

2005 DRAFTING REQUEST

Bill

Received: 06/09/2005

Received By: mdsida

Wanted: As time permits

Identical to LRB:

For: Mark Gundrum (608) 267-5158

By/Representing:

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters:

Subject: Criminal Law - miscellaneous

Extra Copies:

Submit via email: YES

Requester's email: Rep.Gundrum@legis.state.wi.us

Carbon copy (CC:) to: robin.ryan@legis.state.wi.us  
cathlene.hanaman@legis.state.wi.us  
greipp.jeffrey@mail.da.state.wi.us

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Pre Topic:

No specific pre topic given

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Topic:

Penalties for intimidating a witness

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Instructions:

See Attached

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Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mdsida 07/08/2005	wjackson 08/04/2005		_____			S&L Crime
/1			rschluet 08/04/2005	_____	mbarman 08/04/2005	mbarman 10/03/2005	

FE Sent For:

*AF-intro*

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/?	mdsida 07/08/2005	wjackson 08/04/2005		_____			S&L Crime
/1			rschlue 08/04/2005	_____	mbarman 08/04/2005		

FE Sent For:

Send to Rep. Davis  
Per Kevin Usealman  
in Gundrum's office

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May Contact:

Addl. Drafters:

Subject: **Criminal Law - victims**  
**Criminal Law - miscellaneous**

Extra Copies:

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**cathlene.hanaman@legis.state.wi.us**

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Penalties for intimidating a victim or witness

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**Instructions:**

See Attached

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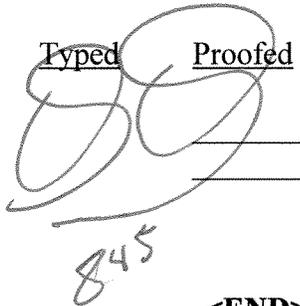
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/?

mdsida

1 Wlj 8/4

  
845

FE Sent For:

<END>

\* Increase  
penalties in 940.42 - 45

For 940.42 IF <sup>underlying</sup> crime is a Class G, new offense is I  
.44 " " " " F " " H

⌋  
(No change for misd. or for Class I or H felons)

For 940.43 IF <sup>underlying</sup> crime is Class E, new crime is F  
.45 " " " " D " " F

⌋  
(No change for misd or Class F, G, H, or I felons)

How to  
Treat unclassified? (Attempt~~ed~~ to commit crime → Life = Class B)  
Attempts?  
Conspiracy.

Three-strike - same as Class A.

Rep G. asked me to look at const'ly of 940.42  
+ .44



## Dsida, Michael

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**From:** Greipp, Jeffrey  
**Sent:** Thursday, June 16, 2005 1:46 PM  
**To:** Dsida, Michael  
**Subject:** RE: New Criminal Code Revisions and Legislation...

Does that mean that if the case involves a Homicide Class A, stemming from a Felony Theft and the defendant attempts to dissuade the Felony theft witness consolidated as count 2 in the complaint the defendant would be culpable at the related Class A penalty structure?

I believe your idea is a greater level of justice - it holds defendants accountable at a proportionate level in relation to the intimidation... However, although intellectually it is the right decision, practically speaking this will render and place our courts and juries into a quagmire of issues that we will rarely survive without complex briefing schedules and even greater appellate issues let alone an issue for the jury to become confused about... If a simplistic statute is passed that is all the advocacy groups and prosecutors as asking for is to close the loophole and make defendants who intimidate on felonies a felony... after additional thought we could simply pass intimidation Felony H of a witness and not even bother to distinguish if they are a victim. Please call... 414-467-5050

Thanks

Jeff

-----Original Message-----

**From:** Dsida, Michael [mailto:Michael.Dsida@legis.state.wi.us]  
**Sent:** Thursday, June 16, 2005 1:37 PM  
**To:** Greipp, Jeffrey  
**Subject:** RE: New Criminal Code Revisions and Legislation...

Although I understand your concern about keeping the statute simple, I wouldn't use the language "the most serious charge." The penalty for the intimidation would be linked to whichever offense pending at the time of the intimidation had the longest maximum term of imprisonment. And the crime would be case-based, not offense-based, so there would be no need to link witness A to Count X. The offense would occur if the defendant attempted to keep the witness testifying at the trial, regardless of what count the witness's testimony would relate to.

-----Original Message-----

**From:** Greipp, Jeffrey  
**Sent:** Thursday, June 16, 2005 1:29 PM  
**To:** Dsida, Michael  
**Subject:** RE: New Criminal Code Revisions and Legislation...

I appreciate the plug... I really do - I drafted something similar in preparing this but this level of complications is simply tremendous and no other State in the country does this. There are states, four or five if I recall, that have a separate intimidation penalty for Felony Class A prosecutions, I believe because they are cases which are rarely amended and are always homicide.

In our cases language such as 'the most serious charge' would be extremely difficult and burdensome on prosecutors and juries - the problems still exists with multiple witnesses and multiple charges and having the jury deliberate as to which crime is the most serious linked to which witness at which time did the defendant intend and is culpable for.

We need simplicity in these prosecutions... the intimidation statutes are excellent as presently written, very easy for juries to understand and for prosecutors to enforce - it is the loophole for felonies which creates this problem.

Also as I mentioned in the other email to Rep. Gundrum that I forwarded to you, I believe its important to consider this as a very very serious and independent crime. We need to alert and put defendants, felony criminal defendants on notice that this behavior is not tolerated and is considered for what it is, a serious crime independent of what the system is attempting to hold the person originally accountable for. I believe the best and most affective way to do this is with an H Felony Intimidation of Witness and an E Felony Intimidation Victim -

Note also we are not talking about the other intimidation statues - those apply to every citizen in the entire state. This one that you are drafting applies only to criminal defendants, individuals that have been charged with felony crimes, crimes the State has articulated to the defendant it intends to prove beyond a reasonable doubt. Once that happens they ought to be put on notice that intimidation is taken very very seriously and the system responds with equal and in some cases even greater seriousness because of what this is doing to our justice system: its dismantling it, its creating disparity in whom we are convicting and its enabling experienced criminal defendants to continue their abuse and criminal enterprises with impunity. With this statute we will have, finally, an affective ability to stopping it and restoring the balance in the system...

Sorry to go on at length... I just returned from speaking in Washington DC and San Francisco on this issue and tend to get a tad verbose...

Please feel free to contact me (414) 467-5050...

ADA Jeff Greipp  
Sensitive Crimes Unit  
Milwaukee Co. Dist. Atty's Office  
(414) 278-4997

-----Original Message-----

From: Dsida, Michael [mailto:Michael.Dsida@legis.state.wi.us]  
Sent: Thursday, June 16, 2005 9:33 AM  
To: Greipp, Jeffrey  
Subject: RE: New Criminal Code Revisions and Legislation...

Jeff-

I will follow up with Rep. Gundrum on this, but I'll put in one last plug for staircasing. To address your concern regarding amended complaints, what if you linked the penalty for the intimidation to the most severe offense charged at the time of the intimidation?

## **Dsida, Michael**

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**From:** Gundrum, Mark  
**Sent:** Thursday, June 16, 2005 3:59 PM  
**To:** Dsida, Michael  
**Cc:** Usealman, Kevin  
**Subject:** FW: New Criminal Code Revisions and Legislation...

Mike, I got the response I needed from Jeff regarding this legislation. Let's draft it as he has indicated here in his e-mail. Feel free to call Jeff directly if you have any technical questions. Thanks.

Mark

-----Original Message-----

From: Greipp, Jeffrey  
Sent: Thursday, June 16, 2005 3:24 PM  
To: Gundrum, Mark; Greipp, Jeffrey  
Cc: Dsida, Michael  
Subject: RE: New Criminal Code Revisions and Legislation...

Mark,

I received your voice mail. We have just returned from a meeting with the Milwaukee County District Attorney's administration with Deputy District Attorney Jon Reddin, Pat Kenney and E. Michael McCann. Mr. McCann asks me to send you the following message. He thanks you for your time, consideration, support and efforts on this, what he views, as an important issue for this State. He considers this statute and its passage important and will see to it that you have all of the support you need to assure its passage. Former Deputy Carol White has also been involved in the development of this effort.

The following language meets with the support of the Administration. Furthermore, Deputy District Attorney Bob Donohoo is out of the office but has been a part of this discussion in the past and will be consulted on the specific language and is expected to affirm this position. On an equally important note it is agreed that a step system is overly complex and will lead to a significant level of pre-trial, trial and appellate issues that we may not be able to overcome and that prosecutors will not be able to efficiently prosecute.

**SUPPORTED LANGUAGE:**

**AGGRAVATED INTIMIDATION OF A WITNESS**

Wis.Stat.Sect. 940.435

Whoever, having been charged with a Felony, knowingly and maliciously prevents or dissuades or who attempts to so prevent or dissuade any witness from attending or giving testimony at any trial, proceeding or inquire authorized by law for said offense is Guilty of a Class H Felony.

**AGGRAVATED INTIMIDATION OF A VICTIM**

Wis.Stat.Sect. 940.455

Whoever, having been charged with a Felony, knowingly and maliciously prevents or dissuades or who attempts to so prevent or dissuade any victim of said offense from attending or giving testimony at any trial, proceeding or inquire, authorized by law for said offense is Guilty of a Class G Felony.

It is further requested that Wisconsin Statutes 940.42, 940.43, 940.44, 940.45 remain unmodified.

Again, thank you for your time, consideration and attention. Thanks especially to your careful review and expressed concerns related to all of the relevant issues associated with this effort.

I look forward to speaking with you and again feel free to contact me at any time,

ADA Jeff Greipp  
Sensitive Crimes Unit  
Milwaukee Co. Dist. Atty's Office  
(414) 278-4997

## Dsida, Michael

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**From:** Dsida, Michael  
**Sent:** Tuesday, July 05, 2005 2:23 PM  
**To:** Greipp, Jeffrey  
**Subject:** RE: Victim/Witness Intimidation Bill

I'm not sure what you are suggesting as an alternative. Is it this? *Plc from Jeff - yes.*

1. Create a new provision in s. 940.43 that provides that if a person who is charged with a felony violates s. 940.42 in connection with a trial, proceeding, or inquiry for that felony, the person is guilty of a Class G felony.
2. Create a new subsection in s. 940.45 that provides that if a person who has committed a felony violates s. 940.44 in connection with that felony, the person is guilty of a Class G felony.

(Note that, like current law, item 2 would cover intimidation of a person acting on behalf of the victim. Is that your intent?)

My suggestions about how to structure these provisions are not based on whether they will make the bill more likely to be enacted. (The LRB is a nonpartisan agency.) Instead, they are based on having the new provisions fit well into existing law and making the statutes easy to read, work with, etc.

-----Original Message-----

**From:** Greipp, Jeffrey  
**Sent:** Tuesday, July 05, 2005 1:37 PM  
**To:** Dsida, Michael  
**Subject:** RE: Victim/Witness Intimidation Bill

Mike,

Thank you. I agree with most everything you have written. When considering sub (b) however, perhaps we could simply re-visit 940.45 for violations of 940.44? We could leave everything a G felony...

The important matter/element distinction is simply we are differentiating the previous laws of intimidation to... now... label in a more restrictive class the felony criminal defendants and the witnesses and victims of those crimes into a more protective class.

Previously the law was applicable to anyone in the public who intimidated a witness even if it was not at the direction of the defendant. Here we are holding accountable, specifically, felony criminal defendants who attempt to dissuade victim's and witnesses. We presumed that it was more direct to simply incorporate a new statute to hold these specific felony defendant's who intimidate accountable rather than add a new series of elements to the existing Intimidation Felony level... However if you feel this eases passage it appears to be achieving the same results. If we are simply adding subsections to the present Felony statutes may I suggest making Felony defendants who intimidate equal 'G' penalties...

Thank you for your time...

Jeff Greipp

-----Original Message-----

**From:** Dsida, Michael [mailto:Michael.Dsida@legis.state.wi.us]  
**Sent:** Tuesday, July 05, 2005 12:18 PM  
**To:** Greipp, Jeffrey  
**Subject:** Victim/Witness Intimidation Bill

Jeff-

> I just wanted to let you know that the crimes created under the bill will have the same elements as those articulated in your email to Rep. Gundrum on 6/16 at 3:24, but I will probably incorporate your proposed s. 940.435 into current s. 940.43. That will preserve the existing structure of the intimidation statutes -- with one section for misdemeanor offenses and a second one for felonies.

>

In addition, since it involves a victim who is also a witness, your proposed s. 940.455 is more closely related to current s. 940.43 (and your proposed s. 940.435) than it is to current s. 940.44. (Section 940.44 addresses assisting in the prosecution of an offense but it does not explicitly address testifying. It also does not cover cases in which a defendant seeks to prevent a witness from testifying on behalf of a co-defendant, which your proposed s. 940.435 would cover.) Therefore, it probably makes sense to incorporate your proposed s. 940.455 into s. 940.43 as well. Your proposed statutes would become part of a new subsection of that statute:

(X) (a) Except as provided in par. (b), if a person who is charged with a felony violates s. 940.42 in connection with a trial, proceeding, or inquiry for that felony, the person is guilty of a Class H felony.

(b) If a person who is charged with a felony violates s. 940.42 in connection with a trial, proceeding, or inquiry for that felony and the victim of that felony is also the victim of the violation of s. 940.42, the person is guilty of a Class G felony.

Mike Dsida  
Legislative Reference Bureau  
608/266-9867  
michael.dsida@legis.state.wi.us

**Dsida, Michael**

---

**From:** Greipp, Jeffrey  
**Sent:** Wednesday, July 06, 2005 2:23 PM  
**To:** Dsida, Michael  
**Subject:** RE: Victim/Witness Intimidation Bill

Exactly...

If you can get intimidation of a witness on a felony case as a G felony it becomes sufficeint and we do not need to distinguish with victims or with witnesses - In fact amending the Felony Intimidation statute to simply be having been charged with a Felony and intimidating on that felony resulting in a G Felony accomplishes everything we need...

Thank you for pointing this out... Your ideas to amend this statute in this method is not only represents our original intent... it is also more powerful and efficient.

Again thank you...

To be certain... Felony intimidation by a Felony defendant to a witness if a G felony we therefore do not need a seperate victim statute language...

JG

-----Original Message-----

**From:** Dsida, Michael [mailto:Michael.Dsida@legis.state.wi.us]  
**Sent:** Wednesday, July 06, 2005 2:17 PM  
**To:** Greipp, Jeffrey  
**Subject:** RE: Victim/Witness Intimidation Bill

But that gets us back to where we were with the first email that I sent you yesterday. Set aside the non-victim witness piece for now, because I think we're okay on that. If your focus with the remaining piece is on a potential witness who was also the victim of the underlying offense, shouldn't that crime be covered in s. 940.43? After all, s. 940.44 deals with preventing or dissuading a victim from getting the case started. In the situation you are describing below, the case HAS been commenced.

-----Original Message-----

**From:** Greipp, Jeffrey  
**Sent:** Wednesday, July 06, 2005 10:14 AM  
**To:** Dsida, Michael  
**Subject:** RE: Victim/Witness Intimidation Bill

Yes... it matters.

Please leave it as "having been charged with a felony" - that language is very very important...

You are correct that when the language becomes "by a person who committed that crime" we find ourselves in a situation where the new law would be unenforceable. We are attempting to hold defendants accountable for intimidating witnesses (.). When the law requires the state to prove beyond a reasonable doubt that the defendant is both guilty of the underlying offense as an element to intimidation than the State is in a real pickle. How can we prove the underlying offense when the person has already been intimidated and, commonly, unavailable at trial. THAT is the exact reason for this new law. Defendants are dismantling the underlying criminal prosecution these cases are being dismissed Because the witnesses are gone. That is why the language must read "having been charged with a felony..." because regardless of whether or not the State can prove the crime, intimidating wintesses is in an of itself a seperate crime...

By using language "having been charged with a felony" it follows that defendants cannot intimidate (.). And we can charge them and prosecute them for this crime 'independently' from the underlying offense.

07/06/2005

-----Original Message-----

**From:** Dsida, Michael [mailto:Michael.Dsida@legis.state.wi.us]

**Sent:** Tuesday, July 05, 2005 4:58 PM

**To:** Greipp, Jeffrey

**Subject:** Victim/Witness Intimidation Bill

Jeff-

Here is what I was thinking of using for a new subsection in s. 940.45: "(7) Where the crime referred to in s. 940.44 (intro.) was a felony and the act is committed by a person who committed that crime." But one problem with linking this new provision to the nature of the underlying crime is that a prosecutor charging a person with intimidation would still need to prove that the underlying crime was a felony -- which may not be possible when the intimidation is successful. By contrast, the new version of s. 940.43 is based on the person being *charged with* a felony. Does that matter?

Mike



State of Wisconsin  
2005 - 2006 LEGISLATURE

LRB-3188/2

MGD:./:....

WLj

8/5

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen

1 AN ACT ...; relating to: intimidating a witness and providing a penalty.

*Analysis by the Legislative Reference Bureau*

Current law prohibits intimidating a witness — knowingly and maliciously preventing or dissuading any witness (or attempting to prevent or dissuade any witness) from attending or giving testimony at any trial, proceeding, or inquiry authorized by law. A person who violates this prohibition is guilty of a Class A misdemeanor and may be fined up to \$10,000 or sentenced to a term of imprisonment of up to nine months or both. The maximum sentence for this offense, however, increases when: 1) the act is accompanied by force or violence or the attempted use of force or violence; 2) the act is accompanied by damage to property; 3) the act is accompanied by any express or implied threat of force, violence, or property damage; 4) the act is in furtherance of a conspiracy; 5) the act is committed by a person with a prior conviction for intimidating a witness or victim; or 6) the person committing the act is hired to do it by another person. Under any of those circumstances, a person who unlawfully intimidates a witness is guilty of a Class G felony and may be fined up to \$10,000 or sentenced to a term of imprisonment of up to ten years (which, if the sentence is for more than one year, consists of a term of confinement followed by a term of extended supervision) or both.

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This bill specifies another set of circumstances under which witness intimidation is a Class G felony. Under the bill, if a person who is charged with a felony unlawfully intimidates a witness or a potential witness in connection with a trial, proceeding, or inquiry for that felony, the person is guilty of a Class G felony.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a

