February 3, 2006

Missouri Court of Appeals
Eastern District of Missouri
One Post office Square
815 Olive St., Room 304
St. Louis, Mo. 63101

RE: Jones v. Fife, ED86955

Dear Clerk:

Enclosed, please find theAppellant's briefs for filing.

Thanking you in advance for your time and considerations in this matter.

Sincerely,

Jones Frank 508702

Frank Jones #508702
Northeast Correctional Center
13698 Airport Rd.
Bowling Green, Mo. 63334

encl: Appellants briefs

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

---

No. ED86955

---

FRANK JONES,

Appellant,

Vs.

GAYE LYNN FIFE, RECORDS OFFICER,

Respondent.

---

APPEAL FROM THE CIRCUIT COURT OF PIKE COUNTY,
MISSOURI, HONORABLE DAN DILDINE, JUDGE

---

# APPELLANT'S STATEMENT, BRIEF AND ARGUMENT

---

Respectfully submitted

FRANK JONES
13698 Airport Rd.
Bowling Green, Mo. 63334

Appellant

TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases



Statutes



Other Authorities



Constitutional Provisions

## JURISDICTIONAL STATEMENT

This is an appeal from the August 25, 2005 denial of the Appellant's petition for declaratory judgment regarding the calculation of Appellant's prior commitments, excluding commitments to long-term drug treatment, to calculate his mandatory minimum prison term by the Respondent. (LF-2, 174-175). A timely notice of appeal was filed on September 21, 2005. (LF-178-180).

Since none of the issues contained within this appeal fall within the exclusive jurisdiction of the Supreme Court, this Court has jurisdiction to hear and determine this appeal in accordance with Section §512 et seq., RSMo, and Article V, Section 3 of the Missouri Constitution.

## STATEMENT OF FACTS[1]

The Appellant, Frank Jones, is a prisoner in the custody of the Missouri Department of Corrections. (hereinafter "MDOC"). Mr. Jones is currently housed at the Northeast Correctional Center in Bowling Green, Missouri, hereinafter "NECC".[2] Sometime after Frank was delivered to NECC he was advised by Respondent Fife[3] that she had calculated his prior commitment count and that he would now be required to serve eighty percent of his sentence due to three prior commitments in the MDOC. (LF-27).

Based on what Frank perceived to be an erroneous prior commitment calculation, he filed and exhausted all available prison grievances and appeals, as well as expressed his intent to pursue this matter further. (LF-146-148). Thereafter, Frank provisionally filed his petition for declaratory judgment in the Circuit Court of Pike County, Missouri on February 28, 2005. (LF- 1, 9-29).

Franks summary judgment motion was filed on June 16, 2005. (LF-2, 44-103). On July 14, 2005, the respondent filed her untimely response, without leave of Court, as well as a cross motion for summary judgment. (LF-2, 106-138, 139-164). Frank filed his timely response. (LF-2, 169-173).

On August 29, 2005, Judge Dildine signed the respondent's proposed order granting her summary judgment. (LF-2, 174-175). Frank filed a timely

---

[1] References to the Appellant will collectively be to "Appellant", "Frank" or "Mr. Jones". References to Appellant's legal file will be to "LF-" followed by the page number referenced in that legal file. Reference to the addendum will be to "Add-" followed by the page number referenced. Any references to the Respondent will simply be to "Respondent".

[2] Although not specifically germane to this appeal, Frank is presently serving an eleven (11) year sentence imposed by the Circuit Court of St. Louis City, for the crime of stealing from a person. (LF-76-77, 84-85). Frank was sentenced in St. Louis City case no. 001-1839 as a prior and persistent offender in accordance with Section 558.016 RSMo., to an extended term of imprisonment for the class C felony, albeit his sentence did not include any mandatory minimum prison term percentages or requirements. Id.

[3] Respondent Fife is the records officer at NECC.

notice of appeal on September 14, 2005. (LF-2, 176-180). This appeal follows:[4]

POINT I

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, BECAUSE THE FACTS AND EVIDENCE BEFORE THE COURT ILLUSTRATED THAT RESPONDENT FIFE HAD ERRONEOUSLY CALCULATED THE FRANKS PRIOR COMMITMENTS AT THREE (3), WHERE IT IS UNDISPUTED THAT ONE OF THE CALCULATED COMMITMENTS IN QUESTION WAS THE PRODUCT OF A SECTION 559.115 RSMO. AND ONE A SECTION 217.362 RSMO. SHOCK PROBATION WHICH IS EXEMPTED BY THE PREEMPTIVE LANGUAGE OF BOTH SECTIONS 559.115, 217.362 AND 558.019 RSMO., FROM ANY COMMITMENT CALCULATION.

*Irvin v. Kempker*, 152 S.W.3d 358 (Mo. App.W.D. 2004)

*Powell v. Missouri Department of Corrections*, 152 S.W.3d 363 (Mo. App. 2004)

*Scott v. Missouri Department of Corrections*, 152 S.W.3d 372)(WD Mo. 2005)

[4] The facts will be further developed as deemed necessary in the argument portion of this brief.

## ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT IN THAT THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE, BECAUSE THE FACTS AND EVIDENCE BEFORE THE COURT ILLUSTRATED THAT RESPONDENT FIFE HAD ERRONEOUSLY CALCULATED THE FRANKS PRIOR COMMITMENTS AT THREE (3), WHERE IT IS UNDISPUTED THAT ONE OF THE CALCULATED COMMITMENTS IN QUESTION WAS THE PRODUCT OF A SECTION 559.115 RSMO. AND ONE A SECTION 217.362 RSMO. SHOCK PROBATION WHICH IS EXEMPTED BY THE PREEMPTIVE LANGUAGE OF BOTH SECTIONS 559.115, 217.362 AND 558.019 RSMO., FROM ANY COMMITMENT CALCULATION.

## STANDARD OF REVIEW

The standard of review in a declaratory judgment case is the same as in any other court-tried case. ***Levinson v. State,*** 104 S.W.3d 409, 410 (Mo. 2003); citing ***Guyer v. City of Kirkwood,*** 38 S.W.3d 412, 413 (Mo. Banc 2001). The judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. Id.

To maintain a declaratory judgment action, Mr. Jones must demonstrate a justicable controversy for which he has no adequate remedy at law. ***Northgate Apartments, L.P. v. City of North Kansas City,*** 45 S.W.3d 475, 479 (Mo. App. 2001). A justicable controversy exists where the Appellant has a legally protectable interest at stake, a substantial controversy exists between parties with genuinely adverse interest, and that controversy is ripe for judicial determination. ***Missouri Health Care Association v. Attorney General of the State of Missouri,*** 953 S.W.2d 617, 620 (Mo. banc 1997). A controversy is ripe if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character. Id. at 621.

The propriety of the trial court's entry of summary judgment is purely an issue of law, and this Court's review is therefore de novo. ***Wright v. Missouri Department of Corrections,*** 87 S.W.3d 396, 397 (Mo. App. 2002); citing ***Boersing v. Missouri Dep't of Corr.,*** 959 S.W.2d 454, 456 (Mo. banc

1997). The moving party is entitled to summary judgment on a showing that there is not a genuine issue of any material fact in dispute and that judgment should be granted as a matter of law. Id. (citing Rule 74.04 (c)(3)).

When considering an appeal from summary judgment, the Court reviews the record in the light most favorable to the party against whom judgment was entered and must accord the non-movant the benefit of all reasonable inferences there from. Id. The criteria on appeal for testing the propriety of summary judgment are no different from those that should be employed by the trial court to determine the propriety of sustaining the motion initially. ***McDermott v. Missouri Bd. Of Prob. & Parole,*** 61 S.W.3d 246, 247 (Mo. banc 2001).

## Argument

In our case, prior to the present term of incarceration, Frank had suffered the following sentences and conviction:

a. 10/30/86 Cause No. 861-00934 No program stipulation

b. 4/23/90 Cause NO. 891-2867 No program stipulation

c. 9/18/92 Cause NO. 929-5854 Sentenced to St. Louis City Workhouse, not the Department of Corrections. (NO commitment).

d. 8/20/93 Cause NO. 931-1210 20 years suspended, placed on probation (No commitment).

e. 9/22/94 Cause NO. 931-2989 §217.362 120 day shock stipulation

f. 7/5/96 Cause No. 961-410A Section 559.115 RSMo. Long-term drug stipulation.

When calculating these convictions on a remand and or commitment basis for a minimum term requirement, the Respondent incorrectly indicated that Frank had at least 3 or more, prior commitments to the Missouri Department of Correction and was required to serve 80% of his present sentence. (LF-44-45).

The respondent's calculation was incorrect on its face, in that a cursory review illustrates that Case No. 929-5854 cannot be utilized as a

commitment or remand calculation because Frank was never sent to the Missouri Department of Corrections on this case and was therefore not committed under the plain and ordinary language of Section 558.019 RSMO. Suffice to say, if Frank was not, in fact, received by the Missouri Department of Corrections, then there can be no commitment. Id.

Additionally, case no. 931-1210 was a sentence wherein Frank was sent to long-term treatment - which was successfully completed. It is axiomatic that the MDOC shall not include commitments to regimented discipline programs pursuant to Section 217.362 RSMo. Therefore, that commitment was also to have been excluded. Indeed, case no. 931-2928 was ran concurrent to case no. 931-1210, and Frank was contemporaneously admitted to long term drug treatment which he again successfully completed.

Indeed, Section 217.362.5 specifically states:

> 5. An offender's first incarceration in a department of corrections program pursuant to this section prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term pursuant to the provisions of section 558.019, RSMo.

VAMS 217.362, Chronic nonviolent offenders with cocaine addictions not convicted of dangerous felonies--long-term program for treatment. Furthermore, Section 559.115 Rsmo. also leave no room for interpretation, specifically stating:

> 7. An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo.

Frank is therefore entitled to exclusion for both of these placements, as they are mutually exclusive in the preemptive language. In light of these facts it was clear that Respondent Fife miscalculated Frank's commitments, as Frank should have been serving 50% of his sentence and not 80% of his sentence. During the summary judgment proceedings, the parties concluded

that the commitment in question was narrowed down to a single issue of whether the Section 559.115 RSMo probationary placement could be counted as a prior commitment. (LF-106-138, 169-173).

In finding that the Section 559.115 RSMo., shock probationary term was to be included in the calculation, the court issued the following erroneous order:

> " . . The parties, however, dispute whether incarcerations in the Department of Corrections that began September 22, 1994 and August 5, 1996 should count as prior commitments under §559.115, RSMO 2000. There are no genuinely disputed issues of material fact between the parties.
> The incarcerations on September 22, 1994 and August 5, 2996 (sic) are properly counted as commitments under §558.019 RSMo. 2000 requiring Jones to serve eighty-five (sic) percent of his current sentence. Because §559.115 and §217.362.5 are mandatory laws that would reduce Jone's' punishment retroactively by shortening the mandatory minimum time, he must serve in prison those laws cannot be applied to Jones' current sentence for an offense committed before those laws became effective. See §1.160 RSMo. 2000 Section 217.362 RSMo. Which deals with boot camps for youthful offenders also does not exclude Jones' 1994 and 1996 incarcerations from being counted as commitments."

(LF-174-175, Addendum 1-2). This decision is both clearly erroneous and deliberately disregards the ***stare decisis*** of several courts which have denounced each particular issue enunciated and endorsed by Judge Dildine. See **Irvin v. Kempker**, 152 S.W.3d 358 (Mo. App.W.D. 2004)(holding 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. V.A.M.S. §§ 558.019, 559.115, subd. 7); **Powell v. *Missouri Department of Corrections***, 152 S.W.3d 363 (Mo. App. 2004)(Same holding); See Also ***Scott v. Missouri Department of Corrections***, 152 S.W.3d 372)(declaratory judgment issued on the same issue).

At the Circuit Court level the Respondent ultimately convinced the Circuit Court of this meritless retroactive argument, predicated upon his reliance on ***State v. Lawhorn***, 762 S.W.2d 820 (Mo. Banc 1988) which stood for the proposition that the penalty for a crime may not be retroactively decreased by an amendment to a law. However, Respondent's and the Circuit Court's reliance on ***Lawhorn***, supra, is misplaced. In ***Lawhorn***, the Missouri Supreme Court concluded that an amendment to a statute made after the defendant was sentenced which changed the mandatory-minimum prison term ***was*** retrospective in nature. Id. At 824. In holding that the retrospective amendment could not be applied, however, be applied retroactively, the Supreme Court determined that the revised mandatory minimum parole guidelines could not be applied to ***Lawhorn*** as he would be substantially disadvantaged by the retrospective application of the revised guidelines to this crime. ***Lawhorn*** at 825.

The Court and the Respondent also mistakenly agree that retroactive application of the amended provisions would reduce his sentences and would be repugnant to Section 1.160 RSMO.,(2000). Without question, retrospective application of the amended sentence would not reduce Frank's sentences, only the minimum parole eligibility. The Court's and Respondent's contention is meritless. Indeed, this precise argument was previously rejected by the Missouri Court of Appeals in ***Irvin v. Kempker***, 152 S.W.3d 358, 362 (Mo. App.W.D. 2004), where the Court held:

> Finally, we consider whether application of Section 559.115.7 to Irvin after he has been sentenced violates section 1.160, RSMo, relating to retroactive applications of repeals and amendments of substantive laws governing criminal offenses. The Supreme Court addressed this very issue in Russell saying " Section 558.016.8 is a new statutory provision; it does not repeal or amend any previously existing statute." 129 S.W.3d at 870 (citing ***State ex rel. Nixon v. Kelly***, 58 S.W.3d 513, 518 (Mo. banc 2001)). Additionally, as in Russell, Section 559.115.7 does not shorten Irvin's sentence or alter the law creating the offense. In ***Russell***, the Court cited approvingly to ***State ex rel. Cavallaro v. Groose***, 908 S.W.2d 133 (Mo. banc 1995). There, the prisoner argued that he should be subject to the same statutory provisions for probation that existed at the time of his

> sentence. See id. at 134. This argument was rejected, again, for the reason that it did not increase the length of his sentence. See id. at 136.
>
> Finding the State's argument unpersuasive, we agree with Irvin that Russell counsels us to apply the amendments to Section 559.115, RSMo 2003, retroactively. Under those amendments, the time ***Irvin*** spent in the custody of the Department of Corrections in the spring of 2000 under a 120-day callback program and prior to his release on probation cannot be considered a "prior commitment" to the Department of Corrections for purpose of calculating his minimum prison term before becoming eligible for parole under Section 558.019, RSMo.
>
> Under that reasoning, it is clear that the State improperly determined Irvin's parole eligibility. The State calculated his parole eligibility upon the incorrect premise that ***Irvin*** had one "prior commitment" to the Department of Corrections for purposes of Section 558.019, RSMo, due to his prior placement and successful completion of a 120-day callback program. Under Section
>
> 559.115.7, RSMo 2003 , this was impermissible. Instead, Irvin's parole eligibility should have been determined as if he had no prior prison commitments.

***Irvin v. Kempker*** ,152 S.W.3d 358, 362-363 (Mo.App. W.D. 2004). The Appellant respectfully requests that the Circuit Court and the Respondent be cautioned for advancing such a reckless and frivolous legal position.

In any event, Section 1.160 RSMo., is inapplicable as it is implicated only where there in an amendment to the "law creating the offense" ***State ex rel. Nixon v. Kelly***, 58 S.W.3d 513, 517 (Mo. banc 2001). Section 559.115.7 is a new statutory provision, it did not repeal or amend any previously created statute. ***Irvin***, at 362; ***State ex rel. Nixon v. Russell***, 129 S.w.3d 867, 870 (Mo. Banc 2004). The same is true for section 217.362.5 RSMo. Which was a new provision added by Senate Bill 5 in 2003.

The Circuit Court seemingly disregarded the fact that is is bound by ***stare decisis*** of ***Irvin v. Kempker*** ,152 S.W.3d 358, 362-363 (Mo.App. W.D. 2004); ***Powell v. Missouri Department of Corrections***, 152 S.W.3d 363 (Mo. App. 2004) and ***Scott v. Missouri Department of Corrections***, 152 S.W.3d 372)(declaratory judgment issued on the same issue).

The respondent's tenuous opinion at the Circuit level that they were decided wrong is irrelevant. The Circuit Court is bound to follow these decisions. Indeed, a claim that the Missouri Appellate Court has incorrectly

decided a previous case or cases is not cognizable in the in a Circuit Court. ***State v. Patterson***, 18 S.W.3d 474, 481 (Mo.App. S.D.2000).

At the Circuit Court level, the respondent attempted to rely on ***Star v. Burgess***, 160 S.W.3d 376, 378 (Mo. 2005) for the proposition that Section 559.115 - 120 shock probationary placements, could be counted as a prior commitments. Id. At 378. The Circuit Court should be "bound to follow the most recent controlling decision of the Missouri Supreme Court." ***Kinder v. Missouri Dep't of Corr.***, 43 S.W.3d 369, 374 (Mo.App. W.D.2001) (citing Mo. Const. art. V, § 2 ). ***Independence-Nat. Educ. Ass'n v. Independence School District***, WL 89058, (Mo.App. W.D. 2005). However, this is not a controlling decision and the respondent has ignored footnote 2 of that decision which stated:

> "Since Star filed this action, section 559.115, RSMo Supp.2004, has been enacted. As amended, section 559.115 provides that an offender's first incarceration for 120 days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for purposes of section 558.019. Section 559.115.7, RSMo Supp.2004. Whether this section provides relief to Star was not raised in the trial court. This Court generally will not convict a lower court of error on an issue that was not put before it to decide. ***Lincoln Credit Co. v. Peach***, 636 S.W.2d 31, 36 (Mo. banc 1982)."

***Star v. Burgess***, 160 S.W.3d 376, 379 fn. 2 (Mo. 2005).

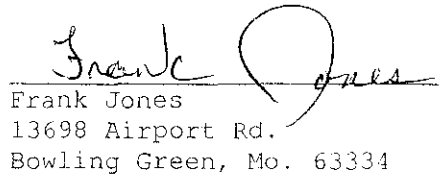
In our case, Frank properly placed this issued before the Circuit Court, distinguishing this issue from Star's. Hence, this issue is ripe for review and Frank is entitled to relief. Additionally, at first glance, it would appear that ***Star supra*** would have been a controlling Supreme Court precedent on this issue, albeit the Supreme Court itself recognized that the issue properly before this Court was not raised or briefed before the Supreme Court, nor the trial Court in ***Star***, supra. Therefore, the question before us has never been determined by the Supreme Court, only by the Western District Court of Appeals in *Irvin v. Kempker*, supra and ***Powell v. Missouri Dept. of Corrections***, supra.

Clearly, the Circuit Court lacked authority to ignore the above cases that control this issue. Oddly enough, the respondent offered no authority that permits such a rebellious act by Judge Dildine. This decision must be overturned to promote uniformity in the Court's decisions and the principles of *stare decisis*.

## CONCLUSION

***WHEREFORE***, for the foregoing reasons, Frank prays this Court to reverse the decision of the Circuit Court; that the Court declare that Frank has only two (2) prior prison commitments and he is required to serve 40% of his current prison term prior to being eligible for parole and for such further relief deemed just in the premises.

Respectfully submitted,



Frank Jones
13698 Airport Rd.
Bowling Green, Mo. 63334

Appellant

Certificate of Service

I hereby certify that two true and correct copies of the above brief were mailed to the Missouri Attorney General, P.O. Box 899, Jefferson City, Mo. 65102, by first class mail, postage prepaid, this 3 day of February, 2006

Frank Jones

ADDENDUM

IN THE CIRCUIT COURT OF PIKE COUNTY
STATE OF MISSOURI

| | | |
|---|---|---|
| FRANK JONES, | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 05-PI-CC-00010 |
| | ) | |
| | ) | |
| G. FIFE Records Officer III, | ) | |
| Northeast Correctional Center, | ) | |
| Respondent. | ) | |

**DECISION, JUDGMENT, ORDER AND DECREE**

Frank Jones, an inmate in the Missouri Department of Corrections, has filed a petition for declaratory judgment challenging the calculation that he has three or more prior commitments that must be counted against his current sentence requiring him to serve eighty percent of that sentence prior to parole eligibility. Jones acknowledges that he has two prior commitments and must serve fifty percent of his current sentence prior to parole eligibility for that reason. The parties however, dispute whether incarcerations in the Department of Corrections that began on September 22, 1994 and August 5, 1996 should count as prior commitments under § 559.019, RSMo 2000. There are no genuinely disputed issues of material fact between the parties.

The incarcerations on September 22, 1994 and August 5, 2996 are properly counted as commitments under § 558.019, RSMo 2000 requiring Jones to serve eighty-five percent of his current sentence. Because § 559.11.5.7 and § 217.362.5 are amendatory laws that would reduce Jones' punishment retroactively by shortening the mandatory-minimum time, he must serve in prison those laws cannot be applied to Jones' current sentence for an offense committed before those laws became effective. See § 1.160, RSMo 2000. Section 217.378, RSMo, which deals with boot camps

for useful offenders also does not exclude Jones' 1994 and 1996 incarcerations from being counted as commitments.

Wherefore, because there are no genuine disputes of material fact between the parties and Petitioner's claim fails as a matter of law, it is DECIDED, ADJUDGED, ORDERED and DECREED that summary judgment is granted for the Respondent.

The Honorable Dan Dildine

**217.362. Program for offenders with substance abuse addiction — eligibility, disposition, placement — completion, effect.** — 1. The department of corrections shall design and implement an intensive long-term program for the treatment of chronic nonviolent offenders with serious substance abuse addictions who have not pleaded guilty to or been convicted of a dangerous felony as defined in section 556.061, RSMo.

2. Prior to sentencing, any judge considering an offender for this program shall notify the department. The potential candidate for the program shall be screened by the department to determine eligibility. The department shall, by regulation, establish eligibility criteria and inform the court of such criteria. The department shall notify the court as to the offender's eligibility and the availability of space in the program. Notwithstanding any other provision of law to the contrary, except as provided for in section 558.019, RSMo, if an offender is eligible and there is adequate space, the court may sentence a person to the program which shall consist of institutional drug or alcohol treatment for a period of at least twelve and no more than twenty-four months, as well as a term of incarceration. The department shall determine the nature, intensity, duration, and completion criteria of the education, treatment, and aftercare portions of any program services provided. Execution of the offender's term of incarceration shall be suspended pending completion of said program. Allocation of space in the program may be distributed by the department in proportion to drug arrest patterns in the state. If the court is advised that an offender is not eligible or that there is no space available, the court shall consider other authorized dispositions.

3. Upon successful completion of the program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. If the court determines that probation is not appropriate the court may order the execution of the offender's sentence.

4. If it is determined by the department that the offender has not successfully completed the program, or that the offender is not cooperatively participating in the program, the offender shall be removed from the program and the court shall be advised. Failure of an offender to complete the program shall cause the offender to serve the sentence prescribed by the court and void the right to be considered for probation on this sentence.

5. An offender's first incarceration in a department of corrections program pursuant to this section prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term pursuant to the provisions of section 558.019, RSMo.

(L. 1994 S.B. 763, A.L. 1998 H.B. 1147, et al., A.L. 2003 S.B. 5)
Effective 6-27-03

*94625 V.A.M.S. 559.115

# VERNON'S ANNOTATED MISSOURI STATUTES TITLE XXXVIII. CRIMES AND PUNISHMENT; PEACE OFFICERS AND PUBLIC DEFENDERS CHAPTER 559. PROBATION

*Statutes and Constitution are current through the end of the First Regular Session of the 93rd General Assembly (2005).*

## 559.115. Appeals, probation not to be granted, when--delivery to department of corrections, time limitation--notification to state, hearing--no probation in certain cases

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

2. Unless otherwise prohibited by subsection 5 of this section, a circuit court only upon its own motion and not that of the state or the offender shall have the power to grant probation to an offender anytime up to one hundred twenty days after such offender has been delivered to the department of corrections but not thereafter. The court may request information and a recommendation from the department concerning the offender and such offender's behavior during the period of incarceration. Except as provided in this section, the court may place the offender on probation in a program created pursuant to section 217.777, RSMo, or may place the offender on probation with any other conditions authorized by law.

3. The court may recommend placement of an offender in a department of corrections one hundred twenty-day program. Upon the recommendation of the court, the department of corrections shall determine the offender's eligibility for the program, the nature, intensity, and duration of any offender's participation in a program and the availability of space for an offender in any program. When the court recommends and receives placement of an offender in a department of corrections one hundred twenty-day program, the offender shall be released on probation if the department of corrections determines that the offender has successfully completed the program except as follows. Upon successful completion of a treatment program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. The court shall release the offender unless such release constitutes an abuse of discretion. If the court determined that there is an abuse of discretion, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the court does not respond when an offender successfully completes the program, the offender shall be released on probation. Upon successful completion of a shock incarceration program, the board of probation and parole shall advise the sentencing court of an offender's probationary release date thirty days prior to release. The court shall follow the recommendation of the department unless the court determines that probation is not appropriate. If the court determines that probation is not appropriate, the court may order the execution of the offender's sentence only after conducting a hearing on the matter within ninety to one hundred twenty days of the offender's sentence. If the department determines that an offender is not successful in a program, then after one hundred days of incarceration the circuit court shall receive from the department of corrections a report on the offender's participation in the program and department recommendations for terms and conditions of an offender's probation. The court shall then release the offender on probation or order the offender to remain in the department to serve the sentence imposed.

*94626 4. If the department of corrections one hundred twenty-day program is full, the court may place the offender in a private program approved by the department of corrections or the court, the expenses of such program to be paid by the offender, or in an available program offered by another organization. If the offender is convicted of a class C or class D nonviolent felony, the court may order probation while awaiting appointment to treatment.

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

6. Unless the offender is being granted probation pursuant to successful completion of a one hundred twenty-day program the circuit court shall notify the state in writing when the court intends to grant probation to the offender pursuant to the provisions of this section. The state may, in writing, request a hearing within ten days of receipt of the court's notification that the court intends to grant probation. Upon the state's request for a hearing, the court shall grant a hearing as soon as reasonably possible. If the state does not respond to the court's notice in writing within ten days, the court may proceed upon its own motion to grant probation.

7. An offender's first incarceration for one hundred twenty days for participation in a department of corrections program prior to release on probation shall not be considered a previous prison commitment for the purpose of determining a minimum prison term under the provisions of section 558.019, RSMo.

8. Notwithstanding any other provision of law, probation may not be granted pursuant to this section to offenders who have been convicted of murder in the second degree pursuant to section 565.021, RSMo; forcible rape pursuant to section 566.030, RSMo; forcible sodomy pursuant to section 566.060, RSMo; statutory rape in the first degree pursuant to section 566.032, RSMo; statutory sodomy in the first degree pursuant to section 566. 062, RSMo; child molestation in the first degree pursuant to section 566.067, RSMo, when classified as a class A felony; abuse of a child pursuant to section 568.060, RSMo, when classified as a class A felony; an offender who has been found to be a predatory sexual offender pursuant to section 558.018, RSMo; or any offense in which there exists a statutory prohibition against either probation or parole.



V