

SECOND REGULAR SESSION

HOUSE BILL NO. 2384

94TH GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES STEVENSON (Sponsor), SILVEY,
FISHER AND SCHAD (Co-sponsors).

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D. ADAM CRUMBLISS, Chief Clerk

5467L.01I

AN ACT

To repeal sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo, and to enact in lieu thereof nine new sections relating to punishment for certain crimes against a child under the age of twelve, with penalty provisions.

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

Section A. Sections 565.005, 565.006, 565.035, 565.040, 566.030, and 566.060, RSMo,
2 are repealed and nine new sections enacted in lieu thereof, to be known as sections 565.005,
3 565.006, 565.035, 565.040, 565.425, 565.430, 565.435, 566.030, and 566.060, to read as
4 follows:

565.005. 1. At a reasonable time before the commencement of the first stage of any trial
2 of murder in the first degree, **forcible rape of a child under the age of twelve, or forcible**
3 **sodomy of a child under the age of twelve**, at which the death penalty is not waived, the state
4 and defendant, upon request and without order of the court, shall serve counsel of the opposing
5 party with:

6 (1) A list of all aggravating or mitigating circumstances as provided in [subsection 1 of]
7 section 565.032 **for murder in the first degree or section 565.415 for forcible rape of a child**
8 **under the age of twelve or forcible sodomy of a child under the age of twelve**, which the
9 party intends to prove at the second stage of the trial;

10 (2) The names of all persons whom the party intends to call as witnesses at the second
11 stage of the trial;

EXPLANATION — Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted from the law. Matter in **bold-face** type in the above bill is proposed language.

12 (3) Copies or locations and custodian of any books, papers, documents, photographs or
13 objects which the party intends to offer at the second stage of the trial. If copies of such
14 materials are not supplied to opposing counsel, the party shall cause them to be made available
15 for inspection and copying without order of the court.

16 2. The disclosures required in subsection 1 of this section are supplemental to those
17 required by rules of the supreme court relating to a continuing duty to disclose information, the
18 use of matters disclosed, matters not subject to disclosure, protective orders, and sanctions for
19 failure to comply with an applicable discovery rule or order, all of which shall also apply to any
20 disclosure required by this section.

565.006. 1. At any time before the commencement of the trial of a homicide [offense],
2 **forcible rape of a child under the age of twelve, or forcible sodomy of a child under the age**
3 **of twelve**, the defendant may, with the assent of the court, waive a trial by jury and agree to
4 submit all issues in the case to the court, whose finding shall have the force and effect of a
5 verdict of a jury. Such a waiver must include a waiver of a trial by jury of all issues and offenses
6 charged in the case, including the punishment to be assessed and imposed if the defendant is
7 found guilty.

8 2. No defendant who pleads guilty to a homicide [offense] , **forcible rape of a child**
9 **under the age of twelve, or forcible sodomy of a child under the age of twelve**, or who is
10 found guilty of a homicide [offense] , **forcible rape of a child under the age of twelve, or**
11 **forcible sodomy of a child under the age of twelve** after trial to the court without a jury shall
12 be permitted a trial by jury on the issue of the punishment to be imposed, except by agreement
13 of the state.

14 3. If a defendant is found guilty of murder in the first degree, **forcible rape of a child**
15 **under the age of twelve, or forcible sodomy of a child under the age of twelve** after a jury
16 trial in which the state has not waived the death penalty, the defendant may not waive a jury trial
17 of the issue of the punishment to be imposed, except by agreement with the state and the court.

18 4. Any waiver of a jury trial and agreement permitted by this section shall be entered in
19 the court record.

565.035. 1. Whenever the death penalty is imposed in any case, and upon the judgment
2 becoming final in the trial court, the sentence shall be reviewed on the record by the supreme
3 court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving
4 the transcript, shall transmit the entire record and transcript to the supreme court together with
5 a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall
6 set forth the title and docket number of the case, the name of the defendant and the name and
7 address of his attorney, a narrative statement of the judgment, the offense, and the punishment

8 prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and
9 supplied by the supreme court of Missouri.

10 2. The supreme court of Missouri shall consider the punishment as well as any errors
11 enumerated by way of appeal.

12 3. With regard to the sentence, the supreme court shall determine:

13 (1) Whether the sentence of death was imposed under the influence of passion, prejudice,
14 or any other arbitrary factor; and

15 (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating
16 circumstance as enumerated in subsection 2 of section 565.032 **or subsection 2 of section**
17 **565.435** and any other circumstance found;

18 (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed
19 in similar cases, considering both the crime, the strength of the evidence and the defendant.

20 4. Both the defendant and the state shall have the right to submit briefs within the time
21 provided by the supreme court, and to present oral argument to the supreme court.

22 5. The supreme court shall include in its decision a reference to those similar cases which
23 it took into consideration. In addition to its authority regarding correction of errors, the supreme
24 court, with regard to review of death sentences, shall be authorized to:

25 (1) Affirm the sentence of death; or

26 (2) Set the sentence aside and resentence the defendant to life imprisonment without
27 eligibility for probation, parole, or release except by act of the governor; or

28 (3) Set the sentence aside and remand the case for retrial of the punishment hearing. A
29 new jury shall be selected or a jury may be waived by agreement of both parties and then the
30 punishment trial shall proceed in accordance with this chapter, with the exception that the
31 evidence of the guilty verdict shall be admissible in the new trial together with the official
32 transcript of any testimony and evidence properly admitted in each stage of the original trial
33 where relevant to determine punishment.

34 6. There shall be an assistant to the supreme court, who shall be an attorney appointed
35 by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate
36 the records of all cases in which the sentence of death or life imprisonment without probation
37 or parole was imposed after May 26, 1977, or such earlier date as the court may deem
38 appropriate. The assistant shall provide the court with whatever extracted information the court
39 desires with respect thereto, including but not limited to a synopsis or brief of the facts in the
40 record concerning the crime and the defendant. The court shall be authorized to employ an
41 appropriate staff, within the limits of appropriations made for that purpose, and such methods
42 to compile such data as are deemed by the supreme court to be appropriate and relevant to the
43 statutory questions concerning the validity of the sentence. The office of the assistant to the

44 supreme court shall be attached to the office of the clerk of the supreme court for administrative
45 purposes.

46 7. In addition to the mandatory sentence review, there shall be a right of direct appeal
47 of the conviction to the supreme court of Missouri. This right of appeal may be waived by the
48 defendant. If an appeal is taken, the appeal and the sentence review shall be consolidated for
49 consideration. The court shall render its decision on legal errors enumerated, the factual
50 substantiation of the verdict, and the validity of the sentence.

565.040. 1. In the event that the death penalty provided in this chapter is held to be
2 unconstitutional, any person convicted of murder in the first degree, **forcible rape of a child**
3 **under the age of twelve, or forcible sodomy of a child under the age of twelve** shall be
4 sentenced by the court to life imprisonment without eligibility for probation, parole, or release
5 except by act of the governor, with the exception that when a specific aggravating circumstance
6 found in a case is held to be unconstitutional or invalid for another reason, the supreme court of
7 Missouri is further authorized to remand the case for resentencing or retrial of the punishment
8 pursuant to subsection 5 of section 565.036.

9 2. In the event that any death sentence imposed pursuant to this chapter is held to be
10 unconstitutional, the trial court which previously sentenced the defendant to death shall cause
11 the defendant to be brought before the court and shall sentence the defendant to life
12 imprisonment without eligibility for probation, parole, or release except by act of the governor,
13 with the exception that when a specific aggravating circumstance found in a case is held to be
14 inapplicable, unconstitutional or invalid for another reason, the supreme court of Missouri is
15 further authorized to remand the case for retrial of the punishment pursuant to subsection 5 of
16 section 565.035.

565.425. 1. Except as provided in subsections 2, 3, and 4 of this section, no forcible
2 **rape of a child under the age of twelve offense may be tried together with any offense other**
3 **than forcible rape of a child under the age of twelve and no forcible sodomy of a child**
4 **under the age of twelve offense may be tried together with any offense other than forcible**
5 **sodomy of a child under the age of twelve. In the event of a joinder of forcible rape of a**
6 **child under the age of twelve offenses or forcible sodomy of a child under the age of twelve**
7 **offenses, all offenses charged which are supported by the evidence in the case shall, when**
8 **requested by one of the parties or the court, be submitted to the jury or, in a jury-waived**
9 **trial, considered by the judge.**

10 2. A count charging any offense of forcible rape of a child under the age of twelve
11 of a particular individual may be joined in an indictment or information and tried with one
12 or more counts charging alternatively any other forcible rape of a child under the age of
13 twelve or offense other than forcible rape of a child under the age of twelve committed
14 against that individual. A count charging any offense of forcible sodomy of a child under

15 the age of twelve of a particular individual may be joined in an indictment or information
16 and tried with one or more counts charging alternatively any other forcible sodomy of a
17 child under the age of twelve or offense other than forcible sodomy of a child under the age
18 of twelve committed against that individual. The state shall not be required to make an
19 election as to the alternative count on which it will proceed. This subsection in no way
20 limits the right to try in the conjunctive, where they are properly joined under subsection
21 1 of this section, either:

22 (1) Separate offenses other than forcible rape of a child under the age of twelve or
23 separate offenses of forcible rape of a child under the age of twelve committed against
24 different individuals;

25 (2) Separate offenses other than forcible sodomy of a child under the age of twelve
26 or separate offenses of forcible sodomy of a child under the age of twelve committed
27 against different individuals.

28 3. (1) When a defendant has been charged and proven before trial to be a prior
29 offender under chapter 558, RSMo, so that the judge shall assess punishment and not a
30 jury for an offense other than forcible rape of a child under the age of twelve, that offense
31 may be tried and submitted to the trier together with any forcible rape of a child under the
32 age of twelve charge with which it is lawfully joined. In such case the judge shall assess
33 punishment on any offense joined with a forcible rape of a child under the age of twelve
34 charge according to law and, when the trier is a jury, it shall be instructed upon
35 punishment on the charge of forcible rape of a child under the age of twelve in accordance
36 with section 565.430.

37 (2) When a defendant has been charged and proven before trial to be a prior
38 offender under chapter 558, RSMo, so that the judge shall assess punishment and not a
39 jury for an offense other than forcible sodomy of a child under the age of twelve, that
40 offense may be tried and submitted to the trier together with any forcible sodomy of a child
41 under the age of twelve charge with which it is lawfully joined. In such case the judge shall
42 assess punishment on any offense joined with a forcible sodomy of a child under the age
43 of twelve charge according to law and, when the trier is a jury, it shall be instructed upon
44 punishment on the charge of forcible sodomy of a child under the age of twelve in
45 accordance with section 565.430.

46 4. When the state waives the death penalty for a forcible rape of a child under the
47 age of twelve offense or forcible sodomy of a child under the age of twelve offense, that
48 offense may be tried and submitted to the trier together with any other charge with which
49 it is lawfully joined.

565.430. 1. Where forcible rape of a child under the age of twelve or forcible
2 sodomy of a child under the age of twelve is charged but not submitted or where the state

3 waives the death penalty, the submission to the trier and all subsequent proceedings in the
4 case shall proceed as in all other criminal cases with a single stage trial in which guilt and
5 punishment are submitted together.

6 2. Where forcible rape of a child under the age of twelve or forcible sodomy of a
7 child under the age of twelve is submitted to the trier without a waiver of the death penalty,
8 the trial shall proceed in two stages before the same trier. At the first stage, the trier shall
9 decide only whether the defendant is guilty or not guilty of any submitted offense. The
10 issue of punishment shall not be submitted to the trier at the first stage. If an offense is
11 charged other than forcible rape of a child under the age of twelve in a count together with
12 a count of forcible rape of a child under the age of twelve, the trial judge shall assess
13 punishment on any such offense according to law, after the defendant is found guilty of
14 such offense and after the trial judge finds the defendant to be a prior offender under
15 chapter 558, RSMo. If an offense is charged other than forcible sodomy of a child under
16 the age of twelve in a count together with a count of forcible sodomy of a child under the
17 age of twelve, the trial judge shall assess punishment on any such offense according to law,
18 after the defendant is found guilty of such offense and after the trial judge finds the
19 defendant to be a prior offender under chapter 558, RSMo.

20 3. If the trier at the first stage of a trial where the death penalty was not waived
21 finds the defendant guilty of forcible rape of a child under the age of twelve or forcible
22 sodomy of a child under the age of twelve, a second stage of the trial shall proceed at which
23 the only issue shall be the punishment to be assessed and declared. Evidence in
24 aggravation and mitigation of punishment, including but not limited to evidence
25 supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3
26 of section 565.435, may be presented subject to the rules of evidence at criminal trials.
27 Such evidence may include, within the discretion of the court, evidence concerning the
28 victim and the impact of the crime upon the family of the victim and others. Rebuttal and
29 surrebuttal evidence may be presented. The state shall be the first to proceed. If the trier
30 is a jury, the jury shall be instructed on the law. The attorneys may then argue the issue
31 of punishment to the jury, and the state shall have the right to open and close the
32 argument. The trier shall assess and declare the punishment at life imprisonment without
33 eligibility for probation, parole, or release except by act of the governor:

34 (1) If the trier finds by a preponderance of the evidence that the defendant is
35 mentally retarded; or

36 (2) If the trier does not find beyond a reasonable doubt at least one of the
37 aggravating circumstances set out in subsection 2 of section 565.435; or

38 (3) If the trier concludes that there is evidence in mitigation of punishment,
39 including but not limited to evidence supporting the mitigating circumstances listed in

40 subsection 3 of section 565.435, which is sufficient to outweigh the evidence in aggravation
41 of punishment found by the trier; or

42 (4) If the trier decides under all of the circumstances not to assess and declare the
43 punishment at death. If the trier is a jury it shall be so instructed.

44

45 If the trier assesses and declares the punishment at death it shall, in its findings or verdict,
46 set out in writing the aggravating circumstance or circumstances listed in subsection 2 of
47 section 565.435 which it found beyond a reasonable doubt. If the trier is a jury, the jury
48 shall be instructed before the case is submitted that if the jury is unable to decide or agree
49 upon the punishment the court shall assess and declare the punishment at life
50 imprisonment without eligibility for probation, parole, or release except by act of the
51 governor or death. The court shall follow the same procedure as set out in this section
52 whenever it is required to determine punishment for forcible rape of a child under the age
53 of twelve or forcible sodomy of a child under the age of twelve.

54 4. Upon written agreement of the parties and with leave of the court, the issue of
55 the defendant's mental retardation may be taken up by the court and decided prior to trial
56 without prejudicing the defendant's right to have the issue submitted to the trier of fact as
57 provided in subsection 3 of this section.

58 5. As used in this section, the terms "mental retardation" or "mentally retarded"
59 refer to a condition involving substantial limitations in general functioning characterized
60 by significantly subaverage intellectual functioning with continual extensive related deficits
61 and limitations in two or more adaptive behaviors such as communication, self-care, home
62 living, social skills, community use, self-direction, health and safety, functional academics,
63 leisure and work, which conditions are manifested and documented before eighteen years
64 of age.

65 6. The provisions of this section shall only govern offenses committed on or after
66 August 28, 2008.

565.435. 1. In all cases of forcible rape of a child under the age of twelve or forcible
2 sodomy of a child under the age of twelve for which the death penalty is authorized, the
3 judge in a jury-waived trial shall consider, or the judge shall include in his or her
4 instructions to the jury for the jury to consider:

5 (1) Whether an aggravating circumstance or circumstances enumerated in
6 subsection 2 of this section is established by the evidence beyond a reasonable doubt; and

7 (2) If an aggravating circumstance or circumstances is proven beyond a reasonable
8 doubt, whether the evidence as a whole justifies a sentence of death or a sentence of life
9 imprisonment without eligibility for probation, parole, or release except by act of the
10 governor. In determining the issues enumerated in this subdivision and subdivision (1) of

11 this subsection, the trier shall consider all evidence which the trier finds to be in
12 aggravation or mitigation of punishment, including evidence received during the first stage
13 of the trial and evidence supporting any of the aggravating or mitigating circumstances set
14 out in subsections 2 and 3 of this section. If the trier is a jury, the jury shall not be
15 instructed upon any specific evidence which may be in aggravation or mitigation of
16 punishment, but shall be instructed that each juror shall consider any evidence which he
17 or she considers to be aggravating or mitigating.

18 **2. Aggravating circumstances for a forcible rape of a child under the age of twelve**
19 **offense or forcible sodomy of a child under the age of twelve offense shall be limited to the**
20 **following:**

21 **(1) The offense was committed by a person with a prior record of pleading to or**
22 **being found guilty of forcible rape of a child under the age of twelve or forcible sodomy of**
23 **a child under the age of twelve, or the offense was committed by a person who has pleaded**
24 **guilty to or been found guilty of one or more serious assaultive criminal offenses;**

25 **(2) The offense was committed while the offender was engaged in the commission**
26 **or attempted commission of another unlawful rape or sodomy;**

27 **(3) The offender by his or her act of forcible rape of a child under the age of twelve**
28 **or forcible sodomy of a child under the age of twelve knowingly created a great risk of**
29 **death to more than one person by means of a weapon or device which would normally be**
30 **hazardous to the lives of more than one person;**

31 **(4) The offender committed the offense for himself or herself or another, for the**
32 **purpose of receiving money or any other thing of monetary value from the victim of the**
33 **forcible rape or forcible sodomy or another;**

34 **(5) The offender caused or directed another to commit forcible rape of a child**
35 **under the age of twelve or forcible sodomy of a child under the age of twelve or committed**
36 **forcible rape of a child under the age of twelve or forcible sodomy of a child under the age**
37 **of twelve as an agent or employee of another person;**

38 **(6) The raped or sodomized individual was a witness or potential witness in any**
39 **past or pending investigation or past or pending prosecution, and was raped or sodomized**
40 **as a result of his or her status as a witness or potential witness;**

41 **(7) The offense was committed during the commission of a crime which is part of**
42 **a pattern of criminal street gang activity as defined in section 578.421, RSMo;**

43 **(8) The offense was committed outrageously, wantonly vile, horribly, or**
44 **inhumanely in that it involved torture or depravity of mind;**

45 **(9) The offense was committed by a person in, or who escaped from, the lawful**
46 **custody of a peace officer or place of lawful confinement;**

47 **(10) The offense was committed while the defendant was engaged in the**
48 **perpetration or was aiding or encouraging another person to perpetrate or attempt to**
49 **perpetrate a felony of any degree of homicide, burglary, robbery, kidnapping or any felony**
50 **offense under chapter 195, RSMo.**

51 **3. Mitigating circumstances shall include the following:**

52 **(1) The defendant has no significant history of prior criminal activity;**

53 **(2) The offense was committed while the defendant was under the influence of**
54 **extreme mental or emotional disturbance;**

55 **(3) The capacity of the defendant to appreciate the criminality of his or her conduct**
56 **or to conform his or her conduct to the requirements of law was substantially impaired;**

57 **(4) The age of the defendant at the time of the crime;**

58 **(5) The defendant acted under the substantial domination of another person.**

566.030. 1. A person commits the crime of forcible rape if such person has sexual
2 intercourse with another person by the use of forcible compulsion. Forcible compulsion includes
3 the use of a substance administered without a victim's knowledge or consent which renders the
4 victim physically or mentally impaired so as to be incapable of making an informed consent to
5 sexual intercourse.

6 2. Forcible rape or an attempt to commit forcible rape is a felony for which the
7 authorized term of imprisonment is life imprisonment or a term of years not less than five years,
8 unless:

9 (1) In the course thereof the actor inflicts serious physical injury or displays a deadly
10 weapon or dangerous instrument in a threatening manner or subjects the victim to sexual
11 intercourse or deviate sexual intercourse with more than one person, in which case the authorized
12 term of imprisonment is life imprisonment or a term of years not less than fifteen years; or

13 (2) The victim is a child less than twelve years of age, in which case [the required term
14 of imprisonment is life imprisonment without eligibility for probation or parole until the
15 defendant has served not less than thirty years of such sentence or unless the defendant has
16 reached the age of seventy-five years and has served at least fifteen years of such sentence.
17 Subsection 4 of section 558.019, RSMo, shall not apply to the sentence of a person who has
18 pleaded guilty to or has been found guilty of forcible rape when the victim is under the age of
19 twelve, and "life imprisonment" shall mean imprisonment for the duration of a person's natural
20 life for the purposes of this section] , **the punishment shall be either death or life**
21 **imprisonment without eligibility for probation, parole, or release except by act of the**
22 **governor; except that, if a person has not reached his or her eighteenth birthday at the time**
23 **of the commission of the crime, the punishment shall be life imprisonment without**
24 **eligibility for probation, parole, or release except by an act of the governor.**

25 3. No person found guilty of or pleading guilty to forcible rape or an attempt to commit
26 forcible rape shall be granted a suspended imposition of sentence or suspended execution of
27 sentence.

 566.060. 1. A person commits the crime of forcible sodomy if such person has deviate
2 sexual intercourse with another person by the use of forcible compulsion. Forcible compulsion
3 includes the use of a substance administered without a victim's knowledge or consent which
4 renders the victim physically or mentally impaired so as to be incapable of making an informed
5 consent to sexual intercourse.

6 2. Forcible sodomy or an attempt to commit forcible sodomy is a felony for which the
7 authorized term of imprisonment is life imprisonment or a term of years not less than five years,
8 unless:

9 (1) In the course thereof the actor inflicts serious physical injury or displays a deadly
10 weapon or dangerous instrument in a threatening manner or subjects the victim to sexual
11 intercourse or deviate sexual intercourse with more than one person, in which case the authorized
12 term of imprisonment is life imprisonment or a term of years not less than ten years; or

13 (2) The victim is a child less than twelve years of age, in which case [the required term
14 of imprisonment is life imprisonment without eligibility for probation or parole until the
15 defendant has served not less than thirty years of such sentence or unless the defendant has
16 reached the age of seventy-five years and has served at least fifteen years of such sentence.
17 Subsection 4 of section 558.019, RSMo, shall not apply to the sentence of a person who has
18 pleaded guilty to or has been found guilty of forcible sodomy when the victim is under the age
19 of twelve, and "life imprisonment" shall mean imprisonment for the duration of a person's natural
20 life for the purposes of this section] , **the punishment shall be either death or life**
21 **imprisonment without eligibility for probation, parole, or release except by act of the**
22 **governor; except that, if a person has not reached his or her eighteenth birthday at the time**
23 **of the commission of the crime, the punishment shall be life imprisonment without**
24 **eligibility for probation, parole, or release except by an act of the governor.**

25 3. No person found guilty of or pleading guilty to forcible sodomy or an attempt to
26 commit forcible sodomy shall be granted a suspended imposition of sentence or suspended
27 execution of sentence.

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