9)

14.5. Sufficiency of denial

Board of Probation and Parole's statement that circumstances of inmate's offense, including loss of three lives, warranted denial of parole was stated with sufficient specificity to satisfy statutory requirement that Board state why severity of offense and sentence required deferral of parole. Epperson v. Missouri Bd. of Probation and Parole (App. W.D. 2002) 81 S.W.3d 540, rehearing and/or transfer denied. Pardon And Parole 61

15. Prison time served

Inmate's probation revocation and resulting incarceration did not count as a "prior commitment" for purposes of calculating minimum time served prior to parole or early release eligibility on instant conviction, where, although defendant's incarceration as result of revocation was a "commitment," it was not a "prior" commitment, but was instead simultaneous with his commitment on new charges. Furey v. Missouri Dept. of Corrections (App. W.D. 2006) 2006 WL 1675332. Pardon And Parole 50

Defendant's release on parole rendered moot challenge by Department of Corrections that it consider defendant eligible for parole prior to defendant serving 40% of sentence. Underwood v. Director of Missouri Dept. of Corrections (App. W.D. 2007) 215 S.W.3d 326. Criminal Law 1131(4)

Defendant had three or more previous prison commitments for felonies unrelated to present driving while intoxicated (DWI) offense, thus requiring him to serve 80 percent of sentences prior to parole eligibility; defendant's receipt by Missouri Department of Corrections (MDOC) represented commitment for probation revocation and commitment for initial new offense of DWI, defendant's subsequent commission of new offense of DWI was the third previous commitment, and none of the prior commitments were related to present offense of DWI. Gilles v. Missouri Dept. of Corrections (App. W.D. 2006) 200 S.W.3d 50, rehearing and/or transfer denied. Pardon And Parole 50

Defendant's initial incarceration for a 120-day callback program could not be considered a "previous prison commitment" for purpose of statute requiring offender to serve at least 80 percent of sentence if offender has three or more previous prison commitments; section of statute governing probation clearly indicated that it was only offender's first incarceration that could not be considered a previous prison commitment for purpose of determining minimum prison term. Gilles v. Missouri Dept. of Corrections (App. W.D. 2006) 200 S.W.3d 50, rehearing and/or transfer denied. Pardon And Parole 50

Fact that defendant was already in prison on first case, due to the revocation of his probation, when he was sentenced in second case did not preclude the Department of Correction (DOC) from counting his commitment in the second case as a previous prison commitment, in determining minimum prison term to be served upon yet another, subsequent conviction. Ridinger v. Missouri Bd. of Probation and Parole (App. W.D. 2005) 2005 WL 2977802, opinion superseded on rehearing 189 S.W.3d 658. Sentencing And Punishment 1286

Though defendant's first-time incarceration in 120-day callback, or "shock incarceration," program could not be considered a previous prison commitment for purposes of determining minimum prison term to be served for subsequent offense, his returns to prison, first when his probation was revoked, and then again later when his parole was revoked, both with respect to the sentence imposed on the prior offense, were each

“previous prison commitments” that could be considered. Ridinger v. Missouri Bd. of Probation and Parole (App. W.D. 2005) 2005 WL 2977802, opinion superseded on rehearing 189 S.W.3d 658. Sentencing And Punishment 1287

Inmate had two, rather than three, qualifying previous prison commitments before his most recent commitment, and thus, inmate was required to serve 50 percent of his current sentence before becoming eligible for parole; amendments to statutory sections governing probation and governing long-term program for treatment applied retroactively, and under amendments, time inmate spent in custody of Department of Corrections (DOC) under 120-day callback program and time he spent under long-term drug treatment program could not be counted as previous prison commitments. Ridinger v. Missouri Bd. of Probation and Parole (App. W.D. 2006) 189 S.W.3d 658. Pardon And Parole 53

Counsel's failure to inform defendant pleading guilty to second-degree murder that he was required under statute to serve 85 percent of sentence before being eligible for parole did not amount to ineffective assistance of counsel; defendant understood that he could receive a sentence of 10 years to a maximum of 30 years or life imprisonment. Rollins v. State (App. W.D. 1998) 974 S.W.2d 593, rehearing and/or transfer denied. Criminal Law 1920

Oral pronouncement of sentence at guilty plea hearing could be orally amended before it was reduced to writing by expressly informing defendant that she would have to serve 80 percent of her sentence pursuant to statutory minimum term provision. Jones v. State (App. E.D. 1996) 926 S.W.2d 184, rehearing and/or transfer denied. Sentencing And Punishment 2302

Defendant did not serve 120 days in penal institution of another state equivalent to Missouri Department of Corrections, as required to sentence defendant as prior and persistent offender, where evidence showed only that defendant had pled guilty to two prior felonies for which he served time in Illinois county jails. State v. Ellsworth (App. E.D. 1995) 908 S.W.2d 375, denial of post-conviction relief affirmed 964 S.W.2d 455. Sentencing And Punishment 1272

For defendant to be found to be prior and persistent offender for purposes of enhanced sentencing, defendant must have: plead guilty to felony, and served time of imprisonment of not less than 120 days in Missouri Department of Corrections or in penal institution in another state which was equivalent to Missouri Department of Corrections. State v. Ellsworth (App. E.D. 1995) 908 S.W.2d 375, denial of post-conviction relief affirmed 964 S.W.2d 455. Sentencing And Punishment 1251; Sentencing And Punishment 1272

To correct trial court error in sentencing defendant as prior and persistent defender, Court of Appeals would modify judgment by removing finding that defendant was prior and persistent defender with regard to his sentence for first-degree robbery, rather than remand for resentencing, where finding by trial court affected only mandatory minimum time to be served and not sentence imposed. State v. Ellsworth (App. E.D. 1995) 908 S.W.2d 375, denial of post-conviction relief affirmed 964 S.W.2d 455. Criminal Law 1184(4.1)

To be adjudged a prior minimum term offender, defendant must have pled or been found guilty of a felony and have served 120 days incarceration. State v. Harper (App. W.D. 1993) 855 S.W.2d 474. Sentencing And Punishment 1254; Sentencing And Punishment 1251

Finding by postconviction court that defense counsel informed defendant, in connection with advising on plea bargain, that defendant would be required to serve 85% of his sentence if he were found guilty of second-degree murder, and that counsel thus did not provide ineffective assistance, was supported by testimony of counsel and investigator that defendant had been so informed. State v. Broseman (App. W.D. 1997) 947 S.W.2d 520. Criminal Law 1618(10)

15.5. Prior prison commitment

Inmate's 120-day incarceration, after violating the terms of his probation, constituted a prior prison commitment, for the purpose of determining the statutory minimum prison term inmate was required to serve before becoming eligible for parole; statute, which provided that an offender's first incarceration of 120-days for participation in a Department of Corrections program prior to release on parole was not considered a previous prison commitment, did not apply since defendant was sentenced to serve 120-days after violating the terms of his probation. Coldiron v. Missouri Dept. of Corrections (App. W.D. 2007) 220 S.W.3d 371, rehearing and/or transfer denied. Pardon And Parole 50

Inmate's 120-day incarceration under prison callback program did not constitute a prior prison commitment, for the purpose of determining the statutory minimum prison term inmate was required to serve before becoming eligible for parole; statute provided that an offender's first incarceration of 120-days for participation in a Department of Corrections program prior to release on parole was not considered a previous prison commitment. Coldiron v. Missouri Dept. of Corrections (App. W.D. 2007) 220 S.W.3d 371, rehearing and/or transfer denied. Pardon And Parole 50

16. Sentencing

Defendant's two prison sentences constituted two separate commitments for purposes of habitual offender statute, even though sentences were imposed at the same time and made to run concurrently, where offenses on which sentences were based occurred seventeen months apart, and were unrelated to each other. Wilson v. Kempker (App. W.D. 2006) 2006 WL 1525884, rehearing and/or transfer denied, transferred to mo.s.ct. Sentencing And Punishment 1309

Statutory provision stating that an offender's first commitment to a long-term drug treatment program should not count as a prior incarceration for purposes of calculating the minimum portion of a subsequent sentence to be served in prison applied retroactively to inmate who was sentenced before statute was amended to add the provision; provision was new, provision neither repealed nor amended a previously existing statute, provision did not affect an offender's parole eligibility or lengthen or shorten the offender's sentence, and provision did not disadvantage the offender, so as to violate the prohibition on ex post facto laws. Bantle v. Dwyer (App. S.D. 2006) 195 S.W.3d 428, rehearing and/or transfer denied. Sentencing And Punishment 1219

Statute prohibiting use of a defendant's previous probationary 120-day commitment to department of corrections program as means to imposing greater mandatory minimum prison terms for subsequent offenses applied retroactively to defendant's benefit, as statute was a purely procedural law that merely clarified the procedure by which minimum prison terms were to be determined under sentencing guidelines. Nieuwendaal v. Missouri Dept. of Corrections (App. W.D. 2005) 181 S.W.3d 153, rehearing and/or transfer denied. Sentencing And Punishment 664(5)

Assault defendant was not entitled, under statute requiring that jury be instructed as to range of punishment authorized by statute for charged offense, to inform jury of "eighty-five percent rule," under which persons convicted of certain enumerated dangerous felonies, including first-degree assault, must serve 85 percent of their sentence before being eligible for parole. State v. Campbell (App. W.D. 2000) 26 S.W.3d 249, rehearing and/or transfer denied, denial of post-conviction relief affirmed 65 S.W.3d 571. Assault And Battery 96(7)

Once trial court finds facts beyond reasonable doubt showing that defendant has been found guilty of two prior felonies, it has no discretion but to find defendant to be persistent offender; imposition of enhancement provision becomes automatic, and trial court is not obligated to repeat at sentencing previous finding or even mention those findings during sentencing hearing. State v. Jordan (App. W.D. 1997) 947 S.W.2d 95. Sentencing And Punishment 1207

Sentencing as Class X offender does not require three prior convictions for Class A or B felonies or dangerous felonies committed at different times, but, rather, convictions for

three prior felonies committed at different times along with current conviction for Class A or B felony or dangerous felony. State v. Young (App. W.D. 1997) 943 S.W.2d 794, rehearing and/or transfer denied. Sentencing And Punishment 1254

After failing to mention defendant's status as prior and persistent offender at sentencing hearing following defendant's guilty plea, trial court acted properly when on that same day it vacated defendant's sentence and resentenced him after making specific findings that defendant was indeed a prior and persistent offender. Johnson v. State (App. W.D. 1997) 941 S.W.2d 827. Criminal Law 1556

Because trial court retains jurisdiction to modify sentence until court enters its written judgment, defendant may be called back for resentencing. Johnson v. State (App. W.D. 1997) 941 S.W.2d 827. Sentencing And Punishment 2279

17. Remands

Board of Probation and Parole was not precluded from counting as a remand defendant's prior conviction for stealing that occurred while defendant was incarcerated, and thus, defendant was required to serve 80 percent of his sentence; although defendant alleged that his prior conviction for stealing should not be counted as a remand since he never left custody of the Department of Corrections to be "re-committed," sentence for stealing was a new sentence, and thus a new commitment to the Department. Carroll v. Missouri Bd. Of Probation and Parole (App. W.D. 2003) 113 S.W.3d 654, rehearing and/or transfer denied. Pardon And Parole 50

Board of Probation and Parole was not precluded from counting as a remand defendant's prior conviction for stealing that occurred while defendant was incarcerated, and thus, defendant was required to serve 80 percent of his sentence; although defendant alleged that his prior conviction for stealing should not be counted as a remand since he never left custody of the Department of Corrections to be "re-committed," sentence for stealing was a new sentence, and thus a new commitment to the Department. Carroll v. Missouri Bd. Of Probation and Parole (App. W.D. 2003) 113 S.W.3d 654, rehearing and/or transfer denied. Pardon And Parole 50

Each new commitment after an initial commitment to the Department of Corrections (DOC) is a "remand," for the purpose of the recidivist sentencing statute. Irvin v. Missouri Bd. of Probation and Parole (App. W.D. 2000) 34 S.W.3d 202, transfer denied. Sentencing And Punishment 1302

Defendant had three or more previous "remands" to Department of Corrections, as factor in determining eligibility for early release under minimum prison term statute, though

defendant had received previous sentences while on probation. Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Prisons 245(3)

Each new commitment after initial commitment to Department of Corrections is a "remand" for purposes of minimum prison term statute, which varies defendant's eligibility for early release according to number of defendant's previous remands to Department. Boersig v. Missouri Dept. of Corrections (Sup. 1997) 959 S.W.2d 454. Prisons 245(3)

18. Counsel

Defendant did not establish ineffective assistance of counsel on ground of failure to advise him of statutory minimum sentences based on repeat offenses, where court, before guilty plea, advised defendant of range of punishment for charges, defendant was informed that sentences could run consecutively, and defendant at time of plea stated he had no complaints about effectiveness of his trial counsel. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Criminal Law 1920

Defendant who pled guilty without knowledge of how repeat offender statute would affect his sentence was not entitled to evidentiary hearing on postconviction motion alleging that trial court and counsel had duty to inform him of effect of statute; defendant did not allege that he would not have pleaded guilty had he been so informed, court before guilty plea advised defendant of range of punishment for charges, and defendant entered knowing, intelligent and voluntary plea. Huth v. State (App. E.D. 1998) 976 S.W.2d 514, rehearing and/or transfer denied. Criminal Law 1655(3)

Defense counsel was not ineffective in failing to inform defendant that, as a prior offender, he would have to serve 40 percent of any prison sentence imposed in prosecution for stealing, where defendant claimed that if he had known, he would have accepted state's plea bargain in exchange for more favorable sentence; even if counsel had been deficient, speculation that the trial court would have accepted potential plea agreement in light of defendant's previous felony did not establish prejudice. Tilton v. State (App. S.D. 1998) 971 S.W.2d 913. Criminal Law 1920

19. Review

Court of Appeals declined to review prisoner's claim that bill enacting parole statute violated State Constitution, where prisoner did not question statute's constitutionality at the earliest opportunity. McClain v. Department of Corrections (App. W.D. 1999) 8 S.W.3d 210. Appeal And Error 179(4)

Because persistent offender statute by its terms did not permit sentencing as persistent offender for stealing, receiving stolen property, or possession of concealable firearm, remand was required for limited purpose of allowing trial court to enter order nunc pro tunc to remove references to persistent offender statute from court's written judgment on jury verdict with respect to those offenses. State v. Harris (App. W.D. 1996) 939 S.W.2d 915. Criminal Law 1181.5(9)

Failure to present issue to trial court foreclosed defendant from presenting to appellate court issue whether statute defining "dangerous felony" to exclude burglary from consideration for sentencing as class X offender applied to offense prior to effective date of statute. State v. Williams (App. W.D. 1996) 936 S.W.2d 828. Criminal Law 1042.5

Error in sentencing defendant as prior offender where state failed to prove that defendant's release from custody on prior conviction used for enhancement of sentence was within 25 years of offense required sentence to be vacated and cause remanded. State v. Knight (App. S.D. 1996) 920 S.W.2d 612. Criminal Law 1181.5(9)

Proper procedure when there is error associated with charge, proof or findings regarding sentencing for repeat offenders is remand for purpose of permitting State to prove allegations in information, or to amend information and submit proof supporting repeat-offender status and, if proof on this issue fails, then new trial is required. State v. Knight (App. S.D. 1996) 920 S.W.2d 612. Criminal Law 1181.5(9)

Because trial court's erroneous finding that defendant was class X offender affected only mandatory minimum penalty to be served and not sentence imposed, Court of Appeals could modify judgment by removing finding that defendant was class X offender with regard to his conviction and sentence for possession of cocaine. State v. Simms (App. E.D. 1993) 859 S.W.2d 943. Criminal Law 1184(4.1)

Nunc pro tunc correction was permissible as to error in written judgment stating statutes under which defendant was prior and persistent drug offender. State v. Anthony (App. W.D. 1993) 857 S.W.2d 861. Criminal Law 996(1)

Constitutional challenge to sentencing as prior and persistent drug offender was not preserved and could not be transferred to Supreme Court; issue was not presented in trial court. State v. Anthony (App. W.D. 1993) 857 S.W.2d 861. Criminal Law 1042.5

Defendant failed to preserve issue of his sentencing as class X offender for appeal where defendant did not raise this point in either his pro se or amended motion for

postconviction relief. Risalvato v. State (App. W.D. 1993) 856 S.W.2d 370. Criminal Law 1042.7(2)

Defendant had not properly preserved for appellate review claim that trial court erred by classifying him as prior offender under V.A.M.S. § 558.019 that became effective after he committed offenses and requires defendant to serve at least 40 percent of sentence as prior offender, where defendant did not make necessary objection at trial or challenge finding that he was prior offender in motion for new trial, but the issue would be reviewed for plain error based on defendant's claim that application of V.A.M.S. § 558.019 increased punishment after commission of crime and rendered such section an ex post facto law. State v. West (App. E.D. 1989) 766 S.W.2d 103. Criminal Law 1042.5; Criminal Law 1063(1)

Defendant failed to preserve for review the issue of whether circuit court erroneously found him to be a Class X offender where he did not raise point before circuit court. State v. Young (App. W.D. 1997) 943 S.W.2d 794, rehearing and/or transfer denied. Criminal Law 1042.5

V. A. M. S. 558.019, MO ST 558.019
Statutes are current with emergency legislation approved through June 26, 2009 of the 2009 First Regular Session of the 95th General Assembly, Constitution are current through November 4, 2008 General Election.

END OF DOCUMENT