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LEGISLATIVE NOTE

CRIMINAL LAW—SENTENCING PROVISIONS IN THE NEW MISSOURI CRIMINAL CODE

The Missouri Committee to Draft a Modern Criminal Code undertook in October, 1969, a comprehensive revision of the criminal laws of Missouri for the first time since 1835.¹ A core project of the Committee was sentencing reform.² Missouri presently lacks a rationally conceived sentencing system, due to piecemeal legislative revision for more than a century.³ Inconsistent sentencing provisions contribute to disparity of sentences among offenders of comparable culpability.⁴ The Committee attempted to develop a rational and effective sentencing system that would minimize such disparity yet permit sufficient flexibility to impose a sentence that fits the specific circumstances.⁵ To accomplish this objective the Committee proposed three major changes in sentencing practice: classification of crimes into distinct sentencing categories based on the seriousness of the offense, with an uncomplicated range of penalties assigned to each category;⁶ vesting in the court the exclusive responsibility for fixing punishment while requiring that the jury, if there is one, be informed of the permissible range of penalties;⁷ and appellate review of sentences.⁸

These proposed changes differ significantly from existing criminal statutes under which each offense usually carries its own specific range of penalties.⁹ The basic sentencing authority is currently in the jury; however, in practice so many exceptions exist that sentencing usually is done by the court.¹⁰ No current statutory provision expressly authorizes appellate review of sentences and the appellate courts have not con-

1. THE COMMITTEE TO DRAFT A MODERN CRIMINAL CODE, THE PROPOSED CRIMINAL CODE FOR THE STATE OF MISSOURI 6 (1973) [hereinafter cited as PROPOSED CODE].

2. Anderson, *Sentencing Under the Proposed Missouri Code—The Need for Reform*, 38 MO. L. REV. 549 (1973).

3. *Id.*

4. *Id.*

5. *Id.*

6. PROPOSED CODE, *supra* note 1, at 6; Anderson, *supra* note 2, at 550-53.

7. PROPOSED CODE, *supra* note 1, at 6; Anderson, *supra* note 2, at 567-68.

8. PROPOSED CODE, *supra* note 1, § 2.070; Anderson, *supra* note 2, at 562-65.

9. Anderson, *supra* note 2, at 550.

10. §§ 546.410, .430-.460, RSMo 1969 (repealed effective January 1, 1979); Anderson, *supra* note 2, at 568.

strued their general authority to review criminal judgments to include the review of sentences.¹¹

Using this Proposed Code as a guide, the Missouri legislature has enacted a new Criminal Code, to become effective January 1, 1979.¹² Two major departures from the Proposed Code were made: some degree of jury sentencing was retained,¹³ and appellate review of sentences was rejected. Having in mind these departures from the Proposed Code, this note will attempt to explain the sentencing provisions of the new Code and to indicate areas where problems of interpretation could arise.

The initial consideration is the sentencing function of the court. For this purpose the jury's role initially will be disregarded. Literally, the court's function is to decide the extent or duration of sentence or other disposition to be imposed "under all the circumstances."¹⁴ This authority is very broad, but the Code provides restrictions on the court in the form of authorized ranges of punishments for the different classes of offenses, authorized dispositions for the different classes of offenses, and factors to be considered by the court in determining the proper disposition.

For all offenses defined under the Code, there are specified certain authorized dispositions that may be made by the court.¹⁵ These dispositions are allocated by the class of offense and to some degree by the type of offender. The new Code also provides that the punishment to be imposed for offenses defined outside the Code and not repealed by the Code is to be that provided by the statute defining such offense.¹⁶ The Code does not deprive the court of any authority conferred by law to impose any other civil penalty.¹⁷

11. Anderson, *supra* note 2, at 562-65.

12. Act No. 73, § A, 1977 Mo. Legis. Serv. 275 (West).

13. Mo. CRIM. CODE § 557.036.2 (effective January 1, 1979).

14. *Id.* § 557.036.1 (emphasis added).

15. *Id.* § 557.011. The dispositions provided by the Code differ from those provided by current provisions in only two regards. While the court retains the authority provided by § 549.071 RSMo to suspend imposition of sentence without placing the person on probation, when sentence is pronounced and execution is suspended, the court must place the person on probation. *Id.* §§ 557.011.2(4), .011.3(3), .011.4(3). The Code also provides a "split sentence" provision whereby the court may impose a period of detention in jail or prison as a condition of probation imposed after suspending imposition of sentence. *Id.* § 557.011.2(5). Although Missouri courts had previously used detention as a condition of probation, the Missouri Supreme Court in *State ex rel. St. Louis County v. Stussie*, 556 S.W.2d 186 (Mo. En Banc 1977), found that the current statutes do not authorize such practice.

16. *Id.* § 557.011.1. This provision was designed to avoid the prohibition against amending existing statutes with general language in a subsequent statute. *State ex rel. McNary v. Stussie*, 518 S.W.2d 630 (Mo. En Banc 1974).

17. *Id.* § 557.011.5.

The dispositions authorized for offenses defined under the Code are detailed for felonies,¹⁸ misdemeanors,¹⁹ and infractions.²⁰ There is a separate list of authorized dispositions for organizational offenders.²¹ These dispositions include sentence to a term of imprisonment,²² a sentence to pay a fine,²³ suspension of imposition of sentence, with or without placing the person on probation,²⁴ pronouncement of sentence and suspension of its execution, placing the person on probation,²⁵ imposition of a period of detention as a condition of probation,²⁶ and imposition of a special sentence or sanction authorized by law.²⁷

There are authorized ranges of terms of imprisonment for each class of felony²⁸ and misdemeanor.²⁹ The Code also provides for extended terms and special terms of imprisonment. The court may sentence a person who has pleaded guilty or has been found guilty or a class B, C, or D felony to an extended term of imprisonment if it finds the defendant to be a persistent or dangerous offender.³⁰ The Code

18. *Id.* § 557.011.2.

19. *Id.*

20. *Id.* § 557.011.3.

21. *Id.* § 557.011.4.

22. *Id.* § 557.011.2.

23. *Id.* §§ 557.011.2-.011.4.

24. *Id.*

25. *Id.*

26. *Id.* § 557.011.2.

27. *Id.* § 557.011.4.

28. *Id.* § 558.011.1.

29. *Id.*

30. *Id.* § 558.016. A persistent offender is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode. A dangerous offender is one who is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person, and has been previously convicted of a class A or B felony or of a dangerous felony. "Dangerous felony" means murder, forcible rape, assault, burglarly, robbery, kidnapping or the attempt to commit any of these felonies. *Id.* § 556.061.(8).

The dangerous and persistent offender provisions indicate a substantial procedural change from the Habitual Criminal Act, § 556.280, RSMo 1969 (repealed effective January 1, 1979). The present Habitual Criminal Act provides for a hearing to determine the Act's applicability prior to the jury retiring for deliberation and out of the jury's hearing. If the court finds that the defendant is properly charged under the Act, the jury does not assess punishment at all. Under the new Code, if the defendant is convicted, he will be sentenced by the jury. After trial, the court will hold a hearing on the applicability of the dangerous or persistent offender provision. Under the present Habitual Criminal Act, if the court's finding is found on appeal to be erroneous, the case must be remanded for a new trial. *State v. Garrett*, 416 S.W.2d 116, 120 (Mo. 1967). *But see State v. Franklin*, 547 S.W.2d 849 (Mo. App., D.K.C. 1977). Under the new Code, if the court's finding is erroneous, the case need be remanded only for revision of that finding and disposition consistent with the original verdict.

specifies certain preliminary procedures for imposition of such an extended term³¹ and provides separate maximum terms for such offenders.³² In cases of class C and D felonies, the court has the discretion to imprison the defendant for a special term not to exceed one year in a place of confinement to be fixed by the court.³³ However, if the court imposes a term longer than one year, it must commit the person to the custody of the Department of Corrections for a term of not less than two years.³⁴ The Code provides that multiple sentences of imprisonment are to run concurrently unless the court specifies that they run consecutively.³⁵

Each offense having a fine as an authorized punishment is provided a maximum amount³⁶ with separate maximums provided for corporate offenders.³⁷ A fine exceeding this maximum may be imposed if the offender derived a pecuniary or proprietary gain from the commission of the crime.³⁸ If a fine based on the offender's gain is to be imposed, the court must make a specific finding as to the amount of that gain.³⁹ In the case of an offense defined outside the Code providing for a special fine for a corporate offender, the court may impose a fine based on the offender's pecuniary gain even though the statute defining the offense does not so provide.⁴⁰

The imposition of a fine is subject to extensive restrictions concerning when such a punishment may be imposed and in what amount. When any other disposition is authorized, the court may not sentence an individual to pay a fine only, unless, having regard to the nature and circumstances of the offense and the history and character of the offender, the court finds that a fine alone will suffice for the protection of the public.⁴¹ In addition, the court may not sentence an individual to pay a fine *in addition to* any other authorized sentence unless the individual derived a pecuniary gain from the offense, or the court finds that a fine is uniquely adapted to deterrence of the type of offense involved or to the correction of the defendant.⁴² If a fine is to be imposed, the court

31. *Id.* § 558.021.

32. *Id.* § 558.016.4.

33. *Id.* § 558.011.2.

34. *Id.*

35. *Id.* § 558.026. 1.

36. *Id.* §§ 560.011.1(1), .016.1.

37. *Id.* § 560.021.1.

38. *Id.* §§ 560.011, .016.2, .021.1(6).

39. *Id.* § 560.011.2.

40. *Id.* § 560.021.2.

41. *Id.* § 560.026.2. The Code does not specify that the court must make such a finding but only that it "be of the opinion" that a fine alone will suffice to protect the public. However, because this "opinion" is required before a fine may be imposed, the court should make a finding to that effect.

42. *Id.* § 560.026.3. See note 41 *supra*.

is directed, insofar as practicable, to proportion the amount and method of payment of the fine to the burden that such a fine will impose on the individual, in view of his financial resources.⁴³ The court may not sentence an offender to pay a fine in any amount which will prevent him from making restitution or reparation to the victim of the offense.⁴⁴ When an offender is sentenced to pay a fine, the court may not impose at the same time an alternative sentence to be served in the event that the fine is not paid.⁴⁵ There are separate provisions setting out the court's response to nonpayment of a fine.⁴⁶

The court is given the option of placing a person on probation for a specific period upon conviction of any offense or upon suspending imposition of sentence. The Code provides that probation is permissible if, having regard to the nature and circumstances of the offense and to the history and character of the defendant, the court is of the opinion that institutional confinement of the defendant is not necessary for the protection of the public *and* that the defendant is in need of guidance, training or other assistance which, in his case, can be effectively administered through probation supervision.⁴⁷ Except in infraction cases, when probation is granted the court may require that the defendant submit to a period of detention at whatever time or intervals the court may designate.⁴⁸

To insure that the court has available the information necessary to the determination of a proper disposition, the Code requires an investigation and preparation of a presentence report before disposition in all

43. *Id.* § 560.026.1.

44. *Id.*

45. *Id.* § 560.026.5.

46. *Id.* § 560.031. Upon default in the payment of a fine or of any installment, the court may require the offender to show cause why he should not be imprisoned for nonpayment. The offender's default is excusable if he can show that it was not attributable to an intentional refusal to obey the sentence or to a failure to make a good faith effort to obtain the funds necessary for payment. If the default is excusable the court can allow additional time for payment, reduce the amount of the fine, or revoke the fine or the unpaid portion in whole or in part. Should the offender fail to show cause, the court can imprison the offender for a term not to exceed 180 days if the fine was imposed upon a felony conviction or 30 days if upon conviction of misdemeanor or infraction. The term may be later reduced for good cause shown, including payment of the fine.

Default by a corporation can render the persons authorized to make disbursements of corporate assets subject to imprisonment as outlined above.

The court's response to default may be determined only after default. *Id.* § 560.026.5.

47. *Id.* § 559.012. *See* note 41 *supra*.

48. *Id.* § 559.026. Such detention, imposed as a condition of probation, is commonly known as a "split-sentence." The court can designate time or intervals within the period of probation, consecutive or nonconsecutive, for the defendant to submit to detention. For misdemeanor convictions, this term cannot exceed 15 days. For felony convictions, this term cannot exceed 60 days.

felony cases, unless waived by the defendant.⁴⁹ In cases of misdemeanors and infractions, the probation officer must make such a report only if directed by the court.⁵⁰

The new Criminal Code also provides a sentencing function for the jury. The Proposed Code provided for exclusive court sentencing,⁵¹ but this provision was rejected by the legislature in enacting the new Code.⁵² The enacted Code, however, expressly provides only that the jury be instructed as to the range of authorized punishments and that the jury is to "assess and declare" punishment as part of its verdict.⁵³ It does not specify when the jury is to have a sentencing function or the extent of the jury's authority.

Because the Code does not specify when the jury is to exercise its sentencing role, it is necessary to look at those situations when the jury *does not* "assess and declare" punishment. The Code specifies two such situations. It provides that, in the event of a finding of guilt by the jury, the court shall assess punishment should the defendant so request in writing.⁵⁴ The Code also provides that the court shall assess punishment when the jury finds the defendant guilty but cannot agree on the punishment.⁵⁵

49. *Id.* § 557.026.1. The report is required only when a probation officer is available to the court. This provision differs from the statutes in force in two regards. Current rules provide for such a report only for cases in specified courts. Mo. R. CRIM. P. 27.07. The presentence report is presently purely discretionary with the trial court. The use of such reports has been encouraged, but the court's denial of the report's use, even when requested by the defendant, is discretionary and not reviewable. *State v. Tettamble*, 517 S.W.2d 732, 735-36 (Mo. App., D. St. L. 1974).

50. *Id.*

51. PROPOSED CODE, *supra* note 1, § 2.060.

52. MO. CRIM. CODE § 557.036.2 (effective January 1, 1979).

53. *Id.*

54: *Id.* This procedure is new in Missouri and will allow a defendant with a favorable record to remove the sentencing question from the jury which does not receive the presentence report. See Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 989 (1967). This provision may be relatively insignificant if, in practice, the court is generally not restricted by a jury-determined sentence. The Code does not specify, however, whether the court is required to assess punishment in this situation or whether it is discretionary. It probably would not be within the court's discretion to deny such a request if the court found that the defendant was knowledgeable of the consequences and voluntarily made the decision. Such a request is analogous to a guilty plea or a waiver of trial, although there is no inherent right as such to assessment of punishment by a jury. As with a guilty plea and a waiver of trial by jury, the court should make a specific finding as to voluntariness and knowledge prior to accepting the request.

55. *Id.* §§ 557.036.2, .036.3. This authority is currently provided under § 546.440, RSMO 1969 (repealed effective January 1, 1979), but the new Code alters the time at which the court may instruct the jury that it may return a verdict only as to guilt. The current provisions allow the court to instruct the jury on this point when it is charged initially, prior to retiring for deliberation.

Although not specified in the Code, there are other situations in which the jury would not assess punishment. For example, the court will assess punishment in those situations in which no jury is impanelled, *i.e.*, where the defendant pleads guilty prior to trial or waives his right to trial by jury.⁵⁶ The court also will assess punishment in situations when the jury has the authority to assess punishment but returns a guilty verdict that is silent as to punishment.⁵⁷ The court will assess punishment for corporate defendants charged with an offense not having a special sentence or sanction authorized by law. Although the Code does not specify that the court will sentence in this situation, the result is indicated by Code language because the only authorized punishment in such case is a fine⁵⁸ and the Code specifies that the court is to fix the amount of any fine imposed on a corporate defendant.⁵⁹

The jury will not assess punishment when no discretion is authorized as to the kind or extent of punishment for the particular individual or offense. If the only punishment authorized for a particular defendant or offense is mandatory, the only question for the jury is the determination of guilt or innocence. This is not a possibility for offenses defined under the new Code because the Code has no mandatory punishments. This exception to jury sentencing could apply only to an

MO. R. CRIM P. 27.02. The new Code provides that the court may give such an instruction only after the jury has duly deliberated and after the court has made a finding that the jury cannot agree on punishment. MO. CRIM. CODE. § 557.036.2 (effective January 1, 1979). The Code does not specify how long the jury must deliberate before the court is able to find that it cannot agree. There likely will be no specific time required, but there will be a requirement that, before such an instruction is given, the jury in fact has agreed that the defendant is guilty. The law regarding whether and when such an instruction could be given has varied over the years in Missouri. *See generally* Freund, *Power of a Missouri Court to Instruct the Jury in a Criminal Case That it May Return a General Verdict of Guilty and Permit the Court to Fix the Punishment*, 13 ST. L.L. REV. 25 (1928). Of primary concern was whether such an instruction invited the jury's abdication of its sentencing responsibilities. Immediately prior to promulgation of the present rule it was held that such an instruction could be given only after the jury had deliberated and had found the defendant guilty. *State v. Stuver*, 360 S.W.2d 89 (Mo. 1962). The present rule eliminated such a requirement. The new Code seems to return to the former position that protected against the jury's abdication of its sentencing responsibilities. The Code does not specifically require that guilt have been determined before the instruction is given, but the due deliberation requirement is immediately preceded by a provision conditioning the court's assessing punishment in this situation on the jury's finding of guilt.

56. MO. R. CRIM. P. 27.03.

57. This is allowed under the statutes currently in force. § 546.440, RSMo 1969 (repealed effective January 1, 1979). Under the new Code, if the jury is allowed to return a verdict only as to guilt when it cannot agree on punishment, it also should be able to do so without first receiving the instruction informing it of that permissible alternative.

58. MO. CRIM. CODE § 557.011.4 (effective January 1, 1979).

59. *Id.* § 560.021.

offense defined outside the Code which provides for a mandatory punishment upon conviction.⁶⁰

Thus, by excluding situations where the court is to assess punishment, it is possible to determine when the jury is to carry out that function. The jury will "assess and declare" punishment as part of its verdict if there is a trial by jury, if the defendant does not request in writing that the court assess punishment in the event of a guilty verdict, if there is an authorized punishment that is not mandatory, and if the defendant is not a corporation charged with an offense having no special sentence or sanction authorized by law.

A related question is the extent of the jury's sentencing authority, *i.e.*, which punishments are within the authority of the jury to assess and declare. Of the dispositions authorized by the Code, suspension of imposition of sentence and execution of sentence and probation are clearly not a jury function. The Code does not specify that the remaining dispositions, imprisonment and fines, are within the jury's authority but does specify some situations where these are to be determined or fixed by the court. The jury could have the authority to assess and declare only those specified in the Code to be court-determined. The Code specifies that the court will determine the special terms of imprisonment for class C and D felonies,⁶¹ the extended terms of imprisonment under the dangerous and persistent offender provisions,⁶² and fines based on a pecuniary or proprietary gain obtained by the defendant through the commission of the crime.⁶³ The only prison terms and fines not specified as court-determined are the general ranges of terms of imprisonment for each class of offense,⁶⁴ and the general ranges of fines for each class of offense.⁶⁵ For those offenses defined outside the Code,

60. *Id.* § 557.011.1. The most important statute defining an offense outside the Code is Act No. 11, 1977 Mo. Legis. Serv. 29 (West), which defines the homicide offenses and provides mandatory sentences for first degree ("felony") murder.

61. *Id.* § 558.011.2.

62. *Id.* § 558.016.

63. *Id.* §§ 560.011, .016.2. The Code specifies that a fine based on pecuniary gain from the commission of a class C or D felony will be fixed by the court. *Id.* § 560.011.1(2). The Code does not specify who is to fix the amount of such a fine for the commission of a misdemeanor or infraction. *Id.* § 560.016.2.

64. *Id.* § 558.011.1.

65. *Id.* §§ 560.011.1, .016.1. The Code could be interpreted to provide that the assessment of all fines is exclusively within the authority of the court. This interpretation could be based on the Code language limiting the court to a jury-determined sentence only with prison terms, § 557.036.1, and the extensive restrictions placed on the court on when it may impose a fine and what amount the fine may be, § 560.026. The better interpretation would seem to be that the jury does have the authority to assess and declare a fine as punishment unless the Code specifies otherwise as with fines based on gains and fines on corporate defendants. The restrictions on the imposition of fines are similar to the restrictions on other authorized dispositions and warrants no special interpretation.

whether the jury should have the authority to assess punishment upon conviction of such offense should be determined through interpretation of the statute defining the offense.

Of critical importance to the practical operation of the sentencing process under the new Code is the interrelation of the sentencing functions of the court and the jury. The Code directs that the court is to decide the extent or duration of sentence or other disposition to be imposed under all the circumstances.⁶⁶ When the jury acts within its authority in "assessing and declaring" punishment, the question essentially becomes to what extent, if any, is the court limited by a punishment declared by the jury.

The Code language dealing with this question seems clear and unambiguous. The court's responsibility is not limited to those situations outside the jury's authority to assess punishment. Indeed, the Code prefaces the definition of the court's function by providing that it arises upon a finding of guilt by verdict or plea.⁶⁷ In this same section the Code specifies that the court's decision as to the sentence or disposition to be imposed is limited only in one regard.⁶⁸ If the jury returns a verdict of guilty and "declares" a term of imprisonment, the court cannot impose a term in excess of that declared by the jury unless (1) the term declared by the jury is less than the authorized lowest term for the offense, in which event the court cannot impose a term greater than the lowest term provided for the offense, or (2) the defendant is found to be a persistent or dangerous offender.⁶⁹ This indicates that the court's responsibility to decide the extent or duration of sentence or other disposition to be imposed is as pervasive as the sentencing provisions of the Code and is not limited to those situations outside the jury's authority to assess punishment or to those punishments specified to be court-determined. The court's duty and corresponding authority is limited only by the prison term exception noted above. The court may choose not to sentence the defendant to the punishment declared by the jury, may sentence the defendant to a lesser term of imprisonment, may sentence the defendant to pay a fine greater than that declared by the jury, or may sentence the defendant to pay a fine even though a fine is not assessed by the jury.⁷⁰

The fact that the court's authority is limited by a jury-declared punishment in only one respect could be subject to differing interpretations. The language of the Code's sentencing provisions is ambiguous. In addition, there is no recorded legislative history which would indicate

66. *Id.* § 557.036.1.

67. *Id.*

68. *Id.*

69. *Id.* § 557.036.3.

70. *See* n. 65, *supra*.

the legislature's intent in reinstating jury sentencing. It also should be noted that the Code will be subject to judicial interpretation by the Missouri appellate courts which historically have placed emphasis on jury-declared punishments.

The sentencing language of the Code defies reconciliation. It provides that the jury is to "assess and declare" punishment⁷¹ but does not specify when it is to do so or what punishments it may declare. The Code provides two situations where the court is to "assess" punishment.⁷² It specifies situations where the court is to "fix" or "determine" punishment.⁷³ The court is specifically authorized to "sentence" an individual to some punishments.⁷⁴ Concluding this array of differing language is the almost all-encompassing provision which states that the court "shall decide the extent or duration of sentence or other disposition to be imposed under all the circumstances."⁷⁵ Thereafter, the authorized dispositions are detailed and include, as a subset, "sentences."⁷⁶ Reconciliation of this language into an understanding of the practical effect of the jury's sentencing role under the new Code is difficult and is compounded by the lack of clear legislative intent.

The Missouri legislature might have removed exclusive court sentencing from the Proposed Code and inserted jury sentencing for several reasons, none of which are evident. Some of these reasons could logically explain why there was a single limitation placed upon the court in regard to a jury-determined punishment; some could explain why the appellate review provision was removed. However, it is difficult to formulate a motive which could logically explain both legislative actions.

The legislature might have desired the jury to serve as a sounding board for the court. The court could consider the jury's opinions as to the proper punishment when the court determined the proper disposition. This interpretation, however, does not explain the court's limitation to a jury-declared term of imprisonment. The legislature might have been expressing a fear of unduly harsh court-determined punishments. The limitation may have been provided as a restriction upon the court as to that punishment with which the legislature was most concerned—a term of imprisonment. This would logically explain the single limitation placed on the court, but not the removal of appellate review. Exclusive court sentencing and appellate review could have been removed from the Proposed Code for different reasons. There are other possible reasons for these legislative alterations of the Proposed Code. The criminal defense bar favors jury sentencing. Statutory appellate review

71. *Id.* § 557.036.2.

72. *Id.*

73. *Id.* §§ 560.011.1(2), .021.

74. *Id.* § 558.016.1.

75. *Id.* § 557.036.1.

76. *Id.* § 557.011.

provisions would further burden the appellate courts. The legislature may simply have been acting conservatively in not drastically changing the existing law.

Possibly the best interpretation is to consider the enacted provisions as a compromise between the proponents of exclusive court sentencing and appellate review and the proponents of jury sentencing. After consideration of the policies and purposes of the Proposed Code, the legislature perhaps determined that the court's discretion should be limited only in the area of prison terms, which many believe to be unduly severe when excessive. Such a compromise, however, cannot explain the removal of appellate review, which was designed to guard against excessive sentences and to achieve consistency by providing uniform sentencing standards throughout the jurisdiction.

The Code provides for a jury sentencing function but also requires the court to determine the extent or duration of sentence or other disposition, only restricting the court from imposing a term of imprisonment greater than that declared by the jury. The statutes currently in force provide for a jury sentencing function but also authorize the courts to review and reduce jury-determined punishments.⁷⁷ However, the appellate courts have determined that this authority is available only to the trial court⁷⁸ and, although recognizing this authority, have not encouraged its use. Assessing punishment has been seen as primarily a jury function,⁷⁹ and a punishment within the statutory authorization cannot be adjudged excessive.⁸⁰ The trial court's review of a jury-determined punishment is found by the appellate courts to be purely discretionary and not reviewable unless clear evidence of passion and prejudice appears in the record.⁸¹ It is also clear under the present statutes that no sentence may be imposed which is in excess of that declared by the jury.⁸²

The present statutes authorizing the trial court to review and reduce jury sentences have been found to be discretionary with the trial court. The trial court cannot impose a sentence greater than that declared by

77. § 546.430, RSMo 1969 (repealed effective January 1, 1979).

78. Although not specifically stated, this is the effective result as the appellate courts will not interfere with a punishment declared by the jury absent a showing that passion and prejudice so clearly appears from the record that the trial court abused its discretion in declining to reduce punishment. *State v. Agee*, 474 S.W.2d 817, 820-21 (Mo. 1971); *State v. Rule*, 543 S.W.2d 325, 326 (Mo. App., D.K.C. 1976).

79. *State v. Rizer*, 353 Mo. 368, 374-75, 182 S.W.2d 525, 529 (1944); *State v. Bevins*, 328 Mo. 1046, 1050-53, 43 S.W.2d 432, 434-36 (En Banc 1931).

80. *State v. Smith*, 445 S.W.2d 326, 332 (Mo. 1969); *State v. Jenkins*, 327 Mo. 326, 335, 37 S.W.2d 433, 436 (1931).

81. *State v. Laster*, 365 Mo. 1076, 1083, 293 S.W.2d 300, 304-05 (En Banc 1956).

82. *State v. Hardy*, 339 Mo. 897, 902, 98 S.W.2d 593, 596 (1936).

the jury. The Code seems to *require* a more active role for the trial court in determining the proper disposition and limits the court only with regard to a jury-declared prison term. It is questionable, however, that the Missouri appellate courts will *require* this active trial court function given the ambiguous language of the Code, the lack of discernable legislative intent, and the attitude of the courts in emphasizing the primary sentencing function of the jury. This is especially true because the legislature rejected appellate review of sentences. Unless the appellate courts begin on their own to review sentences, it will be difficult for them to require and supervise an active trial court sentencing function. Such an active role, therefore, would remain discretionary with the trial court as it is under present law.

A related problem concerns the sentencing instructions to be given the jury. The new Code provides that the court shall instruct the jury as to the range of punishment authorized by statute.⁸³ It does not specify whether the jury is to be instructed only when it is to assess punishment or on all occasions. It does not specify whether the punishments instructed upon are to be only those within the authority of the jury to assess or the complete range of punishments that could be imposed by the court. There are several supportable interpretations of this instruction requirement. Perhaps the preferable reading of the instruction requirement is that the jury is to receive sentencing instructions only when it is to assess punishment, and such instructions should include only those punishments within the jury's authority to assess.

The Proposed Code included a provision requiring a jury instruction on the range of authorized terms of imprisonment, even though the court had *exclusive* sentencing authority.⁸⁴ That provision represented a compromise between exclusive judicial sentencing and jury sentencing. It probably was included to take into account the fact that juries do consider the possible punishment in determining the question of guilt or innocence.⁸⁵ However, even under the Proposed Code, which required instructions on the authorized prison terms, it is questionable whether all prison terms authorized for the particular case would have been instructed upon. The purpose of the provision was to apprise the jury of those terms the court could impose after a jury finding of guilt, *i.e.*, the *immediate* consequences of the jury determination. Its purpose was not to apprise the jury of *all* the possible consequences of such a finding.

It cannot be argued that under the proposed provision the court would have instructed the jury on the extended term provisions of the dangerous and persistent offender sections. However, such a term is also a consequence of the jury's determination, because a determination of

83. MO. CRIM. CODE § 557.036.2 (effective January 1, 1979).

84. PROPOSED CODE, *supra* note 1, § 2.060(2).

85. *Id.* in Comments.

guilt for the charged felony is a condition precedent to the applicability of the dangerous and persistent offender provisions.⁸⁶ Under the present Habitual Criminal Act⁸⁷ and the new Code's dangerous and persistent offender provisions,⁸⁸ the court determines the applicability of such provisions out of the presence of the jury to protect against the prejudicial effect such charges would have on the jury.

There are two viewpoints concerning the sentencing instructions to be received by the jury. The first would inform the jury of all the possible consequences of a guilty verdict. It is justified by recognizing that juries often consider the possible punishments when determining guilt. The Proposed Code adopted this rationale but, as noted, did not provide for instruction on all the possible consequences of a guilty verdict. This provision was provided partially as a compromise between exclusive court sentencing and jury sentencing. This compromise function of sentencing instructions is no longer necessary because the legislature provided for a jury role in sentencing in the enacted Code.

The second rationale would call for sentencing instructions only when the jury is to assess punishment and would instruct only to the extent necessary for the jury to exercise its authority. In those situations where the jury is to assess punishment, the primary objective of the instructions would be to convey the necessary information on the punishments the jury is authorized to assess. To instruct the same jury on punishments not within its authority would be confusing and thereby unwarranted by any possible benefit such instructions might have. A more compelling argument for this view is consistent with a widely accepted argument in favor of exclusive court sentencing: that jury sentencing debilitates the jury's primary function—to decide the guilt or innocence of the accused.⁸⁹ Once the jury concerns itself with the consequences of its determination, there is a possibility that the "beyond a reasonable doubt" standard will be endangered.⁹⁰

The sentencing provisions of the new Code are sufficiently precise in most areas to facilitate interpretation. The major difficulties seem to be the lack of a clear definition of the jury's actual role, the breadth of the instructions the jury should receive, and when the jury is to be instructed. The difficulties are due primarily to imprecise language and lack of discernible legislative intent. The jury should serve as a guide for the court, but the court should determine the proper disposition without

86. MO. CRIM. CODE § 558.016 (effective January 1, 1979).

87. § 556.280, RSMo 1969 (repealed effective January 1, 1979).

88. MO. CRIM. CODE §§ 558.016, .021 (effective January 1, 1979).

89. See AMERICAN BAR ASSOCIATION ADVISORY COMMITTEE ON SENTENCING AND REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 46 (1967) [hereinafter cited as ABA STANDARDS]; Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 985-86 (1967).

90. See ABA STANDARDS, *supra* note 89, at 46; Note, *supra* note 89, at 986-87.

restriction to the jury-declared punishment except for prison terms. The court has the presentence report available and also is more knowledgeable and skilled in sentencing than is the jury. The jury should not receive instructions except when it is to "assess and declare" punishment. When instructed, it should receive instruction only on those punishments within its authority to declare. Interpretation of the Code in this manner will maximize its effectiveness in achieving modern criminal sentencing objectives.

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