



# Probation Violations: A Guide to Rehabilitation



THANK YOU

# Overview



- 1. The Basics
- 2. Authority to Revoke
- 3. Rights To and At a hearing
- 4. Dispositions
- 5. Future Litigation

## Authority to Grant Probation

§§559.012 and 559.100, RSMo

Court can grant probation if, given the nature and circumstances of the offense and the history and character of the defendant the court is of the opinion that:

- (1) institutional confinement of the defendant is not necessary for the protection of the public; and
- (2) the defendant is in need of guidance, training or other assistance which can be effectively administered through probation supervision

## Types of Probation

- SIS vs SES
- Supervised vs Unsupervised
- Private vs P&P

## Standard Terms of Probation

§§ 559.016 and 559.036

- Felonies: 1-5 yrs per term
- Misdemeanors: 6 mo – 2yrs per term
- Infractions: 6mo-1yr
- Cannot have more than 2 terms of probation for each offense/cause number

## Conditions of Probation

§559.100.2: The circuit court shall determine any conditions of probation or parole for the defendant that it deems **necessary to ensure the successful completion** of the probation or parole term

- #1: LAWS: I will obey all federal and state laws, municipal and county ordinances. I will report all arrests to my Probation and Parole Officer within 48 hours.
- #2 TRAVEL: I will obtain advance permission from my Probation and Parole Officer before leaving the state or the area in which I am living.
- #3 RESIDENCY: I will obtain advance permission from my Probation and Parole Officer before making any change in residency.
- #4 EMPLOYMENT: I will maintain employment unless engaged in a specific program approved by my Probation and Parole Officer. I will obtain advance permission from my Probation and Parole Officer before quitting my job or program. In the event I lose my job or am terminated from a program, I will notify my Probation and Parole Officer within 48 hours.
- #5 ASSOCIATION: I will obtain advance permission from my Probation and Parole Officer before I associate with any person convicted of a felony or misdemeanor, or with anyone currently under the supervision of the Board of Probation and Parole. It is my responsibility to know with whom I am associating.
- #6 DRUGS: I will not have in my possession or use any controlled substance except as prescribed for me by a licensed medical practitioner.
- #7 WEAPONS: I will not own, possess, purchase, receive, sell, or transport any firearms, ammunition or explosive device, or any dangerous weapon if I am on probation or parole for a felony charge or a misdemeanor involving firearms or explosives, or if it is in violation of federal, state, or municipal laws or ordinances.
- #8 REPORTING/DIRECTIVES: I will report as directed to my Probation and Parole Officer. I will abide by any directives given me by my Probation and Parole Officer.
- #9 SUPERVISION STRATEGY: I will enter and successfully complete any supervision strategy and abide by all rules and program requirements as directed by the Court, Board, or my supervising Probation and Parole Officer.
- #10 INTERVENTION FEES: I shall pay a monthly intervention fee in an amount set by Missouri Department of Corrections pursuant to §217.690. This payment shall be due and payable on the first day of the first month following placement on probation, parole or conditional release.
- #11 SPECIAL CONDITIONS: [*Case-specific*]

# # 11 Special Conditions

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Restitution as a condition of probation **limited** to “the victim’s losses due to such offense”; there must be some evidence:

- connecting the defendant to the unrecovered losses
  - that the unrecovered losses were “due to” or “because of” the offense to which the defendant pleaded guilty

SXR Bowman v. Inman, 516 S.W.3d 367

- If special conditions –or the exclusion of special conditions –are not spelled out in the plea agreement, the court can order them as conditions of probation without rejecting the plea agreement, and therefore does not have to let the defendant withdraw the plea if they object to those conditions.

- From the dissenting opinion: *“This Court should not approve of a prosecutor and a circuit court making ambiguous or misleading statements about the effects of a plea bargain and guilty plea to induce a defendant to plead guilty and then surprising the defendant with onerous and unknown conditions of probation...”*

SXR Delf v. Missey, 518 S.W.3d 206

## #6 DRUGS vs. Medical Marijuana

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Mo. Const. Art. XIV – Right to access  
medical marijuana

§217.705.3 – The probation and parole officer  
may **recommend** and, by order duly entered,  
the **court** may **impose** and may at any time  
modify any conditions of probation

## To-Do List

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1. What is your client on probation for (**underlying offense**)?
2. **What kind of probation** does your client have (SIS, SES, or SES after a 120 or long term treatment)?
3. **When** was your client placed on probation?
4. Has your client's probation been **previously revoked** on this offense?
5. Has your client earned any **compliance credits**?
6. What are the alleged **violations**?
7. What **additional discovery** do you need?
8. What **further investigation** needs to be done?
9. What does the **probation officer really think** should happen?

# Reading a Probation Violation Report

Report type: Initial or Supplemental

Check the supervision dates against the docket and your calculations of ECC

Client has charges in other counties

AKPVIF Missouri Department of Corrections Page - 1  
Board of Probation and Parole  
FIELD VIOLATION REPORT

DOC Name: [REDACTED] DOC ID: 1107945

District: 36 Officer: E0032607 RONNI DUBOIS  
District Address: 326 EAST HIGH STREET, SUITE 1  
POTOSI MO 63664  
Phone: 573-438-3448 Fax: 573-436-8906

Type of Report: Supplemental  
Type of Violation: Felony  
Conditions Violated: Laws  
Officer Recommendation: Court Action Requested  
CAPIAS, SUSPENSION

Sentence Name: [REDACTED]  
Sentence Status: Release to Prob-Treatment Ctr  
PG:STEALING \$500 OR MORE  
Type: SES Sentence Length: 4 yr  
Term of Probation: 4 yr Spec Ind:  
District: ERA Supervision Began: 03/21/2013 Expires: 03/20/2017  
County: STLO Circuit/Div: 21/9 Docket Number: [REDACTED]  
Judge: DAVID L. VINCENT III

Sentence Name: [REDACTED]  
Sentence Status: Release to Prob-Treatment Ctr  
PG:THEFT/STEAL (VAL PROP OR SVC IS \$500 OR > BUT < \$25,0000)  
Type: SES Sentence Length: 5 yr  
Term of Probation: 5 yr Spec Ind:  
District: 36 Supervision Began: 03/21/2013 Expires: 03/20/2018  
County: WASH Circuit/Div: 24/2 Docket Number: [REDACTED]  
Judge: KENNETH W. PRATTE

# Reading a Probation Violation Report

Date Violation Discovered:  
Violation Interview Date: Time:  
Location:

N Offender Advised that Any Statements May be Included in Violation Report  
N Offender Given Booklet "Rights of Alleged Violator"  
N Violation Warrant Issued  
Preliminary Hearing Not Applicable  
IN CUSTODY? N Date: 06/07/2013  
Location:

\*\*\* FOR MISSOURI BOARD ABSCONDERS/ESCAPEES ONLY \*\*\*  
Date of Absconder Warrant: Date of Arrest:

OATH/AFFIRMATION: I state that the facts contained in this document are true and correct to the best of my knowledge and belief.

Please refer to the previously submitted violation report(s) dated: 06/27/2013.

Regarding the arrest by the Manchester Police Department on 6-7-13 for Stealing, the police report has been received and reflects the following:

On 6-3-13 Manchester Police Officers Lebbing and Milligan responded to  
Name: [REDACTED] Date - 7/19/13  
DOC ID: [REDACTED] Time - 13:50:08

Two possibilities: either client has yet to be interviewed OR report has yet to be written.

There is a previous report, you need it.

Additional discovery

# Reading a Probation Violation Report

PO's recommendation:

- Initial recommendation (capias, suspension)
- Final recommendation (ultimate disposition)

Clients last known location

Earned/Optimal discharge dates

#### IV. RECOMMENDATION

The recommendation is for Capias, Suspension. There are no words that can sufficiently convey the chaos that [REDACTED] behavior generates for her victims, law enforcement, and this agency. Trying to obtain all relevant reports and adequately communicate [REDACTED] negative impact on the community that she privily skulks through is a constant round robin of activity. She is a menace to society; nothing is sacred. She apparently lives her life by stealing from every proprietor she fancies. There is absolutely NOTHING community supervision can offer her. In the strongest possible terms I am respectfully requesting that the Court expediate Suspending [REDACTED] probation and issuing their Capias'.

Name: [REDACTED]  
DOC ID: [REDACTED]

Date - 7/19/13  
Time - 13:50:08

AKPVIF

Missouri Department of Corrections  
Board of Probation and Parole  
FIELD VIOLATION REPORT

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#### V. AVAILABILITY

[REDACTED] currently residing at: [REDACTED]

Regarding case [REDACTED], [REDACTED] has an Earned Discharge Date of 1-19-17.

Regarding case [REDACTED], [REDACTED] has an Earned Discharge Date of 1-19-18.

# Authority to Revoke

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NOT  
TODAY  
SATAN

# Questions to Answer

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1. Is the probation term expired?
2. If it is expired, does the court still have authority to hold a hearing?
3. Did the violation occur during the probation term?
4. Is Good Samaritan implicated? §195.205 RSMo.

# Power to Revoke

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§559.036.8

The court has the power to revoke probation:

- for the duration of the term of probation designated by the court (*during probation term*); and
- for any further period which is reasonably necessary for the adjudication of matters arising before its expiration (*after probation term*)

*“...for any further period which is reasonably necessary for the adjudication of matters arising before its expiration.”*

1. **Affirmative manifestation** of an **intent to conduct** a revocation hearing; and

- See SXR Barnes v. Pilley, 624 S.W.3d 372 (Mo. App. W.D. 2021)
  - State files Motion to Revoke
  - Court issues Capias warrant
  - Court suspending probation is not sufficient

2. **Every reasonable effort** is made to **notify the probationer** and to **conduct the hearing prior to the expiration** of the probation term

- Court lacks authority to revoke where revocation hearings prior to expiration of probation could have been held, but were not, until well after expiration. SXR Strauser v. Martinez, 416 S.W. 3d 798
- Hearing held 23 days after expiration of probation, court had lost jurisdiction. Timberlake v. State, 419 S.W.3d 224
- If absconds, court retains jurisdiction until probationer apprehended Williams v. State, 927 S.W.2d 903
- If court knows client is in DOC, it is incumbent on the court to notify client of the violation and to writ client in for a hearing. SXR Dotson v. Holden, 416 S.W.3d 821, 825 (Mo. Ct. App. 2013); also SXR Jones v. Eighmy, 572 S.W.3d 503 (Mo. banc 2019)(client in custody in neighboring county).
- 11 year delay in holding hearing -where defendant made his whereabouts known to the court and the court had previously had defendant brought to court and could have him brought again -resulted in court losing authority to revoke SXR Zimmerman v. Dolan, 514 SW3d 603
- Court can't rescind credits in attempt to maintain authority over the probation. SXR Culp v. Rolf, 568 S.W.3d 443 (Mo. App. WD 2019).

# Probationary Term

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- What is the term?

**Begins:** A term of probation commences on the day it is imposed. §559.036.1.

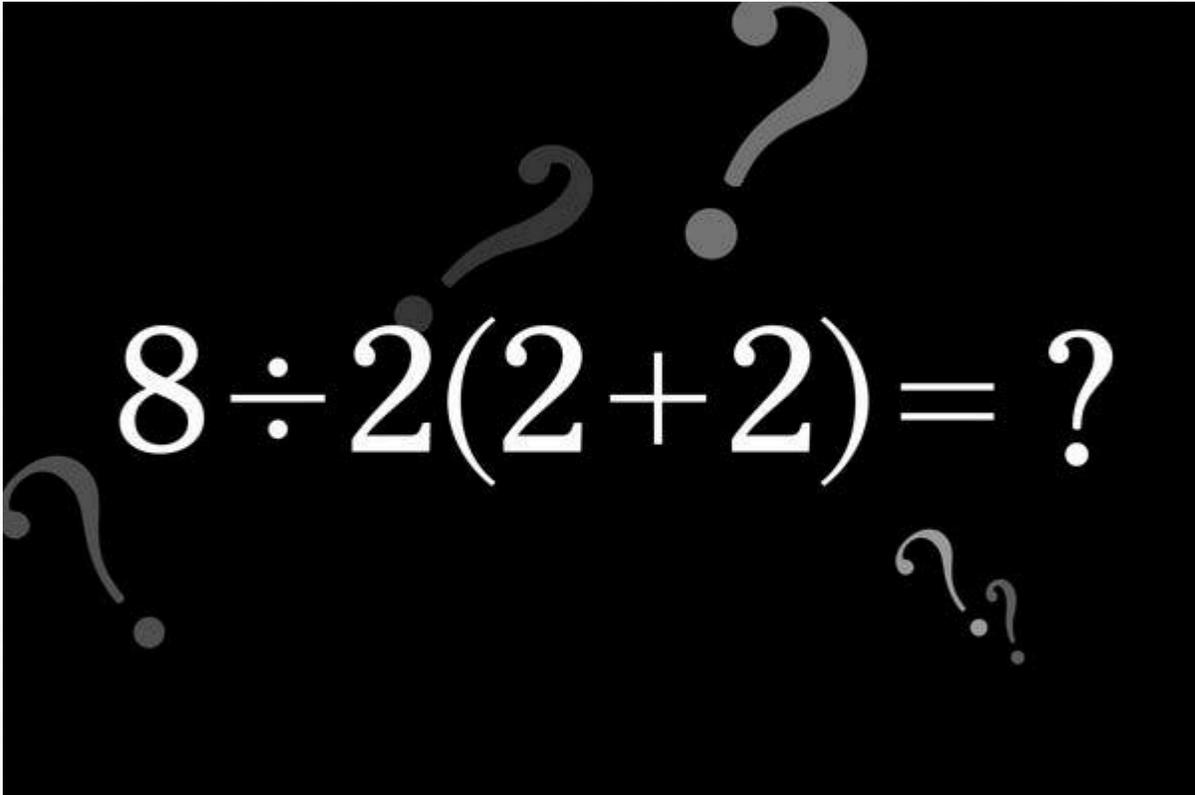
**Ends:** As ordered by court when probation term ordered.

**Extension:** Court can extend probation one time (per term), and can extend by one year beyond maximum if it finds a violation; §559.016

**Reduction:** Certain probationers are entitled to 30 days of earned compliance credits for every month they are “compliant.” §217.703

# Earned Compliance Credits (ECC)

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$$8 \div 2(2 + 2) = ?$$



## What are ECCs?

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What do they do?

- Reduce term of probation by 30 days for every full calendar month of “compliance”

When do they start?

- After the first full calendar month of supervision

## *Earned Compliance Credits (ECC) Eligibility*

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1. Not under lifetime supervision
2. Eligible offenses
  - Drug Offenses
  - C/D felonies (pre-2017); D/E felonies (post-2017)
    - Excluded offenses
    - Excludable offenses
3. Supervised by P&P
4. In “compliance” with conditions of P&P

# Goal = Discharge

§217.703.7: Once the combination of time served in custody, time served on probation, and earned compliance credits satisfy the total term of probation, the board or sentencing court shall order final discharge of the offender.

Time in Custody



Time on  
Supervision



ECC



Probation Term

- 60 days before discharge: P&P notifies court and PA. If neither takes action, offender shall be discharged (§217.703.10)
  - Not required for discharge. *SXR Jonas v. Minor*, 602 S.W.3d 189, 196-197 (Mo. banc 2020).
- Must serve 2 year minimum on probation, including any 120s
- No early discharge if restitution unpaid

# Excluded vs. Excludable

## Excluded offenses (§217.703.1 (2))

- 1) Aggravated Stalking
- 2) Sexual Assault/Rape 2nd
- 3) Deviate Sexual Assault/Sodomy 2nd
- 4) Assault 2nd(physical injury w/ weapon/instrument)
- 5) Sexual Misconduct Involving a Child
- 6) Endangering Welfare of a Child 1st(sexual conduct, child less than 17, actor is parent/guardian/in charge)
- 7) Incest
- 8) Invasion of Privacy
- 9) Abuse of a Child

## Excludable Offenses (§217.703.2)

- 1) Involuntary Manslaughter 1st
- 2) Involuntary Manslaughter 2nd
- 3) Assault 2nd(except physical injury w/ weapon/instrument)
- 4) Domestic Assault 2nd
- 5) Assault LEO 2nd
- 6) Statutory Rape 2nd
- 7) Statutory Sodomy 2nd
- 8) Endangering Welfare of a Child 1st(substantial risk to life/body/health)
- 9) Weapons offenses (Ch. 571)

# Excludable Offenses

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## §217.703.2 ECC Excludable Offenses

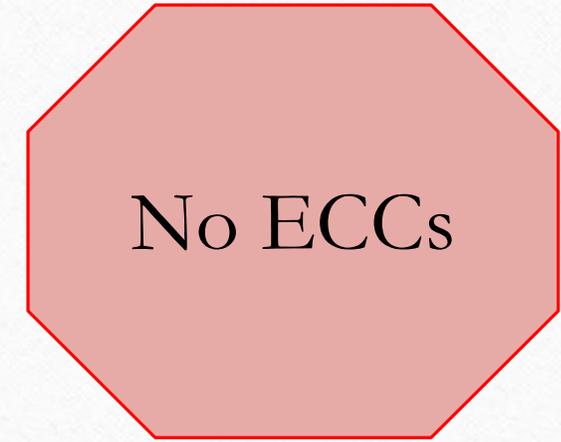
- State can file motion, or court can take up on its own
  - Because of nature and circumstances of the offense or history and character of the defendant a longer term of probation is necessary for protection of the public or the guidance of the offender;

Motion has to be filed:

- At any time prior to the first month in which the person may earn ECC; OR
  - And ECC will be suspended until after issuance of decision
- After a violation and a HEARING, the court finds that the nature and circumstances of the violation indicate that a longer term of probation is necessary for the protection of the public or guidance of the offender (all earned ECC at that point also rescinded)

Denial of ECC only applies to excluded or excludable. SXR Hawley v. Chapman, 567 S.W.3d 197 (Mo. App. WD 2018).

# ECC Denial



§217.703.5 - ECC does not accrue during any month when:

- **Violation report** submitted (but see definition of “compliance” – now includes notice of citation)
- Offender is in **custody**
- **Motion** to revoke or suspend has been filed
- Offender is declared an “**absconder**” (§217.703.6)
  - Offender left place of residency, without permission, for purposes of avoiding supervision
    - Whereabouts unknown\*



## ECC Suspension

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### ECC suspended pending hearing

- No hearing, continuance (not CODs) or no violation found: credits begin again 1<sup>st</sup> day of next calendar month following violation/MTR

### ECC suspended while probation suspended

- Begins to accrue again on the first day of the next calendar month following the lifting of the suspension

# ECC Rescission

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When can ECC be taken back?

- Probation is **revoked** and client gets a **new term** of probation
- Probation is not revoked and client gets **CODS** (§559.036.4) or a **120** (§217.785) as a special condition of probation
- On an **excludable offense**, **judge determines** that a **longer term** of probation is necessary after a violation.

Earned Compliance Credit Calculation Listing

Name: [REDACTED] DOC ID: [REDACTED] DOB: [REDACTED] Cycle: 20130429  
 Legal Name: [REDACTED] Gender: Male  
 Assigned Location: 15 Phone: [REDACTED] Assigned Staff:  
 Current Location: [REDACTED] Phone: [REDACTED]  
 Overall Case Type: [REDACTED]

Earned Compliance Credit Calculation Listing

Calculation Date/Time:

06/21/2017 17:18

Expand All | Collapse All

Case Number	Case Type	Charge Description	Completed	Earned Credit Days	Original Discharge Date	Earned Discharge Date	Optimal Discharge Date
12JE-CR01409-01		DRIVING WHILE INTOXICATED ...	<input type="checkbox"/>	750 600 +150	07/01/2019	11/08/2017	11/08/2017
	Month/Year	Eligibility Status	Ineligible Reason	Override	Override Reason	Earned Credit Days	
<input type="button" value="Override"/>	May 2017	Ineligible	Supervision Suspended	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	April 2017	Ineligible	Supervision Suspended	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	March 2017	Ineligible	Prosecutor - Motion to Revoke ?	<input type="checkbox"/>		<del>30</del>	
<input type="button" value="Override"/>	February 2017	Ineligible	Prosecutor - Motion to Revoke ?	<input type="checkbox"/>		<del>30</del>	
<input type="button" value="Override"/>	January 2017	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	December 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	November 2016	Ineligible	Prosecutor - Motion to Revoke ?	<input type="checkbox"/>		<del>30</del>	
<input type="button" value="Override"/>	October 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	September 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	August 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	July 2016	Ineligible	Prosecutor - Motion to Revoke ?	<input type="checkbox"/>		<del>30</del>	
<input type="button" value="Override"/>	June 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	May 2016	Ineligible	Citation	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	April 2016	Ineligible	Prosecutor - Motion to Revoke ?	<input type="checkbox"/>		<del>30</del>	
<input type="button" value="Override"/>	March 2016	Ineligible	Supervision Suspended	<input type="checkbox"/>		0	
<input type="button" value="Override"/>	February 2016	Ineligible	Supervision Suspended	<input type="checkbox"/>		0	

Pre-08/28/18

Check P&Ps Math

SXR Jonas v. Minor, 602 S.W.3d 189, 193-194 (Mo. banc 2020) – on writ you can challenge calculation of ECC

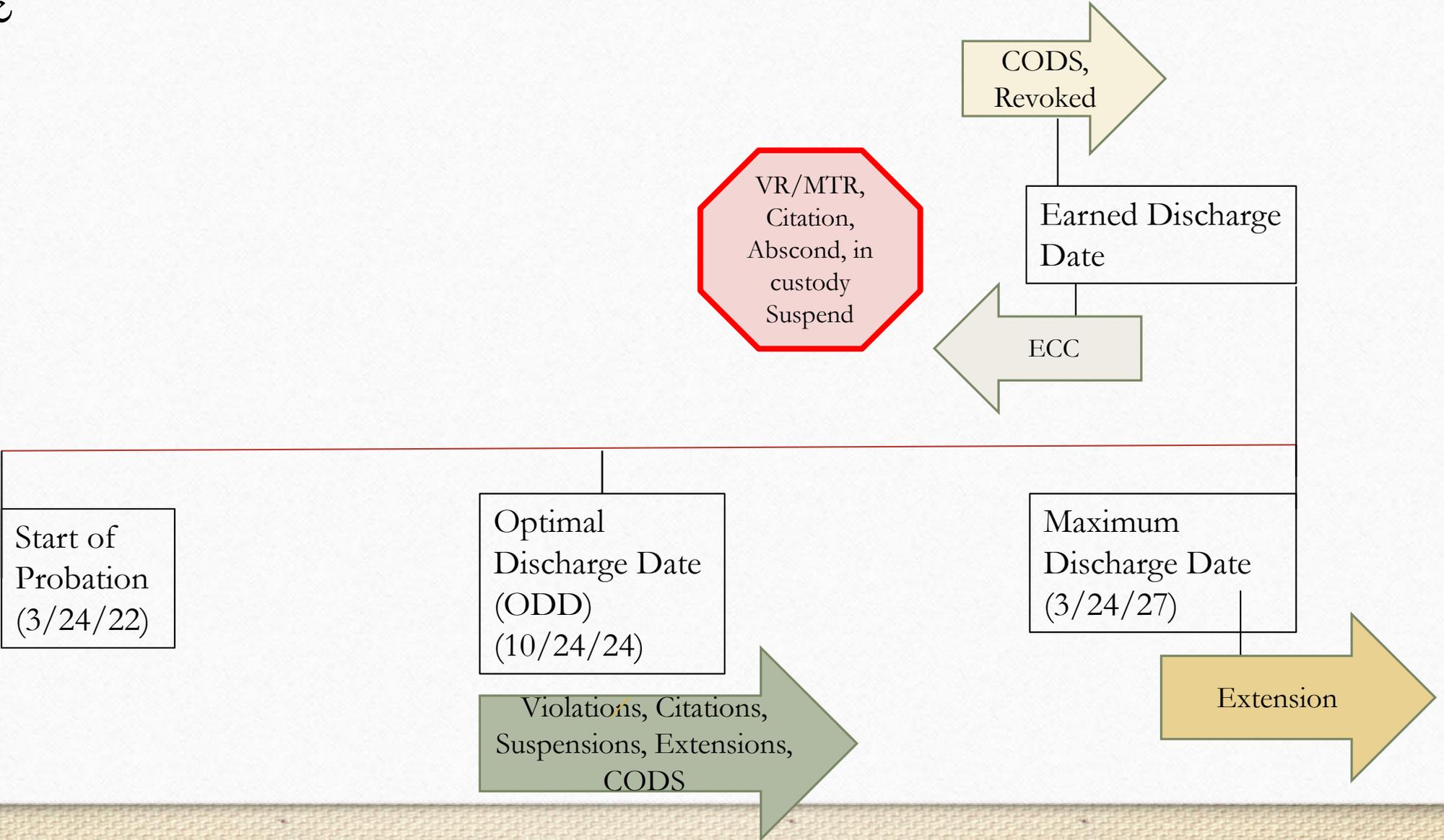
Earned 6-8-17?

# Semantics re: Restitution

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- NO suspending ECC simply because the probationer owes court costs/restitution
  - And can't call court costs restitution. SXR Schmitt v. Hayes, 583 S.W.3d 73 (Mo. App. W.D. 2019).
- BUT
  - Can't be discharged from probation if restitution owed. SXR Hillman v. Beger, 566 S.W.3d 600 (Mo. banc 2019)

Probation  
Timeline





If you think you are close to the expiration date, **DO NOT CONSENT** to any continuances that push the case out past the expiration date.

- See Miller v. State 558 S.W.3d 15 (Mo. banc 2018)
  - “In *Strauser*...this Court expressly found the records did not indicate the defendants agreed to the continuances.
  - Unlike the defendants in *Strauser*, Mr. Miller *affirmatively agreed to continue* the revocation hearing...The plain language of the statute does not preclude the trial court from continuing the matter beyond the expiration date when it...does so by agreement of the parties.”
- See also Suber v. State, 516 S.W.3d 386 (Mo. App. E.D. 2017)



# Helping Hands

Generally probation violations can not be litigated through PCR

- Writs: Look before you leap
- Which type? Habeas, Prohibition, Mandamus
- Who is going to handle it?

It is always a good idea to get ahead of this issue before you have your hearing

- Amy Lowe (Eastern Appellate Area 51)
- James Egan (Central Appellate Area 50)
- Damien de Loyola (Western Appellate Area 69)





Rights To and At a Hearing

## 1. Violation



## 2. Notification:

- In writing
- PO can issue warrant

## 3. Preliminary Hearing:

- Judge or impartial PO
- Conducted according to P&P rules (red book)
- Attorney not present
- Even if no problem cause, Court can still hold revocation hearing

## 4. Probation Violation Hearing

- Right to Counsel if due process requires it
- Right to hearing before a judge



Due process is required in probation revocations and certain minimum requirements must be satisfied to comply with due process. Moore v. Stamps, 507 S.W.2d 939, 947 (Mo. App. 1974).

- (a) **Written notice** of claimed violation and date and time of hearing
- (b) **Disclosure** to probationer in general terms of **evidence against him**
- (c) **Opportunity to be heard** in person or by counsel
- (d) **Right to confront and cross-examine** adverse witnesses



# Basic Rules

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A violation of the conditions of probation is not a criminal offense, and a proceeding to revoke obviously is not a criminal prosecution within the constitutional provisions. State v. Sapp, 55 S.W.3d 382, 383 (Mo. App. W.D. 2001).

- Which rules apply? *Rule 29.18*
  - Rules of Civil Procedure apply “insofar as applicable” EXCEPT
  - Discovery: criminal rules of procedure apply
  - Change of Judge: *Rule 51.05*
    - No automatic right because it is not an “independent civil action”
    - Cannot change if judge is the same one who either put defendant on probation or presided over the previous violation
    - If the judge is not the one who presided over the plea/previous violation: application must be filed within 60 days from service of process or 30 days from the designation of the trial judge, whichever time is longer.
    - See SXR Manion v. Elliott 305 S.W.3d 462 (Mo. banc 2010)

## Right to Discovery

- *Rule 29.18(e):* Discovery. The rules applicable to criminal cases shall govern discovery.
- *Rules 25.03 and 25.08:* Disclosure by State Without Court Order and Continuing Duty to Disclose
- *Rule 25.12:* Discovery Deposition by Defendant
- *Rule 25.10:* Matters not subject to disclosure
  - (A) Legal research, or records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of counsel for the state or members of his legal or investigative staff, or of the defendant, defense counsel, or members of his legal or investigative staff;
  - (B) An informant's identity where his identity is a prosecution secret, a failure to disclose will not infringe the constitutional rights of the defendant, and disclosure is not essential to a fair determination of the cause. Disclosure shall not be denied hereunder as to the identity of an informant to be produced at a hearing or trial.
  - (C) Any material or information which involves a substantial risk of prejudice to national security, where a failure to disclose will not infringe the constitutional rights of the accused, and where disclosure is not essential to a fair determination of the cause. Disclosure shall not be denied hereunder as to material or information which is to be disclosed at a hearing or trial.

### YOUR CLIENT HAS A RIGHT TO THE EVIDENCE AGAINST THEM, INCLUDING:

- Violation reports (statements by client, statements by PO)
- Police reports (where there is a laws violation)
- PO's case notes or ARB road notes
- Any correspondence between the client and the PO
- Any other documents recording statements made by the client
- The names/addresses of any witnesses who provided evidence against them



## **Standard of Proof**

- A probation revocation is not part of the criminal prosecution process and, therefore, the evidence standard is not the reasonable doubt standard and therefore the judge need only be reasonably satisfied that the terms of the probation were violated. Moore v. Stamps, 507 S.W.2d at 949.
- Mere preponderance of the evidence is necessary in civil matter of revocation of probation. Turner v. State, 784 S.W.2d 342 (Mo. App. 1990)(overruled by Hoskins v. State, 329 S.W.3d 695 (Mo. banc 2010), on other grounds).

## **Right to Counsel**

- If probationer requests counsel, the judge shall determine whether counsel is necessary to protect the probationer's due process rights. §559.036.6.
- Indigent defendants who are accused of violating their probation have the same Sixth Amendment right to counsel as all other indigent defendants who face the possibility of imprisonment. SXR Missouri Public Defender Comm'n v. Pratte, 298 S.W.3d 870, 885 (Mo. banc 2009).

## **Right Not to Testify**

- State can not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment. Minnesota v. Murphy, 465 U.S. 420, 438 (1984).
- A probationee retains the privilege enjoyed by all citizens to refuse to answer questions put to him in any proceeding, criminal or civil, formal or informal, where the answers might incriminate him in future criminal proceedings. Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

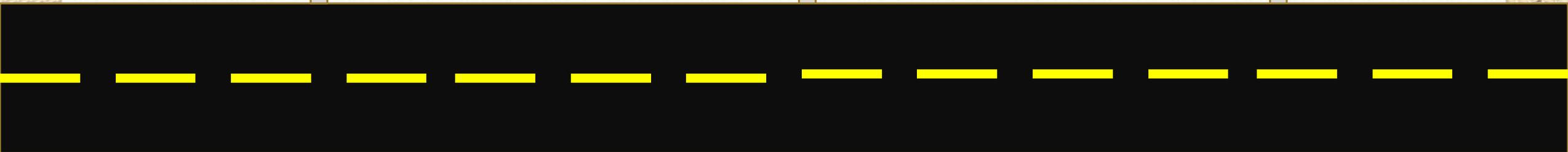
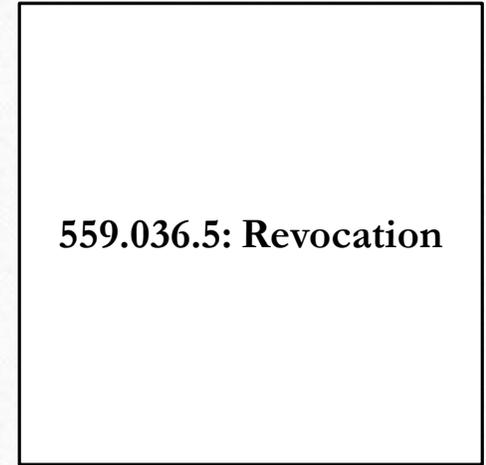
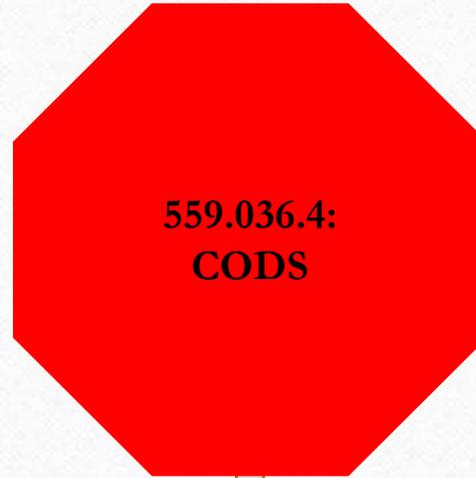
## Right to Confrontation

- Hearsay evidence may form basis to revoke probation if the probationer or counsel may cross-examine witnesses offering hearsay evidence. Moore v. Stamps, 507 S.W.2d at 949.
- Probationee is entitled to confront and cross-examine persons who produced evidence upon which the trial court deprived petitioner of his liberty. In re Carson, 789 S.W.2d 495, 497 (Mo. App. S.D. 1990).
  - State admitted probation violation report and lab results for drug test.
  - No witnesses testified for State.
  - Defendant claimed right to cross examine probation officer who wrote report and lab technician who did lab testing
- Reliability and Relevance must still be established to be admissible.
  - Object
    - Hearsay (Double-Triple-Rumor)
    - Confrontation (Sixth Amendment to the US Constitution, Mo. Const. Art. I §18(a))
    - Due Process (Fifth and Fourteenth Amendments to the US Constitution, Mo. Const. Art, I §10)
    - Relevance (logical and legal)
  - Move to Strike



# Dispositions

# Dispositions



# Dispositions

*§559.036.3: If the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, the court may continue him on the existing conditions, with or without modifying or enlarging the conditions or extending the term.*

For programs, see: <http://doc.mo.gov/Documents/prob/SupervisionStrategies.pdf>

1. **Discharge** defendant from probation prior to expiration of term (doesn't require finding of violation)
2. **Continue** probation without modification of conditions or extension of term
3. **Add conditions** geared towards successful rehabilitation
  - a) Substance abuse treatment
  - b) Community service
  - c) No contact/association
  - d) House arrest (electronic monitoring –free to client/included in Intervention Fees)
  - e) Require specific payment amount per month/renegotiate restitution
4. **Shock** Incarceration (§559.026)
  - a) Misdemeanors –not to exceed shorter of 30 days or maximum term of imprisonment
  - b) Felonies –not to exceed 120 days
5. **Extend** term (§§559.036.2 and 559.016) (if violation found)
  - a) Court may extend one time per probation term by one additional year
    - if placed on maximum term, court may extend one year beyond maximum

Alternatives  
to  
Revocation

# Dispositions

*§559.036.4(1): Unless the defendant consents to the revocation of probation, if a continuation, modification, enlargement or extension is not appropriate under this section, the court shall order placement of the offender in one of the department of corrections' one hundred twenty-day programs so long as [the defendant qualifies for CODS].*

## What does CODS do?

- If continuation is not appropriate and defendant qualifies, the court shall order defendant into 120 day program
- Upon successful completion, defendant shall be released
- Defendant continues to serve the term of probation (probation not revoked)
  - The court can only release a defendant upon successful completion, can not modify the probation term. SXR Sampson v. Hickle, 573 S.W.3d 76 (Mo. banc 2019).
- If not eligible for CODS, may still be eligible for Post-Conviction Treatment (§217.785)
  - 1st time offenders w/ active substance abuse problem (not alcohol only), where drug offense or drugs contributed to offense
  - Ordered as a special condition of probation
  - Ordered without revoking probation
  - SIS and SES are eligible

## Eligibility for CODS:

1. Qualifying underlying offense
  - C or D felony (pre-2017), D./E (post-2017)
    - EXCEPTIONS
  - Any drug offense (Ch. 195/579)
2. Disqualifying violations (IF FOUND)
  - Absconding (#3 & 8, but must meet statutory definition of “absconder”)
  - Laws (#1)(arrest is enough)
  - Weapons (#7)
  - No Contact (#11)
3. No prior 120s for same offense or probation term



# Dispositions



## §559.036.5:

- *If the defendant consents to the revocation of probation or if the defendant is not eligible under subsection 4 of this section for placement in a program and a continuation, modification, enlargement, or extension of the term under this section is not appropriate, the court may revoke probation and order that any sentence previously imposed be executed.*
- *If imposition of sentence was suspended, the court may revoke probation and impose any sentence available under §557.011. The court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation.*
- *The court may, upon revocation of probation, place an offender on a second term of probation. Such probation shall be for a term of probation as provided by §559.016, notwithstanding any amount of time served by the offender on the first term of probation.*

# Dispositions

## Second Term of Probation

- Only available if client is currently on first term of probation
  - Court limited to two terms of probation (SXR Heberlie v. Martinez, 128 S.W.3d 616)
  - If court places person on 3<sup>rd</sup> term of probation, they have no authority to revoke. (SXR Weaver v. Martinez, 481 S.W.3d 127)
- Remember: 120s and long term result in new term of probation

## Revoke SIS and ...

§557.011.2 allows the following:

- (1) term of imprisonment (including 120s/long term);
- (2) pay a fine (if applicable);
- (3) SIS;  
- SXR Connett v. Dickerson, 833 S.W.2d 471, 475 (Mo. App. S.D. 1992)
- (4) SES;
- (5) Shock incarceration as condition of probation

## Revoke SES and ...

- Place on new term of probation with same sentence (backup)
  - Restitution: court cannot go back and order restitution as part of sentence now if it was not ordered as part of sentence at time of initial sentencing. OBJECT TO IT!
  - Can do 120
- Execute sentence
  - Court cannot re-sentence, merely executes previously imposed sentence

## Revoke, Impose/Execute, and Mitigate Sentence - §559.036.5

- DOC sometimes fails to give this credit when it is ordered, so it is a good idea to have a written order ready for the judge to sign rather than just having it done on the record.

# Dispositions

## §559.115 - ITC or Shock

- Sentence executed per 559.115 (not an SES at time of sentencing)
- If client successfully completes program, court shall order release unless it determines release would be “inappropriate”
  - Right to a hearing if release denied
  - If DOC fails to send report within 120 day period, advise client to file Form 40 immediately.
- If ITC: need a bed date, and client must reach DOC 15-36 days before bed date.
- Statutory restrictions on parole (e.g. dangerous felonies) do not limit applicability of 559.115 if eligible for probation (Masters v. Lombardi, 472 S.W.3d 214)

## §217.362 Long Term Treatment

- 1-2 year long program
- Must have minimum 4 year sentence
- Chronic non-violent offenders only
  - $\geq 3$  non-violent felony findings of guilt
    - Includes prior/present offenses, SIS/SES
  - Felonies must have separate cause numbers or offense dates
  - “violent offenses” is defined by DOC regulation (see below resource)
- Client must be screened for long term prior to sentencing



Go to [doc.mo.gov](http://doc.mo.gov) for full list of qualifications

Institutional  
Programs

# Dispositions

**SIS**  
**Offense:** possession  
**Violations:**  
employment, reporting



**Alternatives to Revocation**  
Discharge, shock time, increase supervision level, comm. service



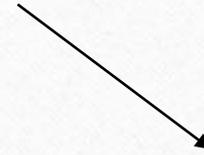
**CODS**  
Eligible: Yes  
Waive it?



Revoke and place on SIS or SES

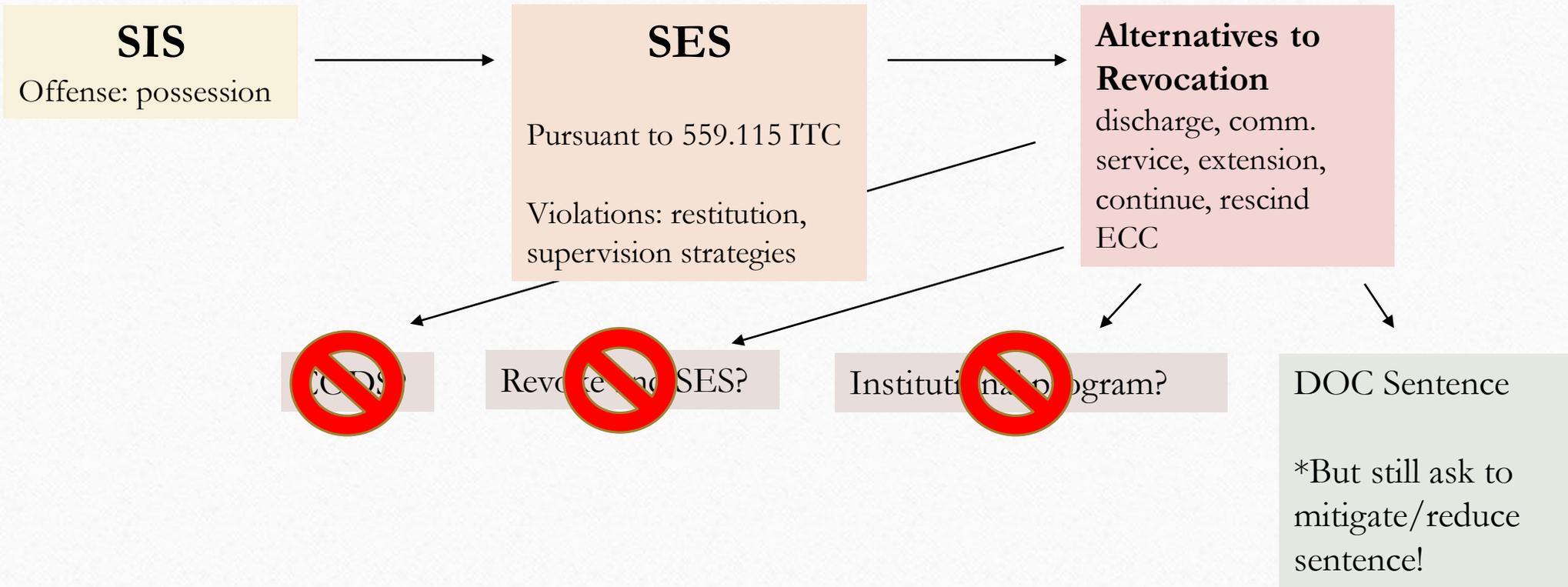


Institutional treatment program



Revoke and sentence

# Dispositions



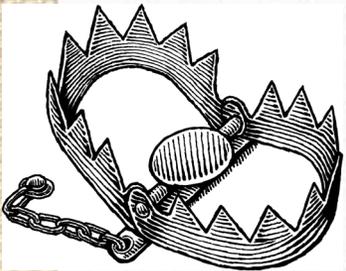


Future Litigation

# Refusing Release to Probation - §§217.362 and 559.115

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- If client successfully completes program, court shall order release unless it determines release would be “inappropriate” (applies to both statutes)
  - Right to a hearing if release denied (only for 559.115)
  - But the failure to release must be based on competent evidence
    - While the Court may consider pre-sentence evidence/conduct, the Court may not base its decision exclusively on that evidence in refusing to release. SXR Hunt v. Seay, 622 S.W.3D 184 (Mo. App. S.D. 2021)(Tyler Coyle – Central PCR)
    - A minor conduct violation for “failing to move a chair” is not sufficient to deny release where client successfully completed long-term treatment. SXR Cullen v. Cardona, 568 S.W.3d 492 (Mo. App. E.D. 2019)(Amy Lowe – Appellate/PCR East A)



# Restitution



Restitution: Failure to pay as reason for revocation prior to maximum term

- If the probationer has made all reasonable efforts to pay the fine or restitution, and yet can not do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the defendant are available. Bearden v. Georgia, 461 U.S. 660, 665 (1983); also Black v. Romano, 471 U.S. 606, 614 (1985).
- No person ordered by the court to pay restitution pursuant to this section shall be released from probation until such restitution is complete. If full restitution is not made within the original term of probation, the court shall order the maximum term of probation allowed for such an offense. §559.105.2.

## §§ 549.500 and 559.125.2 - Sword or Shield?

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- See SXR Jones v. Prokes, 2021 WL 1618002 (Mo. App. W.D., filed April 27, 2021, *transfer denied*) (Kate Merwald – Western Appellate)
- 559.125.2. Information and data *obtained* by a probation or parole officer *shall be privileged information* and shall not be receivable in any court. Such information shall not be disclosed directly or indirectly to anyone other than the members of a parole board and the judge entitled to receive reports, except the court or the board may in its discretion permit the inspection of the report, or parts of such report, by the defendant, or offender or his or her attorney, or other person having a proper interest therein.



# Sword or Shield? (cont'd)

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- P and P is using the statute to deny releasing information to the defense
  - “The purpose of [the privilege] is that the probationer knows that the information learned by the probation officer will be held in confidence.” State v. Davis, 522 S.W.3d 58, 65 (Mo. App. W.D. 2011).
  - “Due process ... is a strong societal interest that mandates the yielding of a privilege.” SXR St. John’s Regional Medical Center v. Dally, 90 S.W.3d 209, 217 (Mo. App. S.D. 2002).
  - “The refusal of the court to direct the FBI agents and the parole officer to answer proper questions upon being deposed,” the court ruled, “denied petitioner the ability to fully and properly prepare for the hearing.” SXR Robinson v. Corum, 716 S.W.2d 376, 378 (Mo. App. W.D. 1986).

# Supervision Disparities

Litigating your client's age, race, and gender

- Questioning PO
  - Community resources offered
  - Community resources eligible
  - Patterns of violating behavior
- Subpoena court records
  - §559.125.1 – “The clerk of the court shall keep in a permanent file all applications for probation and parole by the court, and shall keep in such manner as may be prescribed by the court complete and full records of all presentence investigations requested, probations or paroles granted, revoked or terminated and all discharges from probations and parole.”
- Sunshine request – Chapter 610, RSMo



May 6, 2021

Missouri Department of Corrections, Probation and Parole  
Attention: Public Information Officer  
Email: PP.SunshineRequest@doc.mo.gov

Re: Sunshine Request to Missouri Department of Corrections Board of Probation and Parole

Dear Public Information Office:

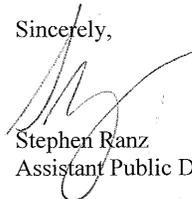
This is a request for records under the Missouri Sunshine Law, Chapter 610, Revised Statutes of Missouri. I request that you make available to me the following records:

**statistical breakdown by race, age and gender of all persons whose probation was revoked and execution of sentence ordered to serve in the Missouri Department of Corrections including the underlying criminal charge, sentence length and conditions of probation they violated which resulted in the revocation from FY 2019-2020.**

I request that all fees for locating and copying the records be waived. The information I obtain through this request will be used by the public defender's office in the investigation of public defender clients' claims for probation violation litigation purposes and claims for post-conviction relief, including ineffective assistance of counsel.

Please send certified copies of the records responsive to my request to me at the following address: 1010 Market Street, Suite 1100, St. Louis, MO 63101, or they can be emailed to me at: [stephen.ranz@mspd.mo.gov](mailto:stephen.ranz@mspd.mo.gov).

Sincerely,

  
Stephen Ranz  
Assistant Public Defender

**FARE THEE WELL,**



**FELICIA**