Olsen, Jefren

From: Brennan, Mike
Sent: Tuesday, January 26, 1999 4:27 PM
To: Olsen, Jefren
Subject: 97 Act 283 and "good time" for felons

Jefren --

A thought on the TIS law. Do you remember during drafting whether the issue ever came up of "good time" for felons sentenced to serve time in the county jail or placed on probation with the condition that they serve a year in jail? Would such offenders earn good time despite the state's move to truth-in-sentencing? I don't believe 302.43, 973.09(1)(d) or 973.09(7m) were affected by Act 283.

Is this something we should be concerned about?

Any thoughts you have would be of interest.

Mike
(414) 227-5102

Olsen, Jefren

From: Brennan, Mike
Sent: Wednesday, January 27, 1999 9:47 AM
To: Olsen, Jefren
Subject: RE: 97 Act 283 and "good time" for felons

Jefren -- Excellent response; thanks very much. And you taught me a new word: tergiversate! Mike

-----Original Message-----
From: Olsen, Jefren
Sent: Tuesday, January 26, 1999 6:IO PM
To: Brennan, Mike
Subject: RE: 97 Act 283 and "good time" for felons

Mike,
"Good time" for felons sentenced to jail instead of prison or confined in jail as a condition of probation did not explicitly come up--in so many words--during the drafting of TIS. I think this is because the law was meant to deal with persons sentenced to state prison. However, in the 2nd draft of the original bill I changed s. 973.01 (1) to clarify that the new sentencing scheme applied only to prison sentences because the 1 st draft referred to "imprisonment" for a felony conviction generally and I thought that language may have been construed to cover jail time. That change was okayed by the requester (DOA via the Governor's office) and remained unchanged through the rest of the process. Also, as you note, TIS did not amend the "good time" statute or s. 973.09 (1) (d) or (7m).

As to whether the exclusion of felons in jail (as opposed to prison) is something the committee should be concerned about, I have to say that I am not sure. Arguably, "good time" under s. 302.43 makes a jail sentence "misleading" in the same way parole eligibility and MR make a prison sentence misleading. If so, the need for truth in sentencing may apply with equal force to felons given jail time. On the other hand, if you take away "good time" for felons, what about for misdemeanants? And will eliminating "good time" for felons sentenced to jails mean more jail crowding and thus increased costs to counties (the old unfunded mandate bugaboo)? Also, if the felon is being sentenced to jail or probation, isn't the sentencing court making a judgment that the person is not as much of a danger to the public as the felon sent to prison? If so, maybe the societal interests that truth in sentencing seeks to vindicate are on balance somewhat less compelling in such cases.

In other words, elimination of "good time" poses a number of policy questions. Because I am not privy to most of the backroom discussion of legislation, I can't say whether the legislature was so focused on prison sentences that the issue never occurred to them or whether they deliberately decided to avoid or postpone the issue. I don't mean to tergiversate, but, on a liberal view of its charge the committee could take the matter up on the grounds that it relates to felony penalties; on the other hand, on a narrow view of its charge the committee is concerned with implementing Act 283, which covers only prison sentences and thus the committee could conclude that changing "good time" is beyond its charge (though making recommendations that the legislature study the issue may not be!).

I hope some of this info. is helpful. Let me know if you have other questions or need more information.

Jefren
-----Original Message-----
From: Brennan, Mike
Sent: Tuesday, January 26, 1999 4:27 PM
To: Olsen, Jefren
Subject: 97 Act 283 and 'good time" for felons

Jefren --

A thought on the TIS law, Do you remember during drafting whether the issue ever came up of "good time" for felons sentenced to serve time in the county jail or placed on probation with the condition that they serve a year in jail? Would such offenders earn good time despite the state's move to truth-in-sentencing? I don't believe 302.43, 973.09(1)(d) or 973.09(7m) were affected by Act 283.

Is this something we should be concerned about?

Any thoughts you have would be of interest.

Mike

Olsen, Jefren

From: Brennan, Mike
Sent: Wednesday, January 27, 1999 4:05 PM
To: Olsen, Jefren
Subject: RE: "Good time" and probation

Jefren --

With regard to (I), I believe CCAP has this information, but only going back 1 year or so.

As to (2), that is a good thought. Although our specific charge is altering ES revocation procedure, we will have much to say about probation, and these thoughts ring true with me, and I'm sure with many other committee members. I'll pass them on.

Any further thoughts you have will be welcomed.

Mike

-----Original Message-----
From: **Olsen, Jefren**
Sent: **Wednesday, January 27, 1999 10:00 AM**
To: **Brennan, Mike**
Subject: **"Good time" and probation**

Mike,
I had a couple more random thoughts about "good time" for felons sentenced to jail.

First, it seems to me that any system of sentencing guidelines will have to address the option of sentencing to straight jail time or jail time as a condition of probation. Maybe this fact militates in favor of the committee addressing whether good time should be abolished for felons serving jail time. Also, to the extent the guidelines are based on recent sentencing history, can the committee (or sentencing commission) learn the percentage of jail time actually served in cases where jail time is imposed? I suppose the information is more readily available for jail as a condition of probation than it is for straight jail time, and I also suppose that straight jail time for a felony is unusual relative to probation and prison sentences.

My second thought is not really related to good time, but goes back to the whether judges should have probation revocation authority. (I mention this realizing the committee may have decided this issue once for all, but if not it might be something to consider.) There have been comments about the lack of confidence some judges have in probation, in part, it appears, from the lack of intensive supervision in some (many?) cases and in part from failures by DOC/DOA to revoke. Is that a fair assessment? If so, more resources and redesigned methods of supervision will address the first part of the problem but not necessarily the second. However, giving the judge the option to retain revocation authority might help address the second part of the problem. In a case where the judge is not overly confident of the offender's ability to succeed on probation he or she can retain revocation authority to resolve any lack of confidence in whether the agency will revoke when the judge feels that would be appropriate.

Jefren

PS. Thanks for your response to my message from yesterday. It came in while I was typing the above.

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Olsen, Jef ren

From: Dubberstein, Jennifer
Sent: Friday, January 29, 1999 10:45 AM
To: aaron nathans -- capital times; adam korbitz -- sen. huelsman's aide; alison poe -- bjis of doa; andrew statz -- state budget office; andy moore; bill Clausius -- DOC public information director; Bill Grosshans; cindy archer -- state budget office; david albino; dick jones; ed bloom -- wis. assoc. criminal defense lawyers; ed eberle -- scott walkers aide; Gary George, Sen.; george mitchell; Goetsch, Rep.; jefren e. olsen -- legislative attorney; jennifer dubberstein; jere bauer, jr. -- legislative fiscal analysis; jessica o'donnell; Jessica Weltman; Julie Clark; julie schultz -- sec'y to Jim Doyle; mark grapentine -- Governor's Office; marline pearson -- matc; matt bromley -- state bar -- govt. relations; Michael Sullivan; Mike Flaherty; prof. michael smith; sandra shane-dubow; Sen.Robson; sharon schmeling; steve jandacek; Sykora, Rep.
Cc: Brennan, Mike
Subject: Criminal Penalties Study Committee

AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Code Reclassification Subcommittee

Friday, February 5, 1999
9:00 a.m.
Via Video Conference Network

Milwaukee - Rm. 542 -- State Office Building
819 N. 6th Street, Milwaukee, Wisconsin 53203

Madison - Rm. SF, Dept. of Administration
101 E. Wilson Street, Madison, WI 53708

Eau Claire - Rm. 139 - State Office Building
718 Claremont Avenue, Eau Claire, Wisconsin 54702

1. **Call to order - Subcommittee Chair Professor Tom Hammer**

2. **Discuss whether proposed Class A-H classification scheme ensures that crimes of similar severity are grouped together for penalty purposes**

3. **Review and discuss documents converting classified and unclassified felonies into proposed Class A-H classification scheme using mandatory release date as conversion period**

4. **Discuss proposing maximum periods of extended supervision for Class A-H classification scheme**

5. **Continued discussion of penalty enhancers and mandatory minimums**

6. **Adjournment**

Jennifer Dubberstein
(414) 227-5103

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Tuesday, February 16, 1999 9:OI AM
To: Aaron Nathans; Alison Poe; Andrew Statz; Andy Moore; Bill Clausius; Bill Grosshans; Cindy Archer; Cindy O'Donnell; David Albino; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Mark Grapentine; Marline Pearson; Matt Bromley; Mike Flaherty; Prof. Michael Smith; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek
cc: Brennan, Mike
Subject: Criminal Penalties Study Committee

The minutes from our last meeting on January 21 -22, 1999, the agenda for the Extended Supervision Revocation Subcommittee meeting on February 18, 1999, and the agenda for the next full committee meeting on February 19, 1999 are as follows:

Criminal Penalties Study Committee

January 21-22, 1999 Meeting Minutes
Senate Room, The Concourse Hotel, Madison, Wisconsin

January 21, 1999

Chair Judge Thomas Barland called the meeting to order at 9:30 a.m. Present were: Judge Barland; State Public Defender Nicholas Chiarkas; Assistant Attorney General Matt Frank on behalf of Attorney General James Doyle; Attorney Greg Everts; Judge Patrick Fiedler; Sheriff Brad Gehring; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman; Attorney Steve Hurley; Bill Jenkins; Judge Elsa Lamelas; Judge Mike Malmstadt; District Attorney Mike McCann; Barbara Powell; Linda Pugh; and Judge Diane Sykes. On Thursday, January 21st, Professor Mike Smith of the University of Wisconsin Law School sat in for Walter Dickey, who had academic obligations that day, but who was present on January 22nd. Judge Wells was in trial on Thursday, January 21st, but attended the committee's meeting on Friday, January 22, 1999.

The committee approved unanimously the minutes from the January 8, 1999 meeting. Judge Bariand began by discussing the schedule for the two-day meeting. Mike Brennan reviewed the various items in the briefing book distributed to committee members, other interested parties, and members of the public. The briefing book collects key documents, working papers, statistics, and proposals from the committee's study thus far, as well as from the work done by the subcommittees. Rick Geithman of the Department of Corrections, Bureau of Technology Management, fielded questions from committee members concerning the data. Certain committee members expressed concern about the reliability of the Department of Corrections data provided at Tab 14 of the briefing book. There was discussion as to why the minimum sentences for certain crimes fell below statutory minimums, but there was no definitive answer given to this problem.

Judge Barland introduced the new Secretary of Corrections, Jon Litscher. Secretary Litscher said that he knew a number of the committee members, and that he hoped his department would be an asset and provide services to the committee. After the discussion the committee just had concerning data, Secretary Litscher mentioned this as an area in which he hoped his department could add clarity.

At approximately 10 a.m., the committee broke into its various subcommittees, which met until noon.

After lunch, the committee reformed to hear reports from the subcommittees.

Code Reclassification Subcommittee
Report and Recommendations

Tom Hammer reported on the code reclassification subcommittee. He directed the committee to the first two elements of its charge: to create a uniform classification system for all felonies, including felonies outside the criminal code; and to classify each felony and Class A misdemeanor such that crimes of similar severity are in the same classification. The code reclassification subcommittee worked hard to develop a mechanism to convert the crimes outside the criminal code into the classification system. As it worked on that, it saw the benefit of using the same conversion mechanism for converting crimes already in the criminal code into a unified system that would encompass all offenses.

The subcommittee agreed to recommend to the committee that the conversion mechanism, subject to crime-by-crime examination, be the mandatory release date for the crime under present law. For example, armed robbery is now a Class B felony. The maximum term of imprisonment is 40 years, but the longest period of time an offender can spend in prison until mandatory release is 26.8 years. The subcommittee recommended that the 26.8 years be the basis for classifying armed robbery under a new system. The subcommittee recommended that the number of classes of felonies be expanded from 6 to 8 to take into account the application of the mandatory release ("MR") converter. Felonies would be classified on an A-H scale, rather than the current A-E (with Class BC) scale. The proposed classification scheme would look like this:

Class	Max. confinement	Max. Extended Supervision	Max.
A			Life
B	40	20	60
C	25	15	40
D	15	10	25
E	10	5	15
F	7.5	5	12.5
G	5	5	10
H	2	3	5

Until further consideration by the subcommittee and committee, armed robbery, for example, would be placed in Class C, because 26.8 years approximates the 25 year prison portion of the bifurcated sentence. The subcommittee's next step will be to look at how the crimes convert into the new categories, and then make determinations as to whether or not the conversion works to classify crimes appropriately, according to the committee's charge, or whether some adjustments need to be made, taking into account the maximum sentences which judges now give for the various offenses, as well as the maximum amount of time that offenders actually serve on these sentences.

Tom Hammer mentioned that it was interesting to review the categories of felonies by felony class. Sometimes, disparate types of crimes - for example, violent offenses and property offenses - are combined in the same class.

Judge Sykes emphasized that this conversion methodology is a starting point, not an ending point. The subcommittee will still go through the process of considering whether the crimes, after conversion, are properly classified. Tom Hammer said that the first cut using the MR converter mechanism would produce maximum possible prison terms which mirror the maximum possible time a person can spend in prison today held to MR. Matt Frank emphasized the need for underlying data for the code reclassification subcommittee to do its work. As this new system is created, the committee will need to demonstrate to the legislature, the governor, and the public how that system will differ from the current system. Without data, that comparison cannot be made. We must be able to show whether in fact there is a change in time-served for different crimes, and if so, more or less time, and how much time.

Tom Hammer reported that the code reclassification subcommittee had discussed the committee's statutory charge to consolidate all felonies into a single criminal code. The subcommittee discussed the various crimes outside the criminal code, dealing with motor vehicles, drugs, and a variety of other crimes such as election law violations, environmental crimes,&. After debate, the subcommittee decided to recommend to the whole committee that those crimes remain in their current locations in the statutes, for a number of reasons. First, an unworkable situation would occur if definitions were separated from crimes. Definitions are often subject-matter specific, and these connections would be lost. Also, the deterrent effect would be lost when individuals who specialize in these subject matter areas fail to see the criminal sanctions listed in the same chapter as that subject matter's other statutes. Rather than attempt a cumbersome and unworkable transfer, the subcommittee recommended that those crimes outside the criminal code remain where they are in the statutes, but be classified, according to this committee's statutory charge.

The subcommittee also recommended that a list of all felony classifications, and the felonies within those classifications, be published in the statutes, so that anyone who has a need to look at which crimes fall into the same category will be able to do so easily. Senator Huelsman thought this list would help the Legislature as it passes new statutes to classify crimes of similar severity together.

Mike McCann agreed with the recommendation concerning leaving felonies where they are in the statutes, as did Steve Hurley. Mike Malmstadt brought up the problem of very high fines in the drug code. This will factor into the penalty structure as drug crimes, for example, are classified. Tom Hammer said the subcommittee will examine that question.

Tom Hammer also discussed the subcommittee's desire to streamline the battery statutes. The question, as he framed it, was whether or not separate statutes are required to take care of classes to which the legislature has granted special protection, or whether enough room exists within the new truth-in-sentencing maximum penalties to use the special statutes as an aggravating factor at sentencing, e.g. in sentencing guidelines. He also said the subcommittee is considering the issue of penalty enhancers. The same question would apply to penalty enhancers as to specialty statutes. The subcommittee members felt strongly that if it were to recommend that enhancer statutes be repealed because the new maximum penalties grant sufficient prison time, then there would have to be some type of statutory replacement for these enhancers to make the aggravating nature of the categories clear. The same would be true for specialty battery classes.

Judge Barland asked the committee for reactions to Tom Hammer's report of the code reclassification subcommittee's work. Mike McCann thought it was excellent work, and that the MR converter is an intelligent and sensible mechanism. It is not a total departure from current history, and grounded in reality. Bill Jenkins raised the question of how the committee would explain this new classification scheme to the public. Tom Hammer said the uninformed person must be rid of the notion that because a crime, for example, had a Class C penalty, and is now a Class E penalty, that that meant the offender would receive less punishment. In fact, in some instances, the offender would receive more punishment. Steve Hurley's preference was to transform penalty enhancers into aggravating sentencing factors. Tom Hammer reiterated that the subcommittee would consider penalty enhancers, but that if they were altered, the public needs to know, in the statutes, that those protections are not going away.

Judge Barland concluded that the committee had endorsed the code reclassification subcommittee's work thus far. The committee members concurred.

Judge Barland mentioned that he had formed an education subcommittee to answer Bill Jenkins' inquiry That subcommittee will be chaired by Judge Sykes, and include Judge Fiedler, Steve Hurley, and Bill Jenkins.

The committee took a break from 2: 15-2:30 p.m.

Extended Supervision ("ES") Revocation Subcommittee
Report and Recommendations

Judge Fiedler gave the report for this subcommittee. It agreed to recommend two administrative law changes, contained at Tabs 9 & 10 of the briefing book. The first change, to DOC Administrative Rule 331.03(3), would make clear that the agent may recommend revocation when the offender's behavior precludes implementation of alternatives. The agent would not be obligated to implement every alternative available. The second change, to HA Administrative Rule 2.05(7), would allow the administrative law judge to consider the offender's criminal history and/or juvenile delinquency referrals in considering revocation. As for extended supervision revocation procedure, the subcommittee concluded that when an offender leaves prison for ES, DOC should review the offender's case to determine the offender's proper initial level of supervision. Presumptions regarding the initial level of supervision would be recommended, with supervision being stricter for felonies committed in the higher classifications. The appropriate level of supervision would be determined by considering length of ES, the dangerousness of the offender, movement between different levels of supervision, and treatment needs. The subcommittee agreed to adopt the recommendation of the Intensive Sanctions Review Panel, chaired by Judge Lamelas, for the format of strict supervision. The subcommittee also agreed to look into ways the current 80 day period from violation to revocation could be shortened.

Judge Fiedler discussed the subcommittee's consideration of who should make the revocation decision. He described how the current revocation procedure works, and the subcommittee's concerns with an administrative law judge retaining unfettered discretion to revoke ES, and to determine the length of consequential imprisonment. This could be solved by circuit judge involvement in the revocation decision. But this also could shift a significant workload to the judges, especially in Milwaukee. The subcommittee recommended that the current procedure, outlined at Tab 6 of the briefing book, be continued, in which the ALJ would make the determination as to whether or not the revocation should occur. If the ALJ ruled to revoke, the case would come back to the sentencing judge to determine how much of the extended supervision time the offender will serve. This could add a significant amount of time to the current 80 day average period from violation to revocation. The subcommittee will continue to look at this time frame issue.

The subcommittee read its charge as not simply ensuring that people are revoked in a swift and fair manner, but also attempting to see if offenders exiting prison can be given the resources to succeed. Judge Fiedler reviewed preliminary cost figures for ES prepared by Bill Grosshans, found at Tab 12 of the briefing book. Another conclusion the subcommittee reached was that if it takes 80 days to revoke an individual, the message is not getting out to supervised offenders that their conduct is wrong. The subcommittee suggested that a probable cause hearing on the allegedly revokable conduct occur within about 40 days of the alleged violation. This would track the current system, which has been found to be constitutional. The analogy would be the current hearings

judges do pursuant to the Supreme Court's County of Riverside decision. The subcommittee suggested that the Department of Corrections do the same thing. A standardized probable cause form would be prepared by the agent within 4 days. Those forms would be reviewed, probably by an ALJ, by day 6. Then the state public defender should be contacted. The agent would put together a revocation packet, which would be sent to the ALJ and the public defender. Then the ALJ should send out notice of a hearing. The goal would be to have the hearing completed within 35 days. The state public defender could require more resources to staff cases on this timetline. One serious problem now faced in setting up such hearings is that prisoners are often moved among state corrections facilities. This could be reduced by building a series of regional ES detention centers around the state.

In response to a question from Tom Hammer, Judge Fiedler described in detail the current revocation process, using Tab 6 of the briefing book. Judge Lamelas expressed her deep reservations about the current revocation process, including when and how the decision is made. She has had agents come to her who cannot get approval to revoke because the decision would not withstand scrutiny by an ALJ under the analysis of Plotkin v. Dept. Health & Social Services. She has examined memoranda describing conduct upon which she did not think any elected judge would deny revocation. She would vote to change the current revocation system. She mentioned that if ES does not offer some protection to the public, judges would change how they structure sentences. Bill Jenkins mentioned that the subcommittee had discussed that quite a bit, and it agreed that the sentencing judge should play a larger role in the revocation decision. All were surprised by the ALJ's potential power under the new law. This is counterbalanced by the need to make revocation decisions quickly.

Steve Hurley expressed concern about the potential cost shift from the county to the state under the new law by sentences to prison for a year instead of placement on probation with a year in the county jail. Bill Grosshans discussed the current reimbursement relationship between the state and counties for housing VOP ("violation of parole/probation") violators: the state pays for those individuals held in county jails on non-criminal conduct, such as absconders. Roughly $4 million in state funds are allocated for this purpose. The state cannot pay for more than $40 per offender per day. Steve Hurley expressed his desire to have sanctions intermediate to revocation: should a revocation occur, rather than sentence the offender to prison, sentence him to probation with jail and Huber privileges as a condition. Judge Lamelas said there are alternatives-to-revocation ("ATR"), which she felt were relied on too heavily. Judge Fiedler said that over-reliance on ATR's was the motivation for the proposed changes, described above, to the administrative rules.

Steve Hurley asked that the committee return to the subject of cost-shifting from the county to the state. Judge Malmstadt said that that cost-shift has occurred as part of the truth-in-sentencing legislation. He did not think the committtee could go back to the legislature and ask it to rethink that problem. Steve Hurley disagreed. He wants to recommend guidelines which include allowing a judge to give probation with jail as opposed to prison. Mike McCann pointed out that the law does not change the judge's authority to effectuate either sentence. Judge Sykes said we should not get drawn into this debate on unfunded state mandates and fiscal battles between the state and its counties. She said that is for the legislature and the governor, not this committee. Bill Jenkins stated that once a sentencing judge sentences an offender to prison, the term of ES does become a state responsibility. He felt it should be budgeted that way.

Judge Fiedler asked for the committee's input on whether the sentencing judge should decide revocation. Mike McCann proposed that that ALJ make findings of fact, and a recommendation to the sentencing judge on whether or not to revoke, and if so, for how long. Then the circuit judge would have all the facts and a recommendation ready for consideration. Judge Barland mentioned how 25 years ago he had led an effort to have judges handle probation revocations, which lost. Judge Barland associated himself with Judge Lamelas' comments: with the length of potential sentences on extended supervision, this should be handled by the sentencing judge. Speaking for the so-called rural judges, Judge Barland places his probation revocation hearings on his calendar within a week or two of the agent's call, and the hearings themselves do not take long.

Matt Frank felt the issue of cost should be taken into account. He noted how often the Milwaukee judges expressed a lack of confidence in supervision, whether probation or parole. He applauded the ESR subcommittee for securing the figures at Tab 12 of the briefing book costing out ES. He said this committee should recommend what it takes to manage the supervision risk and promote public safety, and take those back to the legislature. It is their job is to decide what the costs are and who will pay for those recommendations.

Linda Pugh emphasized that the current system does not work for crime victims. She believed the revocation decision should go back to the sentencing judge, who would be more likely to understand the facts of the underlying crime. She finds herself working with women victims all the time who tell her they are "still waiting" for a revocation decision.

Judge Malmstadt asked about the current ratio of agent-to-probation or parole offender. Bill Grosshans said it was generally 1 agent to 72 offenders, but for sex offenders 1 to 25. In aggregate, the supervision ratio is about 1 agent to 55 offenders. Most agents supervise probationers and parolees, although some have exclusively parolees. Judge Malmstadt wanted to make sure that under the new system, agents are not told they have 20 ES offenders, but then also have 50 probationers. Steve Hurley worried about recommending a 1 to 20 ratio of agent-to-offenders while at the same time putting in motion a cost-shift of unknown magnitude. Mike Smith offered that if the committee's recommendation includes use of a strict supervision period within ES as part of truth-in-sentencing, it should also be a guided decision.

Discussion Concerning Cost

Nick Chiarkas asked whether the committee had agreed that cost should be a factor in its deliberations. Judge Lamelas thought the committee had agreed that it should make some effort to put a price tag on our recommendations; that the committee would not offer this package to the legislature without an idea of its cost. She did not think consensus had been achieved as to whether cost should drive each decision from its beginning, or even its middle. She offered that there was considerable opposition to, as well as considerable support for, cost as the primary factor for consideration. Mike Smith thought there were 2 separate questions: (1) a scheme for judges to follow without a resource assessment, and (2) to make recommendations based upon cost.

Judge Sykes thought this question was analogous to welfare reform as a policy change. It was initiated and passed because it was good public policy to produce societal benefits. The state is spending more money in the early years of welfare reform to achieve that result. In the end, it may save money. Truth-in-sentencing was passed not with the idea of reducing the corrections budget, but because it is a good idea. Nick Chiarkas agreed that more money should be spent on community corrections, but disagreed that more money should be spent on prisons.

Senator Huelsman thought that the legislature must know that if extended supervision is going to work, more funds must be expended on agents. If you do not have enough agents, offenders will not become employed, get appropriate child-care, transportation, etc. And then they are going to end up back in the prison system. The legislature must know that if judges will be sentencing offenders to lengthy periods of extended supervision, agents to supervise these offenders must be provided for. Steve Hurley asked how this cost problem would get through to the legislature, because it has not in the past.

Judge Barland said that the committee's report will estimate costs in some areas. He did not see sharp differences among committee members on this topic. Most concluded that the committee's report should account for the costs of our recommendations in some manner. Most also agreed that an individual judge sentencing an offender should not take cost into consideration.

Nick Chiarkas said that cost should not be the primary issue, but it is an issue. He found troubling that cost is the primary driving issue in representing or defending poor people - such as his agency faces - but that when society wants to put those same people in prison, cost should not be considered. Steve Hurley spoke about how the public members of this committee do not have to worry about cost when they attend meetings, but he does. He said this committee's members may not have to care about overhead. "But the ones you serve do. And you better think about that. You may put together a wish list for what I want to be in the judge's discretion, for how much I want to give the worst-case scenario. But you better think about the people that will pay for your wish list, and what it's going to cost them. Because those are the people that you serve."

Judge Barland asked Steve Hurley, if we accept his statement, what conclusion was he asking the committee to draw? Steve Hurley said the committee was reaching conclusions without knowing what those conclusions would cost. He feared that the committee would come up with a system, propose it to the legislature, estimate cost, and that the legislature would implement our recommendations and not appropriate the money. Judge Barland asked Steve Hurley what he thought the committee should do. Steve Hurley thought we should get a handle on cost before we come to a final decision, and then recommend two systems, a "Cadillac" system, as well as a system which controls costs. Judge Barland said that the committee was making preliminary, but significant, decisions. Once a decision is made on a certain issue, and we cost that recommendation out, we may take a different view once we see the whole picture. Judge Barland asked whether Steve Hurley agreed with that approach. Steve Hurley thought the committee should proceed down 2 lanes: ideal recommendations, and recommendations assuming no further funding. Judge Barland asked Steve Hurley, assuming a ratio of 1 agent to 55 offender - an approximate current overall parole/probation ratio - what changes would he make in the ESR subcommittee's recommendations? Steve Hurley felt that if a 1-55 ratio existed, the ALJ should decide revocation, but if a l-20 ratio existed, a circuit judge could decide revocation. Judge Lamelas said that proposal would not save money, but just make the judges give longer prison terms, which Mike Smith said, in that circumstance, they probably should.

Mike McCann pointed out that a 40 year sentence is a $1 million decision: $100,000 every 4 years, times 10. Mike Smith added that with 20 years ES, it was a $1.5 million decision. Greg Everts was interested in the second of Mike Smith's 2 questions: whether to make individual recommendations based upon cost. He felt that the committee should consider costs, and part of our job was to make tradeoffs and to come up with a more cost-effective system, or at least a system that allows better prediction of costs. He thought we should be thinking from the front-end what these recommendations would cost. He wanted to hear from other committee members, because it could make a difference on how the committee's work proceeds.

Bill Jenkins said he has struggled with this question. He said Act 283 gives us a chance to look at our system, and that is what we should do. At each step, the ESR subcommittee considered not just the cost of its recommendations, but what resources are necessary. Bill Jenkins said that Steve Hurley argues against himself. He keeps using cost as a term to challenge the process. Our committee must be able to accomplish our charge, which means addressing systemic changes, and cost that out simultaneously, which is what we are doing. The other way to do it would be totally artificial. It would be like saying, take the current corrections budget and add 5%. Bill Jenkins thought that the bottom line was that the committee's work would have a fiscal note which would estimate the budgetary impact of the committee's recommendation.

Steve Hurley asked Bill Jenkins whether when he did his business, he put together a plan, costed it out, and decided whether or not he could afford the plan. Bill Jenkins said he does develop the program first. Steve Hurley said that what happened here was that the law got implemented and our committee was told to put together a plan. Bill Jenkins responded that the plan got implemented because it needed to be implemented. He used the example of lack of confidence among Milwaukee judges in the current revocation process. What does it take to fix that process? Is that part of the ultimate costs that Steve Hurley is discussing? Bill Jenkins said in his business, a program is developed first, and then a performer is developed. This committee is doing the same thing. As for Steve Hurley's comment about most committee members not having to worry about costs when they attend meetings, Bill Jenkins said the community consists of private and public sectors. If Bill Jenkins did what Steve Hurley did, nobody would come to Bill's emergency room. Bill Jenkins said that while cost is a key part of what we are doing, it is only part of the whole resource requirement, which itself is part of the larger debate as to whether, and how, we will change our justice system for the better.

Judge Malmstadt was bothered by the possibility of a statutory scheme the committee recommends being passed without being funded. He gave an example from the juvenile justice committee: the age of adult prosecution was dropped to 17, but those programs that were going to be passed in exchange never were. Bill Jenkins said that was a reality of the legislative process. Senator Huelsman said there is a way for committee members to ensure that Judge Malmstadt's fear does not come to pass: by letting legislators know that if this new system is going to work, it must be funded. If this committee does not go overboard in funding requests, the legislature could buy this package. Most legislators have heard from their constituents that they like the idea of truth-in-sentencing. But those same legislators must hear from the members of this committee. Judge Barland agreed that that would be a large part of our job. Not only do we have to come up with a proposal that has a chance of being approved by the legislature, we have to follow up with the education of the legislature and the public. He also pointed out that the fiscal impact of our recommendations will not be felt until the biennium after this upcoming one, as at that time the truth-in-sentencing sentences will be impacting the corrections system.

Mike Malmstadt inquired whether 1 year in prison and 59 years on extended supervision was a realistic sentence. After discussion by a few committee members, it was agreed that the code reclassification subcommittee should review whether the committee should recommend restructuring the new law to cap the number of years of ES on which an offender can be placed.

Judge Sykes said that nobody is opposed to costing out the committee's proposals, but that should not prevent the committee from making its best criminal justice recommendations. We should not be cynical and assume that the legislature will not do the right thing. She proposed that any cynicism about the legislature's activity cease, and that the committee arrive at some good decisions to cost out. Nick Chiarkas and Judge Barland agreed.

Discussion Resumes Concerning
Extended Supervision Revocation Subcommittee's
Report and Recommendation

Judge Fiedler again raised the question whether the decision on revocation should remain with the ALJ, or go to the circuit judge. Committee members discussed this question, and Judge Sykes reasoned that although 1¼ to 1% extra judges would be needed in Milwaukee County to handle ESR revocation decisions, about ½ of such cases could involve a new criminal offense, so having a revocation proceeding piggyback on the criminal case would not result in a significant burden.

The committee took a show of hands as to how many favored a circuit judge, rather than an ALJ, resentencing an offender whose extended supervision has been revoked. Sixteen of the committee members present agreed the circuit judge should resentence; only Steve Hurley opposed it. Matt Frank had stepped out to attend to other business for a portion of the afternoon session.

The committee took a show of hands as to how many favored the ALJ's making findings of fact, making a revocation recommendation, along with a proposed term of revocation, and forwarding those findings of fact and recommendations to a circuit judge, who would make the revocation decision. Fifteen of the committee members agreed with that proposal; Steve Hurley and Nick Chiarkas opposed it; Matt Frank had stepped out for a portion of the afternoon session. This proposal would have the effect of eliminating the appeal from the ALJ's decision to a final hearing before the Department of Administration division of hearings and appeals. This revised process would shorten the revocation process by at least 10 days, and in some cases as many as 20 days.

The committee gave the ESR subcommittee its general views that the revocation process should be shortened, ideally to approximately 50 days or less, from the current 80 days. The ESR subcommittee also agreed to consider what the standard of review should be for the circuit court's review of the ALJ's findings of fact. A clearly erroneous standard was mentioned. The committee also agreed that the ESR subcommittee should consider whether if the ALJ recommends not to revoke, release should be presumed, with the possibility of bail.

At 5:05 p.m., the committee finished its work for the day, and then dined together at the Concourse Hotel.

January 22, 1999

The committee reconvened at 7:45 a.m. to continue its work. Mark Loder and Rick Geithman of the bureau of technology management of the Department of Corrections ("DOC-BTM") appeared before the code reclassification subcommittee, as well as certain members of other subcommittees who were present, to answer questions about state corrections data.

Tom Hammer said that the code reclassification subcommittee was interested in securing information about the percentage of sentences imposed which are served, what data is available concerning that, and how DOC keeps that data. Mark Loder said that the data system has its limitations as to how precise it can get as to time served of a sentence when multiple sentences are being served at the same time, whether consecutive or concurrent. DOC-BTM can tell if an offender is serving time for more than one sentence, and whether there are consecutive or concurrent sentences being served. Where they cannot get precise is, at any given point in time, which sentence is being served, or how much time has actually been served per sentence. The data system, as it is constructed today, does not lend itself to that kind of precision. DOC-BTM can tell how much time is served in total, but does not have the capability to break down a multiple-sentence scenario into how much time was served per each sentence.

Matt Frank said that the code reclassification subcommittee is attempting to figure out where certain offenses should be classified, and whether any adjustment should be made based upon using mandatory release of current sentence length as a converter. That subcommittee wants to ensure that a judge at the time of sentencing has enough incarceration time to use to protect the public. On behalf the code reclassification subcommittee, Matt Frank formulated the following data inquiries:

Minimum sentence, median sentence, coefficient of variation, and maximum sentence for the following:

Sentences Imposed by statutory crime:

1. Single offense -- single sentence
2. Multiple concurrent sentences for the same crime
3. Multiple concurrent sentences when the statutory crime is the governing offense and the offender is also sentenced to other crimes
4. Multiple concurrent sentences when the statutory crime is not the governing offense and the offender is also sentenced to other crimes

Time served to actual first release by statutory crime (actual time served, not offenders who have been revoked):

1. Single offense -- single sentence
2. Multiple concurrent sentences for the same crime
3. Multiple concurrent sentences when the statutory crime is the governing offense and the offender is also sentenced to other crimes
4. Multiple concurrent sentences when the statutory crime is not the governing offense and the offender is also sentenced to other crimes

Also requested are breakdowns of these numbers by county of conviction.
Also requested are any graphs possible of the composite sentences for each statutory crime.

Judge Fiedler followed up Matt Frank's requests with similar data inquiries for the ESR subcommittee. He asked for the same data breakdowns as listed above, but for offenders in parolee status. Mike Smith also made similar data inquiries with regard to probation. He asked for the same data breakdowns listed above, but for those individuals on probation status who have been revoked. Any information regarding imposed and stayed time, prison or jail, is also requested. It was agreed that DOC-BTM would respond to the requests in the order made. Mark Loder made the point that with regard to probation, although DOC keeps track of those offenders on probation, and their term of probation, they do not keep track of a sentence imposed and stayed as a condition of probation.

Committee members discussed various problems in securing DOC data, and pointed them out to the DOC representatives. Mark Loder responded by explaining the history of DOC-BTM's current data system, and where it hopes to go. The CIPIS system is DOC's primary source of data on offenders incarcerated in prison. The system was designed in the early 1980's, and implemented originally in 1983. In part, the system was designed as a statistical data-gathering system for management-information purposes. And, in part, it was designed as an operational system to assist people in the institutions in doing their jobs. The part of the system currently under discussion is sentence-offense information, and was designed based on a federal model at the time called OBSCIS, Offender-Based State Corrections Information System. This part of the system was not designed for recording the total detail of sentences and offenses; hence, some of the deficiencies raised. As the years went on, the system was enhanced, but always in other areas, such as classification, transportation program recording, and intensive-sanctions information. Wisconsin has been working with this sort of abbreviated picture of sentence and offense information, which was only somewhat helpful for statistical purposes. Since then, at the offer of North Carolina, and at Mike Sullivan's initiation, the process has begun to transfer North Carolina's OPUS prison population software to Wisconsin. That system does much more than our CIPIS system does. And since OPUS is in the public domain - although not free because of modification and installation costs - it can be used in Wisconsin. Part of the reason for doing so was because

OPUS was developed in North Carolina due to that state's previous system's inability to handle their version of truth-in-sentencing back in 1994.

DOC-BTM recognizes the shortcomings of the system that Wisconsin now has. Resources have not been available to improve that to date. But DOC-BTM is implementing OPUS which should record more detailed information on sentences and offenses. In the new system, time calculations are automated, as opposed to entered manually, as in Wisconsin's current system.

Mark Loder also said that DOC wishes it had certain data, but just does not. This is the only data it has, and it must make it work for our purposes. In response to inquiries from various committee members as to the availability of certain data, Mark Loder pointed out that although Wisconsin retains the raw data, that data must be manipulated and massaged to provide the kinds of records each time this committee makes a data request. Each time an inquiry is made, DOC-BTM must think in terms of how to produce a database that could be analyzed in the form of the inquiry, not how are the answers produced. That is why Mark Loder asked the committee for particular questions, as he must determine whether all the necessary fields are in CIPIS to answer the inquiry.

At 9:30 a.m., the committee broke into its various subcommittees. At 11:30 a.m., the committee reconvened.

The committee discussed its future schedule. A number of members commented on how productive a 2-day meeting was, and how some of our future meetings should be converted to 2-day meetings.

The committee also discussed the request to the legislature of an extension of the committee's statutory reporting date of April 30, 1999. Judge Barland thought the committee has been making very good progress in some areas, and other areas require quite a bit more discussion. The two biggest obstacles at this stage look to be (1) the nature and detail of the sentencing guidelines the committee will recommend, and (2) securing data required and computer modeling that data for use in policy debate.

Judge Barland opened up the floor for discussion on the committee's request for an extension in its reporting deadline. Informally, proposed dates had ranged from June 30, 1999 to August 31, 1999. Judge Barland asked that the discussion take into account the legislature's schedule, its expectations of us, and the December 31, 1999 effective date for truth-in-sentencing. Mike Brennan offered August 31, 1999 as the best compromise. It allows for the writing of the committee's report in August, and not wasting time prior to the fall legislative session, but it gives the committee the maximum amount of time to reach its conclusions, hopefully cost-out assumptions, and run "what-if'queries on the computer model. Senator Huelsman ran through the legislature's fall schedule. She said it was possible, if the committee's work was completed by the end of August, for the legislature to hold hearings in early September and for legislation to pass both houses one of the last two weeks in September. A special session was also a possibility. There were no other reactions. The committee's unanimous consent was to request an extension in its reporting deadline tc August 3 1, 1999.

The committee discussed its future meeting schedule, which is listed below. Some of these dates were previously agreed to, some are previous dates adapted to 2-day meetings, and some are new dates:

Friday, February 19, 1999
Friday, March 5, 1999
Thursday and Friday, March 18-19, 1999
Friday, April 16, 1999
Friday, April 30, 1999
Thursday and Friday, May 13-14, 1999
Friday, June 4, 1999
Friday, June 251999

The committee members are to notify Mike Brennan or Jennifer Dubberstein as to their availability for meetings in July 1999. The committee meetings will take place in Room 417N of the State Capitol in Madison, except for the 2-day meetings, which will take place at an as yet undecided location(s).

The committee discussed any recommendations it wished to make directly to the Governor for his upcoming state-of-the-state address and budget address. Although certain topics were debated, it was decided not to go on record at this time with any specific recommendations.

Sentencing Guidelines Subcommittee
Report and Recommendation

Judge Lamelas offered a report from this subcommittee. On Thursday, January 21st, the subcommittee listened to 4 presentations on different possible guidelines systems - a grid guidelines system by Greg Everts, a modified version of the Ohio guidelines system by Mike Brennan, the "rule of law" sentencing system developed by Walter Dickey and Mike Smith, and an advocacy system with statistical graphs by Judge Lamelas.

In the subcommittee's discussion that morning, it seemed that some members wished to use previous sentences as a starting point and build a reasoning process from there. A second group of members felt more comfortable with a grid-type system; not a federal sentencing guideline system necessarily, but a looser grid-type system, less restrictive, less numerical, but that would still offer ranges of sentences in matrix form. The subcommittee decided informally to have a meeting on February 12th, at which refined presentations on the Lamelas-Smith type approach, and an Everts grid-type approach, would be offered.

Another area to be explored is extended supervision. There are a couple of ways to do that. If a grid system is chosen, ranges could be placed in a grid. But if the committee adopts another approach, a proper philosophy of ES must be set forth.

Mike Brennan has drafted a memorandum describing a proposed sentencing commission. Judge Lamelas suggested delaying consideration of that memo, as the kind of sentencing guidance system chosen will affect the kind of sentencing commission proposed. If a grid system is proposed, then that sentencing commission will probably make judgments statewide as to where offense should be placed. If the committee decides upon another kind of guidance system, then the role of that sentencing commission would be different, and would be an informative role for the courts. Its role would be to gather information, which would help the courts, help advocates, inform scholars and the community, and guide the public's interest in what the sentence would be.

Mike McCann pointed out that the budget for any sentencing commission will be much debated, and that if reliable information is required for any guidelines system, it is important that such a commission be adequately staffed and funded. Matt Frank opined that someone from CCAP or DOC may need to work directly with the new sentencing commission staff. Judge Barland noted that whatever recommendations this committee makes, a sentencing commission must start functioning as soon as we complete our job. or at least when the legislature passes the enabling legislation.

Judge Lamelas asked that at the next meeting, all members approach the decision regarding the two guidelines systems with open minds, and weigh their strengths and weaknesses. Judge Barland asked whether these 2 systems take into account Judge Malmstadt's argument, made in that morning's guidelines subcommittee meeting, that the committee's charge includes temporary advisory guidelines, and perhaps the old Wisconsin sentencing guidelines could fill that role. Judge Lamelas though we would not be able to use the old guidelines directly because the ranges, and information upon which those ranges are based, are so dated. Judge Lamelas said that we should keep in mind Matt Franks point that philosophically, there may be a point between these two approaches.

At noon, the committee adjourned until its next meeting, which will take place on February 19, 1999, at 9:30 a.m., in Room 417N of the State Capitol, Madison, Wisconsin.

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Extended Supervision Revocation Subcommittee

Thursday, February 18, 1999
1:00 p.m.
Rm. 414
Milwaukee County Courthouse
901 N. 9th Street
Milwaukee, Wisconsin 53233

Witnesses scheduled to appear:

(a) David Schwarz and William Lundstrom of the Dept. of Administration Division of Hearings and Appeals
(b) William Grosshans and Robert Pultz of the Dept. of Corrections, and perhaps 1 probation/parole agent

1. Call to order - Subcommittee Chair Judge Pat Fiedler

2. Discussion of proposed change in revocation procedure:

a. Proper standard of review for trial judge review of ALJ's findings of fact and revocation recommendation

3. **Discussion of ideas to compress period of time from hold until revocation decision**

4. **Continued discussion of strict supervision model as initial stage of extended supervision**

5. **Decision upon matters to be presented at 2/19/99 Criminal Penalties Study Committee meeting in Madison**

6. **Adjournment**

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, February 19, 1999
9:30 a.m.

Rm. 417N
Grand Army of the Republic Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Barland**

2. **Consideration of minutes of January 21-22, 1999 meeting**

3. **Subcommittees meet:**

   a. **Criminal code reclassification (Room 225NW; reserved from 9:30 a.m. to 11:30 a.m.)**
   Further discussion of(i) mandatory minimums, (ii) ch. 939 penalty enhancers, and (iii) establishing maximums for extended supervision
   Review sample conversions of classified crimes to proposed Class A-H scheme

   b. **Sentencing guidelines, along with computer modeling (Room 417N - GAR)**
   Discussion of combination grid/narrative sentencing guidance prototypes.

   c. **Extended supervision revocation (Room 424NE; reserved from 9:30 a.m. to 11:30 a.m.) Further discussion of standard of review for circuit court review of revocation decision, ideas to compress time period for revocation decision, and strict supervision model as initial stage of extended supervision**

4. **Subcommittee chairs present subcommittee recommendations to committee for discussion and possible decision**

5. **Public comments**

6. **Any housekeeping matters and adjournment**

7. **Education subcommittee meets to discuss scheduling**

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Tuesday, March 02, 1999 3:16 PM
To: Aaron Nathans; Alison Poe: Andrew Statz; Andy Moore: Bill Clausius; Bill Grosshans; Cindy Archer; Cindy O'Donnell; David Albino; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Mark Grapentine; Marline Pearson; Matt Bromley; Michael Miller; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek
cc: Brennan, Mike
Subject: Friday, 03/05/99 Criminal Penalties Study Committee meeting

Below please find an open meetings notice and agenda for the above-referenced meeting. Also attached are the minutes from the last Criminal Penalties Study Committee meeting on February 19, 1999.
Jennifer Dubberstein (414) 227-5103

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, March 5, 1999
9:30 a.m.

Rm. 417N
Grand Army of the Republic Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Barland**

2. **Consideration of minutes of February 19, 1999 meeting**

3. **Subcommittees meet:**

   a. **Criminal code reclassification (Room 424NE; reserved from 9:30 a.m. to noon)**
   Review movement of crimes among prospective Classes A-H after mandatory release conversion; further discussion of penalty enhancers and establishing maximums for extended supervision

   b. **Sentencing guidelines, along with computer modeling (Room 417N - GAR)**
   Presentation by and discussion with former Wisconsin Sentencing Commission executive director Sandra Shane-Dubow; continued discussion of adopting former Wisconsin sentencing guidelines as advisory sentencing guidelines

   c. **Extended supervision revocation (Room 415NW; reserved from 9:30 a.m. to noon)**
   Review and discussion of ESR working paper, including revisions from February 18 & 19th subcommittee meetings; further discussion of ideas to compress time period for revocation decision

4. **Subcommittee chairs present subcommittee recommendations to committee for discussion and possible decision**

5. **Public comments**

6. **Any housekeeping matters and adjournment**

7. **Education subcommittee meets to discuss scheduling**

Criminal Penalties Study Committee

February 19, 1999 Meeting Minutes
Room 417N, State Capitol Building, Madison, Wisconsin

Chair Judge Thomas Barland called the meeting to order shortly after 9:30 a.m. Present were: Judge Barland; Nicholas Chiarkas; Professor Mike Smith for Professor Walter Dickey; Executive Assistant to the Attorney General Susan Goodwin on behalf of Attorney General James Doyle; Greg Everts; Judge Patrick Fiedler; Brad Gehring; Professor Thomas Hammer, the committee's reporter; Ray Sobocinski for Senator Joannt Huelsman; Steve Hurley; Judge Elsa Lamelas; Judge Mike Malmstadt; District Attorney Mike McCann; Barbara Powell; Linda Pugh; Judge Diane Sykes; and Judge Lee Wells. Bill Jenkins was absent due to a previously scheduled commitment.

The committee approved unanimously the minutes from the January 21-22, 1999 meeting. Judge Barland reported on a February 15, 1999 meeting between City of Milwaukee Mayor John Norquist and Judge Lamelas, Judge Sykes, Judge Barland, and staff counsel Mike Brennan. The committee representatives reported to the mayor on the committee's work thus far. Mayor Norquist relayed his concerns about drug trafficking, home burglaries, and the quality of probation and parole supervision. Judge Barland introduced to the committee Mayor Norquist's staff assistant, Mike Miller, who attended the committee's meeting. Judge Sykes reported that she is setting up a meeting with Milwaukee County Executive Thomas Ament.

Nick Chiarkas spoke briefly about a public forum that his office will hold in Milwaukee at All Saints Catholic Church, 4060 North 26th Street, on March 23, 1999 at 5:30 p.m. on the topic of "Crime and Punishment: Reality vs. Myth."

Subcommittee Meetings

The committee broke into its subcommittees from 9:40 a.m. to 11:30 a.m.

Public Comments

At 11:30 a.m., the committee reformed to hear public comments from 4 police officers of the Brillion (Calumet County) police department: Sergeant Dan Alloy, and Officers JoAnn Mignon, Brent Muller, and Michael Alt. The officers spoke about the Rogers child abuse case. Officer Mignon read a short statement describing some of the facts of the case, including how Sergeant Alloy had found a seven year-old girl locked in a dog cage in the Rogers' basement. The officers described how much time and effort they expended in investigating this crime. The Rogers were charged with 10 felony counts with a total penalty exposure of 90 years. The parents each pleaded guilty to felony charges. A circuit judge was brought in from a neighboring county to preside over the case, and sentenced the parents to a lengthy probation term, 1 year in the county jail as a condition of probation, with 60 hours per week of Huber work-release and child-care privileges.

The Brillion police officers spoke about their disappointment with these sentences. They felt that the committee's review of the criminal code must be fair to victims, such as the Rogers children. Although an extreme set of circumstances, evidence of continual abuse should have resulted in longer sentences for these parents. The officers said judges should use definite guidelines to determine such sentences. In a case such as this, victims, officers, investigators, prosecutors, judges, and the defendants should know what punishment can be expected after a conviction. The officers would like to see minimum guidelines in sentencing for child abuse cases. Although they did not want to see prison sentences in all child abuse cases, they did advocate imprisonment for aggravated ones.

Officer Mignon expressed the officers outrage at the parents receiving 60 hours per week in release privileges, which is more free time than the seven year-old girl locked in the dog cage every day received. She asked that the committee promulgate guidelines and mandatory minimums such that sentences like these never occur again. The officers contrasted the sentences in the Rogers case with the recent animal abuse case in Janesville, in which the defendant received a much longer sentence. The officers brought along a summary of the Rogers case file, which is in the committee's files.

The committee broke from 12:25 p.m. to 12:55 p.m. for lunch. The committee reformed at 12:55 p.m. to hear reports from the subcommittees.

Code Reclassification Subcommittee Report

Subcommittee chair Tom Hammer reviewed the subcommittee's data requests to DOC. The responses tc the first portion of those requests was eight inches high of paper. The committee's program assistant Jennifer Dubberstein reviewed this information and produced spreadsheet analyses of some of the most common crimes. Among other things, these analyses contrasted sentence data (such as average sentences) with time-served information.

While the subcommittee waited for the data extracts and analysis, it decided to use the mandatory release date under present law to convert old crimes into the Truth-In-Sentencing scheme. The subcommittee made that conversion for a number of the crimes, and will consider whether the conversion results in crimes of similar severity being grouped together in the same class.

The subcommittee has concluded that those crimes which have true mandatory minimums should remain as is. For those crimes with presumptive minimum mandatory sentences - including many drug offenses - the subcommittee has tentatively decided to recommend the elimination of presumptive minimums to give judges maximum leeway in sentencing, but the subcommittee will recommend that sentencing guidelines replace those presumptive minimums. As for those crimes which do not require incarceration, but if incarceration is ordered, prescribe a minimum period therefor, the subcommittee concluded they should be classified and treated like any other crime in that classification. The subcommittee believed that all felonies should be classified, and that judges should have options ranging from probation to the maximum period of incarceration.

The subcommittee has discussed the issue of capping extended supervision ("ES"). The subcommittee has preliminarily considered that ES should be limited to the following periods:

Class	Max. E.S.
A	Life
B	20
C	15
D	10
E	5
F	5
G	5
H	3

The subcommittee also considered the question of whether an offender who receives concurrent sentences which are not mirror images should work off ES time while still in prison.

Tom Hammer spoke about the spreadsheet analyses Jennifer Dubberstein prepared, which were helpful, but which also exposed serious deficiencies in DOC data. Many of the numbers could not be right - percentages

greater than 100, for example. Rick Geithman of Department of Corrections - Bureau of Technology Management was helpful and tried to respond to many of the subcommittee's questions. But the subcommittee concluded that neither the time nor the resources existed to render this data of much help to the committee's work. Accordingly, the subcommittee will classify crimes, using that portion of the DOC data which is helpful, as well as the subcommittee members' collective experience.

The next item on the subcommittee's agenda will be penalty enhancers - whether they should be maintained and used in their present form, or moved into an omnibus statute of aggravated circumstances to be considered by the judge at sentencing.

Judge Lamelas raised the issue of "good time" for time spent in jail as a condition of a probation term, notwithstanding that truth-in-sentencing eliminates "good time" for felonies. A discussion ensued concerning the topic, and it was discerned that "good time" was given for time spent in jail as a condition of probation in Milwaukee County, but not elsewhere. Judge Wells explained that because judges were handling this issue in so many different ways, Milwaukee County decided to pass a program that gives such offenders "good time," unless the judge says otherwise.

Judge Malmstadt asked whether the subcommittee had visited the issue of crimes differentiated based upon the amount of money implicated. Tom Hammer said it had not done so yet.

Sentencing Guidelines Subcommittee Report

Subcommittee chair Judge Lamelas reported on the subcommittee's February 12, 1999 meeting, at which the merits and demerits of grid and non-grid sentencing guidance systems were debated at length. There was a general consensus reached that graphs based on historical sentences could not be used due to the lack of accurate data, the fact that past judgments are not necessarily the best judgments, and that we might want to direct judges in directions that are different from past sentencing practices.

Staff counsel Mike Brennan had presented a combination grid/narrative sentencing guidance system to the subcommittee at its meeting that morning. After considerable debate, there was general agreement that the subcommittee liked a vertical axis with presumptive, aggravated, and mitigated ranges. There was considerable disagreement among subcommittee members as to how a horizontal axis should look. The subcommittee was not comfortable with the task of assigning points to prior crimes, especially to the exclusion of other offender characteristics.

After some debate, and a suggestion from Judge Barland, the subcommittee had decided to review the former Wisconsin sentencing guidelines for possible adaptation and use. The committee staff will secure copies of the last version of the guidelines and put them into a word processing format. The subcommittee will consider ways to alter the old guidelines, including reviewing the horizontal axis. It will also hear from individuals learned in the formulation and use of the old guidelines. Other issues the subcommittee will consider include whether, and if so how, judges should be mandated to do factfinding; the scope of appellate review of the sentence; and recommendations for extended supervision. As to the final issue, the subcommittee is considering recommending a presumptive period of ES equal to ¼ of the prison sentence imposed (in addition to the prison sentence, 100% of which would be served.) The subcommittee has not yet reviewed and discussed a proposal for the nature of the sentencing commission.

Extended Supervision Revocation ("ESR") Subcommittee Report

Subcommitee chair Judge Fiedler reported that the ESR subcommittee had spent much time discussing the amount of time it presently takes to revoke an offender from the day a hold is placed upon them to the time a revocation decision is made.

The ESR subcommittee met on February 18, 1999, and heard testimony from DOA and DOC officials, as well as a parole/probation agent and his supervisor. These witnesses further educated the subcommittee members about the intricacies of the revocation process. The DOA officials had presented the subcommittee with what the members considered to be a good suggestion: instead of having the administrative law judge ("ALJ") simply make a recommendation, the present system would continue, but the circuit judge would make the decision as to the time period of revocation. The certiorari procedure for seeking review of revocation decisions would continue, but a circuit judge would decide the period of time for which the offender would be revoked.

The legislative charge as to the revocation procedure includes to shorten the period from hold to revocation when proper. Now the process takes approximately 84 days. By eliminating a preliminary hearing, and replacing it with a County of Riverside-type probable cause determination by an ALJ, the subcommittee opined it could reduce this time period from 84 days to 69 days. This 69-day estimate assumes the circuit judge would use 30 days to render a decision as to the period of revocation.

Discussion ensued concerning who represents the Department of Corrections at revocation hearings. Judge Wells answered that usually no attorney represents DOC, but that the probation officer is present at the revocation hearing itself. Judge Fiedler noted that the subcommittee is discussing proposing legislation that if the ALJ decides not to revoke, DOC could appeal that decision.

Judge Fiedler stated that the subcommittee would recommend lower caseloads for ES agents, as well as increases in purchase-of-service money for housing, employment,& The subcommittee also envisions ES as a graduated system, easing the offender out of the structured prison environment through strict supervision into more of an administrative supervision. Some of the specific contours of ES could be taken from the final report of the intensive sanctions review panel, chaired by Judge Lamelas.

Judge Lamelas inquired about day reporting centers as part of the subcommittee's recommendations. Bill Grosshans, in charge of community corrections at DOC, spoke about various types of day reporting centers. Judge Fiedler discussed the timeline from the parole hold, to the ALJ's decision, to administrative appeal of that decision, through circuit court review. He also made the point that ES revocations probably would not begin until early 2001, and would trickle in at first, allowing the new system to adapt itself to the new rules.

Judge Sykes commented that in addition to shortening the time from hold to revocation, the legislature was primarily concerned with offenders racking up violations in the community before revocation is initiated and a hold is placed upon them. She felt the legislature wants quick, early intervention by placing an offender in custody when there is a violation, or imposing a sanction with teeth more quickly than is done now. The legislature wants the agents in the field supervising more aggressively, and imposing more aggressive sanctions. Judge Malmstadt agreed. Steve Hurley thought there was nothing our committee's recommendations could do to effect that. Judge Malmstadt disagreed; he said that quicker sanctions were warranted because most offenders have short attention spans.

Judge Lamelas discussed Mayor Norquist's concerns about vacancies and DOC assigning disproportionately inexperienced probation and parole agents to Milwaukee. Bill Grosshans said DOC does not punish agents by assigning them to Milwaukee, but vacancies first appear in Milwaukee because agents tend to transfer out of Milwaukee after their tour there is done. Judge Wells offered that extra compensation could be offered to keep agents in Milwaukee.

Judge Fiedler noted that if the committee offers a recommendation in this area beyond its statutory charge to review ES revocation criteria - say, concerning conditions for all 65,000-70,000 offenders currently on parole or probation statewide - the recommendation will be so expensive as to be dismissed out-of-hand. But if

the committee indicates how ES individuals should be handled as they trickle in - what strict supervision should entail, what the ES officer caseloads should be, etc. - the system can be rebuilt on the new law side first, and have a much better chance to be successfully implemented.

Steve Hurley noted that one of the more effective tools of the probation/parole agent is the hold. A difficulty with its use is that an offender can lose employment if a hold is placed upon him. He asked whether the subcommittee had considered if individuals on ES who are then revoked should have Huber privileges while they are detained. Judge Sykes responded that the subcommittee has discussed the need for sanction beds for the kinds of situations to which Steve Hurley referred: not serious enough for revocation, but serious enough to have to do something about it. Judge Sykes reiterated the need for a middle ground sanction to handle these circumstances, which would include sanction beds in an ES detention facility.

Computer Modeling/Technology Subcommittee Report

Staff counsel Mike Brennan reported that on February 4th and 5th, 1999, the committee's technical consultants, Systems Seminar Consultants, along with committee representatives and technical experts from within state government, had met with Dr. Ron Anderson of the University of Minnesota to discuss the challenge of putting together a computer model. Dr. Anderson came to Madison on a federal technical consulting grant. Dr. Anderson offered a number of ideas as to how to formulate a computer model, and gave the committee a software copy of his structured sentencing system, used (in modified versions) by North Carolina and Minnesota.

The computer modeling group met for 2 days. The deficiencies in Wisconsin's corrections data, described by Tom Hammer above, became apparent. Mike Smith came up with the idea to change the nature of the model from a microsimulation version (tracking each offender through each stage in the criminal justice process) to a consumption model (gauging numbers of offenders and resources consumed for "old world" offenders, "new world" offenders without sentencing guidance, and "new world" offenders with sentencing guidance). The computer modeling group concluded that this latter model might better address the committee's needs. Rick Geithman of DOC-BTM has begun work on the actual DOC data set combining the probation/parole and adult institution databases. Systems Seminar Consultants has formulated flow charts for the "old" and "new" world scenarios. CCAP has produced data concerning probation terms, both for withheld sentences and when sentences have been imposed and stayed. The technical group will meet again in the middle of March to assess progress. The subcommittee is aiming for May 1st, 1999 as the first working day for the computer model.

At 2 p.m., the committee adjourned until its next meeting, which will take place on Friday, March 5, 1999, at 9:30 a.m., in Room 417N of the State Capitol, Madison, Wisconsin.

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Tuesday, March 16, 1999 12:03 PM
To: Aaron Nathans; Alison Poe; Andrew Statz; Andy Moore; Bill Clausius; Bill Grosshans; Cindy Archer; Cindy O'Donnell; David Albino; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Mark Grapentine; Marline Pearson; Matt Bromley; Michael Miller; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Susan Goodwin; Susan Marcott
cc: Brennan, Mike
Subject: Thursday and Friday 3/18-19/99 Criminal Penalties Study Committee meeting

Below please find an open meetings notice and agenda for the above referenced meeting in Waukesha, WI. Also attached are the minutes from the last Criminal Penalties Study Committee meeting on March 5, 1999.

Jennifer Dubberstein
Program Assistant
Criminal Penalties Study Committee
(414) 227-5103
jennifer.dubberstein@doa.state.wi.us

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Thursday, March 18, 1999
9:30 a.m.
Friday, March 19, 1999
8:00 a.m.

The Country Inn Hotel & Conference Center
2810 Golf Road (take Exit 293, Hwy. T, off of Interstate 94)
Waukesha, Wisconsin 53187
Meadowbrook West Room (on 1st floor)

1. **Call to order - Chair Judge Thomas Barland**

2. **Consideration of minutes of March 5, 1999 meeting**

3. **Review of agenda for 2-day meeting**

4. **Full committee breaks out into subcommittees; issues to be considered may include the following:**

   a. **Code Reclassification: Conference Suite 205 (2nd floor)**
      1. **Placement of certain felony crimes in proposed Class A-H structure**
      2. **Prototype sentencing statute, including aggravators and mitigators; recategorization of certain penalty enhancers**
      3. **Proposed omnibus battery statute**

   b. **Extended Supervision Revocation: Conference Suite 204 (2nd floor)**
      (Witnesses to include David Schwarz and William Lundstrom of Dept. of Administration, Division of Hearings and Appeals, and William Grosshans of the Department of Corrections)
      1. **Working paper, including recent revisions**
      2. **Resentencing guidelines**
      3. **Amend 1997 Wis. Act 283 so, if offender waives hearing, circuit judge, rather than DOC, decide period of incarceration upon revocation?**

c. **Sentencing Guidelines: remain in Meadowbrook West**
   1. **Presentations concerning:**
      a. **adaption of former WI sentencing guidelines (including sample guidelines)**
      b. **Rule-of-Law approach (including sample guideline(s))**
   2. **Make-up of sentencing commission**

[Committee members are invited to join in the discussion of other subcommittees if their subcommittee's session finishes early.]

5. **After lunch, full committee reforms in Meadowbrook West to discuss and decide on sentencing guidelines approach**

6. **Full committee considers subcommittee reports at 3:30 p.m.**

7. **On Friday, March 19th, beginning at 8 a.m., subcommittees again meet to discuss issues listed above for any further debate:**

   a. **Code Reclassification: Conference Suite 205 (2nd floor)**
   b. **Extended Supervision Revocation: Conference Suite 204 (2nd floor)**
   c. **Sentencing Guidelines: remain in Meadowbrook West**

8. **Full committee reforms to consider subcommittee reports and discuss future work**

9. **Public comments**

10. **Adjournment on Friday, March 19, 1999 on or before 3 p.m.**

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Criminal Penalties Study Committee

March 5, 1999 Meeting Minutes
Room 417N, State Capitol Building, Madison, Wisconsin

Chair Judge Thomas Barland called the meeting to order shortly after 9:40 a.m. The meeting began slightly late due to inclement weather. Present were: Judge Bar-land; Michael Tobin for Nicholas Chiarkas; Professor Walter Dickey; Matt Frank for Attorney General James Doyle; Greg Everts; Judge Patrick Fiedler; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman; Steve Hurley; William Jenkins; Judge Elsa Lamelas; Judge Mike Malmstadt; District Attorney Mike McCann; Judge Diane Sykes; and Judge Lee Wells. Absent were Brad Gehring, Judge Mike Malmstadt, Barbara Powell, and Linda Pugh.

The committee approved unanimously the minutes from the February 19, 1999 meeting. Legislative Fiscal Bureau Informational Paper No. 55, "Felony Sentencing and Probation," and Paper No. 56, "Adult Corrections Program," were distributed to committee members. The members were encouraged to review both papers, but especially the latter, which contained some statistics the committee had been seeking for months. (Copies of these papers are in the committee's files.)

Subcommittee Meetings

The committee broke into its subcommittees and met from 9:45 a.m. to 12:30 p.m.

The committee reformed for lunch from 12:30 p.m. to 1:00 p.m.

Committee Reports

At 1:00 p.m., the committee reconvened to assess its progress in completing its statutory charges. Judge Bar-land asked each subcommittee chair to report to the full committee that subcommittee's progress.

Extended Supervision Revocation ("ESR") Subcommittee

Subcommittee chair Judge Pat Fielder began by discussing the subcommittee's working paper, which has gone through a number of drafts. The first section of the paper discusses extended supervision ("ES") procedure; the second, extended supervision revocation; and the third, recommended statutory and administrative code changes.

At the subcommittee's meeting that morning, Secretary of the Department of Corrections ("DOC") Jon Litscher, DOC Community Corrections chief William Grosshans, and David Schwartz, administrator of the Department of Administration, Division of Hearings and Appeals, helped the subcommittee by giving suggestions and acted as a sounding board for subcommittee members' opinions on the three topics in the working paper.

Judge Fiedler said that the subcommittee will present its working paper to the full committee at its March 18-19, 1999 meeting. The ESR subcommittee would like the full committee's feedback on the subcommittee's conclusions thus far.

At this time, the ESR subcommittee now recommends to the full committee that the current parole revocation process remain the same for ES revocation, except that once the administrative law judge ("ALJ") decides to revoke, the case would be transferred to a circuit judge who would resentence the offender. The subcommittee also recommends that the DOC have specific statutory and/or administrative code authority to seek certiorari review of an ALJ decision not to revoke.

As for ES procedure, the subcommittee had asked Bill Grosshans to estimate the costs of a strict supervision model for the initial stages of ES. From this stricter supervision, the offender would earn his or her way into administrative supervision. The strict supervision model would cost approximately $8,900 per year per offender, not including start-up costs. The subcommittee also considered how sanctions other than revocation should be provided for smaller ES violations which did not warrant placement in prison. The subcommittee also worked to decrease the time period from alleged revocable conduct through revocation decision. The subcommittee's proposal would decrease that time period from the current 84 days to 69 days, a period which includes 30 days for the judge to resentence the revoked offender.

Steve Hurley asked whether incarceration time spent in a proposed ES detention facility short of full revocation to prison would allow for "good time" credits. Judge Fiedler said the subcommittee had not yet considered that, but would do so, and that subcommittee members welcomed such suggestions.

Mike Tobin asked whether the proposed ES revocation process included a probable cause hearing. Judge Fiedler said it did, similar to a County of Riverside probable cause hearing. Mike Tobin asked whether the offender would be able to present an alternative-to-revocation ("ATR") or plan for an ATR at the hearing itself. Judge Fiedler responded that the subcommittee and full committee had agreed that all ATRs should not have to be explored before revocation could be pursued. Also, the subcommittee may recommend that a revocation criterion be added as to whether or not an ATR is appropriate. Mike Tobin commented that on the revocation waiver form, the agent or the district attorney could indicate what the proposed resentence should be. Judge Fiedler agreed that may be a good idea. He knew the subcommittee would recommend standardizing forms, including that one.

Judge Bar-land asked Judge Fiedler whether he thought the ESR subcommittee could complete its work within the next month. Judge Fiedler said that the ESR subcommittee may still consider recommendations to prevent the odd case possible under 1997 Wisconsin Act 283, the truth-in-sentencing legislation, in which an offender sentenced on a Class B felony conceivably could receive 1 year in prison but 59 years on ES. The **ESR**

subcommittee also may consider resentencing guidelines. As for the issues covered in the working paper, Judge Fiedler thought that the subcommittee may be able to conclude its work within a month.

Mike Tobin asked whether a revoked offender's resentence include an ES term. Judge Fiedler and Tom Hammer thought not.

Code Reclassification Subcommittee

Tom Hammer, chair of this subcommittee, did not think it would finish its work within a month, but that it was well on its way. The subcommittee has taken the 50 most common felonies and, using the mandatory release date, converted them into the proposed Class A-H system. The subcommittee is now sorting through these felonies crime-by-crime and asking whether or not each felony is properly classified. To ensure that the crimes are properly aligned, the subcommittee is using charts which depict the flow of crimes. Thus far, the subcommittee has spent most of its time on the homicides and serious injury felonies.

Although the subcommittee had not yet classified drug felonies, some of its members will meet the week of March 8, 1999 with Pat Kenney of the Milwaukee County D.A.'s office to get his office's input on proper classification of drug felonies. Mike Tobin is taking the same proposal back to his trial lawyers to get their reactions. Tom Hammer expected to address the drug classifications at the full committee's next meeting. After that, he thought the subcommittee would consider an omnibus battery statute to consolidate the numerous special interest batteries, as well as a prototype sentencing statute incorporating current penalty enhancers. Once these tasks are finished, the subcommittee will convert into the new scheme the remaining 350 crimes or so. Tom Hammer thought the subcommittee may finish its work by the end of May 1999.

Sentencing Guidelines Subcommittee

Subcommittee chair Judge Elsa Lamelas said that given the full committee's short deadline, from the beginning, this subcommittee has examined other states' systems to determine if one was attractive to import into Wisconsin. But the subcommittee did not find a system which members thought would be good for Wisconsin.

The last system the subcommittee looked at - that day -- was Wisconsin's former sentencing guidelines. Former Wisconsin Sentencing Commission executive director Sandra Shane-Dubow addressed the subcommittee that day to discuss the rationale and research underlying the former state guidelines. Judge Lamelas thought that there was a consensus that the former state sentencing guidelines are probably as sound a starting point as any for the subcommittee's work. Judge Lamelas also thought it was clear that the old guidelines were based on a very time-consuming analysis of sentencing practices in the state, and that this committee does not have the time or resources with which to engage in that type of analysis of current sentencing practices.

Judge Lamelas thought the committee would have to insert some of its own judgments into a proposed sentencing guidelines scheme. Modified versions of a couple of former guidelines have been developed, and preliminarily considered by a few subcommrm'ttee members and Ms. Dubow. Judge Lamelas thought that if these guidelines could continue to be modified, and the committee approved of them, they could be utilized as temporary advisory sentencing guidelines until the new sentencing commission was up and running.

Judge Lamelas said that the subcommittee has delayed discussing the contours of the new sentencing commission until it had decided upon what type of sentencing guidelines to propose.

Judge Lamelas said that the committee probably could not implement any kind of system along the lines Wisconsin had in the past, such as one based on historical practice. We have learned along the way that DOC

simply does not have that kind of data to shape such a system. The subcommittee has explicitly rejected certain sentencing guidance systems. It is the subcommittee's goal to incorporate the ideas that have been advanced by Mike Smith and Walter Dickey regarding the kinds of thoughtful approaches that judges should have at the time of sentencing. Judge Lamelas hoped the subcommittee could graft those ideas into whatever guidelines system is developed.

Judge Barland asked Judge Lamelas when the sentencing guidelines subcommittee might finish its work. Judge Lamelas did not know, except to say that the committee's reporting date is driving the subcommittee's conclusions.

Judge Barland asked for any reaction from committee members on the report from the guidelines subcommittee, which is at a fundamental point in its work. Judge Lamelas said that some of her report was tentative. She felt that the subcommittee has to meet to consider what it had heard today, and that everybody on the subcommittee should be heard. She mentioned that Walter Dickey and Mike Smith had met yesterday with staff counsel Mike Brennan, and that she had not yet heard a report on that meeting.

Steve Hurley said he agreed with Sandra Shane-Dubow that this committee's work would be part of a framework for a long time to come, and that he did not want such work to be wrong or slap-dash. He would have a hard time putting his name on something like that. Judge Lamelas thought the committee was capable of putting together temporary guidelines which were not slap dash.

Matt Frank asked whether the committee would be able to proceed with its work with some reliable data, with an ability to make projections, or at least to have a computer model with which the committee could make certain assumptions. In response to this question, Mike Brennan gave a short report on the computer modeling effort.

Computer Modeling Subcommittee

Mike Brennan reported that last week, DOC produced for the committee's computer modelers, Systems Seminar Consultants, a data set combining prison and probation/parole data according to certain variables. The computer modelers also have probation information on both withheld and imposed and stayed sentences from CCAP. The modelers also have developed, with help from committee staff, flowcharts of the "old" pre-truth-in-sentencing world, and the "new" post-truth-in-sentencing world.

With these various pieces of data, programming of the computer model began that week. A group of five or six State of Wisconsin employees with technical expertise, and who have agreed to help our committee, meet approximately every two weeks to discuss problems which arise with the development of the computer model. The working group's next meeting is Monday, March 15th. The group's goal is by May 1st to have a model that will: (1) project the numbers of the "old world" population; (2) project the costs to incarcerate or supervise that old world; (3) project the numbers of the "new world" population; and (4) attach cost estimates to that new world population, without guidelines. In the best-case scenario, within a month after that, the computer model would also be able to (5) overlay sentencing guidelines on the new world crimes to give the committee some kind of final corrections population and cost figures.

Mike Brennan thought that the computer modeling effort is not going to be a success unless the model can be used as a tool for committee debate. We are not looking for something that works August 1, 1999, so we can have a pretty picture in our final report. We are looking for something that when we get down to our last few meetings we can use to analyze whether or not a certain classification of a crime or sentencing guideline should be changed or not. He warned that this model would not give the committee a nuanced capability to analyze the data, such as North Carolina and Delaware have. Each of those states was granted 4-5 years to

implement their versions of truth-in-sentencing. Rather, the model would give the committee reliable projections, per crime category, of numbers and costs, among the "old" and "new" world populations. He said he hoped the computer model could be utilized for some policy debate at the committee's two-day meeting May 13-14, 1999.

Judge Wells asked whether if at some point the committee developed sentencing guidelines, one important point will be educating judges and lawyers in how they are used. Judge Sykes took this opportunity tc report on the progress of the education subcommittee.

Education Subcommittee

Some of this subcommittee's members had met with Mayor Norquist, as reported in the committee's February 19, 1999 minutes. Steve Hurley and Judge Sykes appeared on a Wisconsin Public Television program a couple of weeks ago. Wisconsin Public TV is putting together a 1 hour documentary which it plans to air in tandem with the release of the committee's report. Also, Judge Sykes has had some preliminary discussions with David Haas, the director of judicial education, about scheduling a judicial seminar on our work in late fall.

Judge Sykes said there were many "if's" in this scenario. If the legislature likes our committee's work and enacts it in the fall, and if the Governor signs it, then the education subcommittee could go forward with whatever educational plan is put in place. If the legislation is not enacted, the subcommittee will educate the judiciary and the bar on something very different than we anticipate educating them on now.

Judge Barland reported that he, Judge Lamelas, and Mike Brennan would be making a presentation to about 120 judges at the criminal law sentencing seminar on May 20, 1999. The plan is to run through at least 3 sentencing problems which would incorporate truth-in-sentencing.

Judge Wells commented that he sensed concern starting to develop about truth-in-sentencing among lawyers and judges in many jurisdictions. He thought it was partly due to lack of knowledge. He thought there was concern that in July or August 2000, the press would do a study on sentencing guidelines, on sentences before and after truth-in-sentencing, and/or on the financial and other impacts of the legislation. Judge Wells thought that judges and lawyers wanted to be able to say that our committee had considered those factors.

Bill Jenkins said that the committee should worry about educating more than just judges and lawyers. Legislators must be educated as well, and that they in turn will educate their constituencies. As we set up our timelines, we must keep the general public in mind as well.

Judge Bar-land mentioned that the committee saw the explanatory materials other states had printed up for the public. He thought this was a critical part of our work. Judge Barland said he will ask for sufficient time and funding to permit such education in the letter requesting an extension in the committee's work from April 30, 1999 to August 31, 1999.

Senator Huelsman thought it could take a month or more from the time this committee's final proposal goes to the legislature until the time it is passed. Judge Sykes asked if the second week of November will be the outside date to get this legislation passed. Senator Huelsman said yes, although the Governor could always call the legislature into special session to consider this legislation. She knew that several legislators have discussed that possibility. She said the legislation should be passed by both legislative houses within a fairly close period of time to prevent it from falling apart.

Bill Jenkins asked about bills impacting criminal law which are being introduced during our work. He encouraged this committee to have some sort of official mechanism to respond to such bills.

Judge Barland asked the committee members about the structure for the committee's next meeting, for 2

days, March 18-19, 1999. The members agreed substantial time should be set aside for subcommittees to meet.

Judge Barland asked Sandra Shane-Dubow for any last thoughts she had on the committee's work. She suggested that the temporary guidelines be termed "interim"; she thought that might help during their use down the road. She thought the appearance at the judges' criminal sentencing seminar would be a wonderful opportunity to get responses on how judges will sentence under the new system using hypothetical cases.

At 2 p.m., the committee adjourned until its next meeting, which will take place on Thursday and Friday, March 18th and 19th, 1999, at the Country Inn in Waukesha, Wisconsin.

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Thursday, April 08, 1999 11:55 AM
To: Aaron Nathans; Alison Poe; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Cindy Archer; Cindy O'Donnell; David Albino; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Mark Grapentine; Mark Wehrly; Marline Pearson; Matt Bromley; Michael Miller; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George: Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott
cc: Brennan, Mike
Subject: Friday 4/16/99 Criminal Penalties Study Committee Meeting

Below please find an open meetings notice and agenda for the above referenced meeting.
Also attached are the minutes from the last Criminal Penalties Study Committee meeting on March 18 - 19, 1999.

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, April 16, 1999
9:30 a.m.

Rm. 417N
Grand Army of the Republic Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Bat-land**

2. **Consideration of minutes of March 18-19, 1999 meeting**

3. **Presentation on computer modeling effort by Systems Seminar Consultants, Madison Wisconsin -- Russ Lutz & Hari Hariharan**

4. **Subcommittee presentations:**

   a. **Criminal Code Reclassification by Prof. Tom Hammer**
   b. **Extended Supervision Revocation by Judge Pat Fiedler**
   c. **Sentencing Guidelines by Judge Elsa Lamelas**

5. **Discussion of Sen. Gary George's request for committee discussion and comment on potential delay in implementation of Truth-In-Sentencing**

6. **Public comments**

7. **Any housekeeping matters and adjournment**

8. **Subcommittees may meet if they wish**

Criminal Penalties Study Committee

March 18-19, 1999 Meeting Minutes
Meadowbrook West Room, The Country Inn,
Waukesha, Wisconsin

March 18, 1999

Chair Judge Thomas Barland called the meeting to order at 9:30 a.m. Present were: Judge Barland; State Public Defender Nicholas Chiarkas; Assistant Attorney General Matt Frank on behalf of Attorney General James Doyle; Greg Everts; Judge Patrick Fiedler; Sheriff Brad Gehring; Professor Thomas Hammer, the committee's reporter; Ray Sobocinski for Senator Joanne Huelsman; Steve Hurley; Bill Jenkins; Judge Elsa Lamelas; Judge Mike Malmstadt; District Attorney Mike McCann; Barbara Powell; Linda Pugh; and Judge Diane Sykes. Professor Walter Dickey arrived at noon that day. Senator Huelsman attended the meeting on Friday, March 19".

Judge Fiedler offered one change to the minutes of the committee's March 5, 1999 meeting. On page 4, Judge Fiedler said Steve Hurley asked whether, if an offender is detained in a facility short of full revocation and return to prison, Huber privileges would be available. As so modified, the minutes from the previous meeting were approved unanimously.

Judge Barland discussed the committee's requested extension of its reporting date from April 30, 1999 to August 31, 1999. On March 16, 1999, the bill granting the extension passed the Assembly by a vote of 89-8, and the Senate could consider it that morning. Judge Barland mentioned that if the bill did not pass the Senate that day, consideration of the extension would have to wait until the the Senate reconvened in May.

Staff counsel Mike Brennan reviewed the various items in the briefing book distributed to committee members, other interested parties, and members of the public. The briefing book collects key documents, working papers, statistics, and proposals from the committee's study thus far, as well as from the work done by the subcommittees. A copy of the briefing book is in the committee's materials.

Judge Barland discussed the 1998 midyear report of the U.S. Department of Justice, Bureau of Justice Statistics. Its figures for Wisconsin show our state with 321 prisoners per 100,000 population, arithmetic he found suspect given the figure of 283 prisoners per 100,000 population published by the same agency 6 months earlier. Judge Barland discussed the progress accomplished by the code reclassification subcommittee in classifying many of the criminal code felonies into a new scheme. He also discussed the challenge facing the sentencing guidelines subcommittee as it wrestled with different conceptions of how sentencing guidelines should look and should be used.

Mike McCann thought the committee should come to a decision on sentencing guidelines during this 2-day meeting, because if it did not, the necessary work may not ever be accomplished. Steve Hurley agreed.

At approximately 10 a.m., the committee broke into its various subcommittees, which met for the remainder of the morning. The various subcommittees ate lunch in the hotel, and met in afternoon sessions.

At 4: 10 p.m., the full committee reconvened to discuss the progress of the subcommittees, as well as scheduling to accommodate the whole committee considering various guidelines proposals. Judge Barland solicited reactions from the committee members as to how they wished to proceed the next day.

Tom Hammer, on behalf of the code reclassification subcommittee, reported a successful work day, and said that the subcommittee would meet again on Thursday, March 25, 1999 for the entire day. He thought that if the subcommittee continued at its current pace, it will complete a substantial amount of its work relatively soon. Accordingly, he felt the full committee's need to discuss sentencing guidelines trumped the code reclassification subcommittee's need to meet tomorrow.

Judge Lamelas, on behalf of the sentencing guidelines subcommittee, said she thought the subcommittee was on the verge of being able to present sentencing guidance options to the full committee, but was not close to reaching a consensus on a single alternative. Walter Dickey disagreed. He thought that if the subcommittee stayed in a problem-solving mode, a reasonably unanimous consensus would develop. But he thought that if the presentations were made to the full committee and a vote taken, the end product would be a sharply-divided committee, with small numbers in dissent. He suggested remaining in subcommittee to work, and thought the subcommittee was closer to a consensus than Judge Lamelas thought.

Mike McCann admired Walter Dickey's optimistic outlook, **but** he did not feel that the subcommittee was moving expeditiously towards a resolution. He felt the subcommittee members had disparate perceptions. Judge Lamelas said she thought the debate the subcommittee was engaged in was essentially the same debate it had been having all along. She was concerned that the 2-day meeting would come to an end without progress on the format of the sentencing guidance the committee would recommend.

Judge Malmstadt thought the sentencing guidelines subcommittee could begin work at 8 a.m. on Friday. Judge Barland asked Walter Dickey if, that evening, he could work up a model of the "Rule-of-Law" sentencing guidance system, since subcommittee members were having problems visualizing how that system would look. Greg Everts thought that was a good idea: although consensus might not develop, the subcommittee at least would have specific alternatives to discuss.

It was agreed that subcommittees would meet the next day at 8 a.m., except for the code reclassification subcommittee, which would meet at 9 a.m. Judge Malmstadt thought the sentencing guidelines subcommittee should spend some time together, and attempt to present to the committee a unanimous or near-unanimous proposal. Judge Sykes said that if the guidelines subcommittee could not present such a proposal, it could at least pass the systems out of subcommittee without any recommendation and the full committee could vote.

At 5:00 p.m., the committee finished its work for the day, and certain committee members dined together at the Country Inn. A working sub-group of the guidelines subcommittee worked into the evening.

March 19, 1999

At 8:00 a.m., the sentencing guidelines and extended supervision revocation subcommittees reconvened to continue their work. At 9:00 a.m., the code reclassification subcommittee did the same.

Sentencing Guidelines Subcommittee
Presentation to the Committee

At 10:30 a.m., the full committee reconvened to hear presentations on the various sentencing guidance systems under consideration by the sentencing guidelines subcommittee.

The sentencing guidelines subcommittee generated 3 proposals for full consideration. It was agreed that each proposal would receive a lo-minute presentation to the committee, with 5 minutes for technical follow-up questions. After the 3 presentations, the full committee would debate the proposals and vote upon them.

Walter Dickey-Mike Smith "Rule-of-Law"
Sentencing Guidance Proposal

Steve Hurley presented this proposal. He said it operates with the overriding principle that felony sentencing in Wisconsin should advance the public-safety interests of its residents.

He turned to the specific example of burglary to demonstrate this proposal. Because of the underlying statistics for burglary, he said this example turned out differently than those envisioned for other offenses. Once the supporters of this proposal were given the historical range of sentences for burglary over the last 5 years, they noticed it was a very compact group of sentences. So for this offense, the guideline for this approach would have one cell. For other offenses, there may be multiple cells. In the one cell for burglary was a range that extends from 3 years probation to 3 years of prison. The proposal identifies 4 different types of burglars: professional, retaliatory, opportunistic, and thrill-seeking. This approach asks the judge to determine what type of burglar the offender is, which would be relevant to the questions of public protection and punishment deserved.

In determining which type of burglar the offender is, and thus how to treat that case, the judge is to look at certain relevant facts and circumstances. These would include facts about the offense: What type of premises was burgled? Was it a dwelling? Was it a non-residential facility? It would also include facts about the victims: Was the victim a vulnerable person, and was the victim known to the perpetrator to be vulnerable? Was it a professional burglar who chose a vulnerable victim? These facts will affect what punishment is deserved, and what future risk may be to the community and to the individuals, in particular.

Facts about the offender's character and behavior also would be examined. Initially, the judge would look at prior crimes and bad acts. Hurley said this lack of a horizontal axis -- which assessed points for prior crimes, and used those points as an axis on a matrix -- was the essential difference between the Dickey-Smith proposal and the other 2 proposals. Supporters of this proposal felt that scoring prior crimes was deceptive and did not adequately punish offenders who deserved greater punishment because they did not have a prior bad act or prior crime, and over-punished offenders whose prior bad acts or crimes were not related to this particular crime.

Under this proposal, the judge would be told that prior offenses may render an offender more deserving of punishment for the current burglary, but the judge would be required to look at the type of prior offense. If the intent of the burglar was to commit a sexual assault when he entered, a prior crime (or prior bad act, even if not convicted) is relevant if it involves a sexual assault. Conversely, if the offender entered the dwelling with the intent to commit a theft, a prior conviction for sexual assault may not be relevant; to have that scored on a point system would inflate the sentence unreasonably. If the offender's intent on entering was to commit a theft, that the offender has a prior theft conviction is of far greater import in assessing the offender's danger to the community

and what punishment is deserved. This proposal seeks to have the judge engage in a reasoning process about prior convictions to see what is relevant to the offense and what is not.

Other factors the judge would consider include legal status at the time of the crime, age of the perpetrator, and the offender's employment and familial status. This proposal would consider aggravating and mitigating circumstances, but not name them as such, because such circumstances can cut both ways. This proposal tells the judge how to weigh these circumstances by asking 2 fundamental questions: (1) Can the sentence contain the risks posed by the offender's return to the community?, and (2) Can punishment deserved by this offender be effective within the community? If the answer to both questions is "no," the judge must sentence the individual to prison within the range provided. A judge may depart upward or downward from the stated range if the judge, in analyzing these factors, determines that a sentence outside the guideline range was warranted.

Hurley thought the benefits to this proposal were that it tells litigants in advance what information to present to the judge, gives guidance to the judge about how to use the information, makes the judge decide based on current law, which says that the least restrictive form of punishment and protection of the community ought to be used, and it avoids the use of a matrix, which he thought gives undue weight to prior convictions.

Judge Wells asked how the old, indeterminate monthly ranges in the cell would be converted to determinate months. Hurley thought the legislature should be given a number of options, including using mandatory release and time-served time periods.

Judge Lamelas thought the two fundamental questions posed at the end of the proposal focused on containing the risk posed by returning the offender to the community after a term of incarceration, but also implied that incarceration is only warranted in order to punish. She thought one of the questions should be whether public safety is assured if the offender remains in the community on probation. Hurley said she was right: if both questions are answered "yes," public safety can be adequately addressed by punishment within the community, and probation should be imposed. But Judge Lamelas said that the question was not currently phrased that way. The questions, as phrased, seem to assume there is no public safety component to a term of incarceration in prison. Hurley said that is not what the proposal meant, and that perhaps the questions could be better worded. Judge Lamelas confirmed that with these questions, the judge is to consider probation first, which is what the law requires the judge to do, and to reject probation for either public safety or punishment reasons or both. Hurley agreed with this characterization.

Matt Frank asked whether supporters of this proposal had discussed what part of a sentence rendered under this proposal could be appealed. Hurley said no, they had not discussed that. He thought the committee should decide whether or not to change that standard of review.

Judge Sykes said that this proposal was currently 5 ½ pages long. She asked whether it would be reduced to a more practical format so it could be used in a court with many cases every single day. Steve Hurley said a judge would read the proposal four, five, or six times, and, especially for an offense like burglary, memorize the factors to be considered with regard to the particular crime before the judge. Judge Malmstadt said he would envision a shorter form accompanied by commentary contained in a document produced by the sentencing commission on an annual or semiannual basis.

Mike McCann wondered whether this proposal might produce racial disparity. The supporters of the Dickey-Smith proposal thought that considering criminal record inserted racial bias into sentencing. Mike McCann warned that such racial bias might also be inserted if prior record was **not** considered. If you converted the current single cell numbers by mandatory release date, it would read 3 years probation-to-2 years prison; if you adjusted those same numbers by time-served date, it would read 3 years probation-to-l year prison. Such narrow ranges might result in many sentences above these ranges, especially for minorities. Steve Hurley thought that was a problem with any guidelines system. He felt that if criminal history was considered, African-Americans would be treated more harshly.

Lee Wells Former Guidelines Adjusted for Time-Served
Sentencing Guidance Proposal

Judge Wells offered a proposal based on the theory that actual time-served equals truth-in-sentencing. His proposal was based on the fact that an "old-world" indeterminate sentence of 10 years was not truthful. Everybody wants to know how much time the offender will actually serve.

Judge Wells' proposal was simple: take the former Wisconsin sentencing guidelines, and convert the number of months in the matrix to actual-time served in prison. He used overheads to show that as sentence lengths increased, the percentage of the sentence actually served increased. Those increasing percentages of time-served would be multiplied by the increasing sentences in the matrix to give truthful ranges to be used.

Judge Wells thought this proposal would be an effective tool because it lets everybody know, including judges, that sentences

must be modified to the time periods which offenders actually served. "You can't give ten years to somebody when, in fact, they only served two years. That's not what you should be doing. . . . [W]hat you should be doing is reflecting what they actually served."

He thought this proposal would be a better program because it has a statistical foundation in the former guidelines, clearer and more definitive criteria than the other proposals, and is familiar to judges and litigants. Further, if Judge Wells' theory is followed, and if judges follow the guidelines, theoretically, neither the number of prisoners nor costs would increase. Judge Wells' proposal continues to recognize that prior record and offense severity were the 2 key factors that made a difference statistically out of all crimes studied over many years of thousands of sentences. His proposal also allows consideration of aggravating and mitigating factors on the back of the guidelines sheet. Judge Wells thought that it will be difficult for the legislature to tinker with the former guidelines since they are based on historical data and statistics.

Mike McCann confirmed that Judge Wells' proposal was the sentencing guidelines system that existed until 1995 superimposed with actual-time served for the monthly ranges.

Elsa Lamelas-Greg Everts Modified Former Guidelines Sentencing Guidance Proposal

Greg Everts presented the third sentencing guidance proposal, which he offered as a middle ground between the Dickey-Smith and Wells models. This proposal attempts to maintain some of the benefits of a grid-guideline system while not straight-jacketing judges. The main objective of this proposal was to produce a clear starting point, and then specify the major aggravating and mitigating factors that a judge would consider in reaching a sentence. Some of these factors would be general, and some would be crime-specific.

Greg Everts briefly described the former Wisconsin sentencing guidelines. Then he explained that this proposal retains the criminal-history scoring from these old guidelines (the horizontal axis), but with some substantial differences. The old guidelines considered any adult felony conviction(s), and only considered juvenile offenses if they were substantial in number. This proposal would count violent juvenile offenses, and places more weight on prior violent felonies; thus, it considers, at least somewhat, the nature of the prior conviction. But unlike the former guidelines, this proposal contains no severity of offense scoring (the vertical axis); rather, it breaks the offense down into aggravated, intermediate, and mitigated ranges. Finding the intersection of the two axes would give the judge a starting point with a range of prison with extended supervision, or probation. The judge would proceed from this range to the aggravating and mitigating factors, both general and crime-specific, which Everts described.

To address the criticism that points are artificially assigned to place the offender on the horizontal axis, Everts pointed out that the proposal decreases the number of criminal history columns from 4 to 3, reasoning that judges usually think in terms of 3 general categories of offenders. The calculation of the horizontal axis focuses on previous violent crimes, rather than all prior criminal activity. Also, a question has been inserted at the end of the criminal history calculation that allows the judge to adjust the offender's score if, in the judge's opinion, the calculation improperly understates or overstates the offender's criminal history. The proposal also includes a description of an intermediate version of the crime to give the judge and litigants a starting place; **e.g.**, a prototypical armed robbery would have certain characteristics, but not others. That allows easier placement of the case before the court among the 3 horizontal rows of aggravated, intermediate, and mitigated ranges.

By gauging an offender's criminal history, and assessing the type of offense before the court, the judge would have a more definite and concrete starting point than a single box with a range of 85% of all sentences. Also, aggravating and mitigating factors other than those listed could be added to the list. Everts thought this proposal maintained the advantages of predictability and cost control, which he thought were significant. It has the advantage of "cover," for lack of a better word, for judges to transition from longer indeterminate sentences to shorter determinate sentences. It also has the advantage of familiarity to judge and litigants, and can be completed within the committee's remaining life.

Judge Fiedler asked whether this proposal also relied on historical data as a starting point for the grid. Everts confirmed that it did.

Judge Lamelas thought that one of the advantages of this proposal was that it gives the judge and the litigants some idea as to where a judge is likely to start the sentencing analysis. This would allow litigants to structure their arguments to persuade a judge to go up or down. She mentioned that Senator Gary George had told her of his fear that if judges did not have such a starting point, they would be pressured to start at the top of any graph, and that this would have a racially discriminatory effect on minorities.

Committee Debate on 3 Sentencing Guidance Proposals

Mike McCann summarized the three proposals: the Dickey-Smith proposal does not give give direct weight either to an offender's criminal record or to the gravity of the instant offense. The Lamelas-Everts proposal continues consideration of the offender's criminal record, but does not attempt to quantify offense severity. The Wells proposal retains both axes. Mike McCann feared that if neither criminal history nor offense severity were quantified, the guidelines system may have a racially discriminatory effect.

Judge Malmstadt pointed out that for crimes other than burglary, the Dickey-Smith proposal could have more cells than just one. He thought the major difference was a qualitative analysis done by the Dickey-Smith proposal, versus a quantitative analysis done by the other 2 proposals.

Walter Dickey observed that all 3 proposals were in somewhat crude shape. He commented that as he thought about our charge, he decided he wanted sentencing guidance that he would want employed in a case involving his son. Thus, he favored this thoughtful, analytical approach. Michael Smith pointed out that he also wants a system that protects his daughter, i.e., the victim of a crime. Dickey agreed with that too. Another thought was that we should aspire to improve criminal legal practice, because he did not think that practice was at a very high level, and he thought his system gave an opportunity to advocate.

Tom Hammer asked how the parameters of the ranges would be identified in the Dickey-Smith proposal. The other 2 proposals relied on historical data from the former Wisconsin sentencing guidelines. With an offense in which the sentences were not so compacted, how would the Dickey-Smith proposal correlate sentences to answers to narrative questions if one cannot know whether or not the sentence was given for that reason? Dickey responded that while the former Wisconsin sentencing guidelines said they relied on science, he did not think there was much science in them at all, because while they purported to explain sentences, they did not. The former guidelines may explain matters associated with sentences, but they do not explain the purposes behind sentences. Dickey said you would have to make some matches between reasons and sentences. He said all of the systems are inexact; the Dickey-Smith model was only more admittedly so. Mike Smith said Kay Knapp's comment of getting wise heads together to make such determinations would be important with this proposal. He said an explanation of how the distribution corresponds to experience is what the cells would reflect.

Judge Wells thought a consensus had developed that time-served would be a good standard to use to convert old sentences to new sentences. He thought that was good because it addressed concerns about cost, and reflected past experience. He thought that if a feeling exists that judges are not doing the right job, then the Dickey-Smith idea is good. But otherwise, he thought these ideas were already present in case law and in the bench book, and to repeat them again for 15-20 crimes would draw little review from judges, except for the 1st or 2nd time the materials were used.

Judge Fiedler wondered whether the Dickey-Smith proposal told judges enough about a possible range of sentences. He thought Judge Wells was right to point out that using historical data, we can better project numbers and costs. Judge Fiedler also thought it was a matter of fairness. He thought Greg Everts hit upon the important question: if the old sentence was for 10 years, in fairness the new sentence should be between 2 ½ and 6 2/3 years. Judge Fiedler did not think the Dickey-Smith proposal would give the judge enough information to render a fair sentence like that. Walter Dickey responded that although there is something seductive about trying to give a judge numerical cover, he rejected that idea; he thought that principle, law, and fact-finding give the best defense of the sentence.

Judge Barland commented that regardless of the format of sentencing guidance adopted, the committee had tacitly agreed that a conversion table will be prepared, converting a sentence under the indeterminate sentence to a comparable sentence under truth-in-sentencing.

Judge Malmstadt agreed that no matter which system was adopted, there seemed to be agreement that judges should have the best information possible, such as the graph of the length of past sentences for burglary attached as page 2 to the original version of the Dickey-Smith proposal.

Walter Dickey said he too was attracted by the graph, and that if data such as that graph represented could be gathered, descriptions of the types of behavior would start the judge in certain cells, "because that is really where the match is, then you go through the process, and you come to a sentence about it."

Mike Brennan asked Walter Dickey about the difficulty of matching the behavioral description with the sentences contained in a particular cell. If a variety of factors go into a sentence, there could be a number of sentences within a cell of offenders without that fact pattern. Therefore, how would this proposal advance truth-in-sentencing?

Steve Hurley said that the purpose behind the Dickey-Smith proposal was to make sentencing a judgment on an individual in individual circumstances, not a ministerial function, like he felt the other proposals did. He thought a matrix did not sufficiently take into account the individual and his or her circumstances. He thought that if you created a matrix, the starting point for the prosecution becomes a cell into which an individual is automatically plugged, "[a]nd that is the starting point of the negotiation, and it inflates the sentence always." He said each of the experts from other states who have spoken to the committee have said that under truth-in-sentencing, sentences and costs increased. Steve Hurley said we should learn from that experience. If the committee is concerned with allowing judges to do what they think is correct in an individual case, he thought we should maximize the individual judge's discretion. If judges ask for cover from the committee, he thought that we should not give it. That comes from the dilemma in which the legislature placed the committee by, in his opinion, unreasonably increasing the lengths of sentences. He also attributed the need for "cover" from irresponsible media contrasting the potential sentence with the one actually imposed without much scrutiny.

Judge Sykes addressed the sentence inflation argument. The code reclassification subcommittee has solved most of those problems already by increasing the number of classes and arraying the crimes among them. She did not think, and asked Judge Wells whether she was correct, that there was sentence inflation under the former guidelines. Also, in her experience, the former guidelines resulted in lowest common-denominator sentencing, as opposed to the opposite, which was one of her principal complaints with the former guidelines.

Judge Lamelas recalled Mike McCann's comment that when the former guidelines expired, sentence inflation began. She did not believe Steve Hurley's criticism was fair that the Lamelas-Everts proposal would result in ministerial sentencing was fair. She submitted that as long as the guideline system recommended by the committee was voluntary in nature, and required the judge to make discretionary judgments as that judge progresses through the form, that cannot fairly be called ministerial. In fact, by utilizing a form, the Lamelas-Everts approach was more likely to keep those factors in the minds of the litigants and the judge at sentencing. She thought the Dickey-Smith proposal sounded great when read, but that its logic was already embodied in the law. She also was concerned that if enacted, the proposal would be filed away in bench books, and that a judge would consult only the graph of past sentences. She said she could live with that, but what she is hearing, chiefly from defense attorneys, is that judges should have more constraints on them, rather than less.

Judge Malmstadt said his criticism was of the former guidelines, or any guidelines for that matter. Over time, given a busy caseload, there is a tendency to sentence pursuant to the grid. But as sentences conformed to the grid, perhaps practicing law became practicing law to the guideline, as opposed to just practicing law which he thought should occur. He used a medical analogy: diagnosis by grid might be right most of the time, but not all of the time. Using a grid he thought resulted in rote advocacy and rote sentencing dominated by the grid.

Judge Lamelas questioned how much things would change under the Dickey-Smith proposal. The proposal looked to her like what we have now but without a sentencing guideline. Under the Dickey-Smith proposal, a defendant without a criminal history and with a Cadillac attorney can make strong arguments. But the ordinary defendants who come into the courtroom with a state public defender need a system that will make it easier to understand sentencing.

Nick Chiarkas liked the Dickey-Smith proposal as a thoughtful process on behalf of the judge. He said that a structured sentencing system like the federal one can become a "cell" practice - arguing with the prosecutor in to which cell the offender belongs. That is not a thoughtful process. He thought the state public defenders would like the Dickey-Smith approach, and would want to make arguments based on these factors.

Judge Lamelas said the state public defenders in her courtroom were scared to death of truth-in-sentencing. They do not want anything like the federal sentencing guidelines. But they are also very worried that the right of substitution will not take care of the sentence inflation that could occur absent any guidelines format.

Judge Wells asked whether or not the Dickey-Smith proposal would include a form for the judge and litigants to use. Steve Hurley said it would not be difficult to draft such a form.

At noon, the committee broke for a quick lunch served in the hotel. The full committee reconvened for further debate on the guidelines proposals and a vote.

After hearing the presentations that morning, Tom Hammer thought that while he liked the Dickey-Smith proposal, it is based on only 1, apparently atypical, crime. From his perspective, it would be much easier to cast a vote if the proposal included additional crimes. He did not know what the Dickey-Smith proposal would look like when it included many cells for the crime of sexual assault, for example: What would those cells look like, and be based upon? What factors would be considered to place an offender in a cell? While the data we have may show distribution of sentences, how will it show the correlation of sentence to how people were placed into a certain cell? He did not have a sense of how the Dickey-Smith proposal will look as a final product because only 1 example existed on an admittedly nonrepresentative crime.

Judge Lamelas preferred that a decision be reached on the format of sentencing guidance at this meeting because much work remains to be done, and that while the details of the sentencing guidance may not be worked out, at least an approach could be decided upon.

Judge Sykes thought it was important to return to what the committee's goals are in order to determine which proposal would best accomplish those goals. First of those goals for her was to preserve judicial sentencing discretion. Second was to preserve individualized sentencing because that is enshrined in our law as good for public safety as well as for each defendant. A third goal, from the legislature, seems to be to arrive at a system that produces some proportionality in sentencing statewide. This is important because under truth-in-sentencing, all of the discretion will be at the front end of the process, rather than some of it at the back end, as with parole. This proportionality must be vertical - the crimes should be in properly descending order, most serious to least serious - as well as horizontal - comparable sentences lengths for comparable crimes. The legislature also wants the committee to come up with

some predictability, a fourth goal, so that the department of corrections and the legislature may plan for what judges will do under the new system, and plan for a way to pay for that. Judge Sykes ranked those 4 goals in descending order of importance.

With those goals in mind, the committee was charged with coming up with a sentencing guidelines system. The principal problem she saw in the "Rule-of-Law" narrative approach is that it does not accomplish all of these goals. It preserves judicial discretion, as well as individualized sentencing. But it does not accomplish proportionality and predictability.

Judge Sykes began this process not liking grids, and favoring a narrative approach, because of the first 2 goals. But she came back to the idea that a variation of the former sentencing guidelines is the best approach because it comes closest to accomplishing all 4 goals. It preserves judicial discretion and individualized sentencing because the guidelines are advisory, and the judge has the ability to depart for aggravating and mitigating circumstances, both particular to the defendant and to the offense. It produces proportionality statewide because its based on the historical facts of sentencing practices. It is also a better statistical predictor. Based on research, we learned that prior record and severity of the offense have much to do with recidivism, and therefore risk to the community.

Judge Sykes liked very much what Judge Lamelas and Greg Everts had done to the former Wisconsin sentencing guidelines. They had solved some of those guidelines' problems. Like many judges across the state, she had used the old sentencing guidelines. The former guidelines provided the judiciary with some important information about what other judges around the state were doing with this type of an offender. They also allowed the judge, using the factors listed on the back of the form, to depart from the presumptive sentence if necessary. She thought there may be some more factors to add to this section of the form based on further discussion.

She thought a major problem with the old guidelines was their artificial attempt to quantify the severity of the offense. By reducing this axis to 3 categories: aggravated, intermediate, and mitigated, this difficulty was addressed. Further, by giving the judge an "out" to say that the criminal history scoring overstated or understated the offender's background, the judge could properly sentence the offender.

Judge Sykes thought that the Lamelas-Everts proposal takes what is good about the former guidelines, addresses what was bad about them, and adds in many important aspects of a narrative approach. It also accomplishes it in a way that judges can use the form, which is a principal complaint with a narrative system. She thought all good judges go through the thought process which the narrative system memorializes. And if the system should encompass the not-so-good judges, she thought the narrative system was too complicated, especially for a judge with a large caseload, to do in each case. Judge Sykes thought the Lamelas-Everts approach could be done with an average case on a busy felony calendar.

Steve Hurley asked whether Judge Sykes thought predictability would result from adopting a matrix which might not necessarily fit the specific offense and offender, and which set up a presumptive sentence, but which the judge would be allowed to undo. She said no, but that we know that a system based on historical sentencing practices and statistical research would result in more predictability. Steve Hurley did not understand how that was not arbitrary. Judge Sykes responded that while it may be arbitrary for an individual defendant, it was not necessarily arbitrary across the board, as demonstrated in Sandra Shane Dubow's presentation.

Steve Hurley thought the Dickey-Smith proposal would take an extra 5 to 10 minutes for the judge, and that the form produced from this proposal would not be complex. He thought the approach invites the advocates to bring information to the judge, rather than arbitrarily quantify things that skew the results.

But, Judge Lamelas said, these concepts are already in the bench book. She thought people are afraid of judges under truth-in-sentencing. Under the Dickey-Smith approach, she could justify any sentence. Steve Hurley said that under her system, she could justify anything as well.

Judge Sykes offered that the committee was discussing a tool that judges can use. She thought the committee should discuss what tool could be best used in the practical setting of felony courtrooms in Milwaukee County, because those courts generate 50% of Wisconsin's prison inmates. She thought the Lamelas-Everts proposal was the most practical to use in that setting.

Senator Huelsman said she began the committee work in favor of leaving as much discretion as possible with the judges. She has moved a little bit away from that. She thought that one of the concerns was that whatever package the committee recommends must be passed by the legislature, a legislature which has consistently increased the number of minimum mandatory sentences. Her general feeling was that the legislature would be much more predisposed to a guidance system with a more concrete format.

Assuming there are a number of four-page explanations of the Dickey-Smith proposal for various offenses, Judge Wells was concerned that they would remain philosophical explanations for sentencing, but not be used by a trial court on a day-to-day, hour-to-hour, minute-to-minute basis. It is not realistic to think the Dickey-Smith proposal would be used in that way.

Also, Judge Wells noted that his proposal ranks as a primary consideration the prosecutor and defense counsel's recommendation; the others do not. Judge Sykes asked if the attorneys' recommendation could be incorporated into the Lamelas-Everts approach. Judge Barland thought so, and that many aspects of each of the proposals could be incorporated into the final

sentencing guidance recommended.

Judge Lamelas proposed that there be two votes: an initial vote for 1 of the 3 proposals; that vote would winnow out 1 proposal; then a second vote between the remaining 2 proposals.

Bill Jenkins said he was not going to vote, even though he had a responsibility as a member of the committee to vote. He did not feel that he was equipped to vote based upon the discussion today. He did not understand what the Dickey-Smith proposal would use as a starting point. He also was bothered that the debate might be too much about judges. He saw Judge Wells' proposal as very practical. He agreed with Judge Sykes' list of the appropriate goals, but not necessarily where she concluded.

Judge Barland asked whether Bill Jenkins was proposing a more refined development of each of the proposals, such as Tom Hammer had suggested. Bill Jenkins replied not to the extent of Tom Hammer's suggestion, but that he would like to see more of the Dickey-Smith proposal. Mike Brennan said that while he respected Bill Jenkins' comments, if the committee did not choose a sentencing guidance framework in this meeting, it was a real possibility that the committee's work would not get done.

Nick Chiarkas agreed with Bill Jenkins, and would like more information. He did not think any of the 3 proposals was bad. He thought all 3 proposals improved the criminal justice system. He said that whatever proposal was chosen, the committee should put its energy into making it the right proposal. He thought Bill Jenkins should vote. He thought a vote should be taken today. With whichever proposal is chosen, Nick Chiarkas thought the committee should put its energy into supporting it.

Matt Frank agreed with Nick Chiarkas that each of the proposals have merit, and each has weaknesses. Matt Frank did not think that any of the proposals would be strong on every point. He did not quarrel with the analysis in the Dickey-Smith model. His concern was that it would not give enough guidance as to a starting point for where to begin the sentencing analysis. With a crime like first degree sexual assault, with a possible prison term of between 1 and 40 years, judges and litigants must have some starting point. He was concerned with getting a system with consistent and fair sentences across the state. He also was concerned about cost, not just of prison beds, but the cost of releasing violent offenders back into the community before it was proper to do so. He thought the best approach to accomplish these ends was the Lamelas-Everts proposal, which attempts to look at violent versus non-violent felonies.

Committee Vote on 3 Sentencing Guidance Proposals

The Lamelas-Everts proposal received 9 votes (Lamelas, Everts, Hammer, Frank, Fiedler, Powell, Sykes, Huelsman, Gehring); the Dickey-Smith proposal received 5 votes (Dickey, Hurley, Chiarkas, Malmstadt, and Pugh); and the Wells proposal received 2 votes (Wells & McCann). Bill Jenkins did not vote, as he did not feel he was sufficiently informed to do so. As chair, Judge Barland also did not vote. Because the Lamelas-Everts approach received a majority of those voting, a second vote was not taken.

Judge Barland interpreted the debate as an expression that the committee should attempt to incorporate as much as possible of the reasoning process of the Dickey-Smith proposal into the Lamelas-Everts proposal.

Judge Wells said that the members were chosen for this committee because they are skilled and knowledgeable in these areas and can add something to the committee's work from every aspect of their professional lives. That is what the committee members had to do now. His proposal got only 2 votes, but he was not going to walk out of the meeting with his bat and ball and say he was not coming back. Judge Wells thought that all the committee members were dedicated, and should remain dedicated, to work on the best system for the state criminal justice system.

Judge Wells proposed that the committee register its sentiments as to whether or not the average period of incarceration time served per specific offense should be used to calculate the ranges of months in the matrix. A voice vote was taken, and there was unanimous agreement that Judge Wells' suggestion should be adopted.

At 2:00 p.m., the committee adjourned until its next meeting, which will take place on Friday; April 16, 1999, at 9:30 a.m., in Room 417N of the State Capitol, Madison, Wisconsin.

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Wednesday, April 28, 1999 3:14 PM
To: Alison Poe; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Cindy Archer; Cindy O'Donnell; David Albino; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Mark Grapentine; Mark Wehrly; Marline Pearson; Matt Bromley; Melissa Gilbert; Michael Miller; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott
cc: Brennan, Mike
Subject: Friday April 30, 1999 Criminal Penalties Study Committee meeting

Below please find an open meetings notice and agenda for the above referenced meeting.
Also attached are the minutes from the last Criminal Penalties Study Committee meeting on April 16, 1999.

Jennifer Dubberstein
Program Assistant
Criminal Penalties Study Committee
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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, April 30, 1999
9:30 a.m.

Rm. 417N
Grand Army of the Republic Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Barland**

2. **Consideration of minutes of April 16, 1999 meeting**

3. **Public comments**

4. **Housekeeping matters and announcement of logistics for next meeting, May 13th & 14th, in Wisconsin Dells**

5. **Subcommittees meet with following agenda items scheduled:**
   - a. **Criminal Code Reclassification (meet in Room 328NW)**
     1. **Continued discussion regarding classification of criminal code felonies**
     2. **Possible discussion regarding classification of non-criminal code felonies**
   - b. **Extended Supervision Revocation (meet in Room 225NW)**
     1. **Review working paper**
     2. **Review draft proposed legislation regarding Dept. of Admin. - Div. of Hrgs. and Appls.**
     3. **Review Dept. of Corrections memoranda**
     4. **Review State Public Defender memorandum**
   - c. **Sentencing Guidelines (remain in Room 417N)**
     1. **Discuss sentencing commission format**
     2. **Discuss method of determining monthly ranges to be placed into graphs**

6. **Full committee may reconvene after subcommittees meet**

7. **Adjournment**

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Criminal Penalties Study Committee

April 16, 1999 Meeting Minutes
Room 417N, State Capitol Building, Madison, Wisconsin

The committee's reporter, Professor Thomas Hammer, called the meeting to order shortly after 9:30 a.m. He chaired the meeting because Chair Judge Thomas Barland was with his wife, who was undergoing surgery. Present were: Michael Tobin for Nicholas Chiarkas; Matt Frank for Attorney General James Doyle; Judge Patrick Fiedler; Senator Joanne Huelsman; Steve Hurley; William Jenkins; Judge Elsa Lamelas; Judge Mike Malmstadt; Deputy District Attorney Bob Donohoo for District Attorney Mike McCann; Barbara Powell, Linda Pugh, and Judge Diane Sykes. Professor Walter Dickey was present and left at noon. Absent were Greg Everts, Brad Gehring, and Judge Lee Wells.

The committee approved unanimously the minutes from the March 18-19, 1999 meeting.

Report from Computer Modeling Consultants

Staff counsel Mike Brennan prefaced this report by describing the interview and hiring process to locate a builder for the computer model, and the challenges facing the consultants, including the great difficulties presented by any plan to link Department of Corrections ("DOC") data with data from the Circuit Court Automation Project ("CCAP") to produce a microsimulation computer model - one that would recreate the movement of an offender through the corrections system. He discussed the various state employees helping Systems Seminar accomplish its work, including individuals from the Department of Corrections - Bureau of Technology Management, CCAP, the Department of Administration - Bureau of Justice Information Systems ("BJIS"), and Professor Mike Smith of the University of Wisconsin Law School.

Brennan noted that a federal technical consultant, Dr. Ron Anderson of the University of Minnesota, had spent 2 days in February 1999 with the consultants and other state employees understanding the challenge of developing such a model. Anderson issued a pessimistic report given the committee's deadline and the difficulties with how Wisconsin retains its corrections data. At the end of that 2-day meeting, Mike Smith had the idea to develop a "consumption" computer model. This solution would work largely with DOC data, which obviated the need to undergo the laborious, time-consuming, and potentially unfruitful link of that data to CCAP data. This solution seemed to better meet the committee's needs, and could possibly be completed within the committee's deadline, whereas the microsimulation model could not.

Brennan delineated the 3 questions the committee asked the computer modelers to answer:

(i) What resources does Wisconsin need to service its existing corrections population over the next 10 years? ("old world');

(ii) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, absent any guidance from this Committee ("new world without guidance"); and

(iii) What resources does Wisconsin need to service those individuals convicted after 12/31/99 over the next 10 years, modeling this Committee's recommendations ("new world with guidance").

The committee heard a presentation using overheads and handouts from Russ Lutz and Hari Hariharan of Systems Seminar Consultants, the computer technical consultants retained to produce a computer model for the committee.

Russ Lutz briefly described Systems Seminar, its mission, its satisfaction guarantee, and its areas of expertise, including forecasting. Hari Hariharan gave an overview of the problem, including securing the proper data for a model. He described how 2 internal DOC databases (CIPIS, institutional prisoners & CACU, probation and parole supervisees) were linked. A review of those linked databases yielded categories of offenders from which forecasts could be made.

Russ Lutz described how Systems Seminar took quite a bit of time examining the data, analyzing it, and placing it into a "consumption" format to determine how many corrections resources would be used, in what crime categories, and over what period of time. A primary task was to create the proper criminal categories to ensure that all of the data extracted from DOC would fall into the proper category. Mike Brennan mentioned that the 45 categories listed were chosen because (1) it would be extremely difficult for the model to attempt to track all 484 felonies, and (2) CCAP uses most of these categories, and it was thought that judges therefore would be familiar with them.

Lutz discussed a few of the major challenges Systems Seminar has faced since accepting this work. First, the data was stored on an "episodal" basis (each time an offender entered and subsequently left a DOC status, whether incarceration or supervision, is

considered an episode), and the data had to be converted to a "consumption" basis (what type of resources are being used by offenders in each crime category on an aggregate basis). This made it difficult to funnel the DOC data into the proper categories. Also, input of the information on judgements of conviction by DOC, especially the punctuation of statutes, was not uniform, which made the grouping activity just referred to difficult.

Lutz also discussed some data anomalies in the probation and parole data. One such problem is when a particular individual, who has been denoted by a DOC number, has probation and incarceration dates which do not coincide - one stops after the other started, or vice versa. Judge Lamelas asked how Systems Seminar proposed to fix that problem. Lutz responded that at this point, they were not sure, but that they would try re-extracting the data from the mainframe, or relying on the CIPIS (prison institutional) database, which is supposed to have more accurate dates. Judge Lamelas offered that the probation department may not be troubling itself to formally revoke the offender, which would account for some of the anomalies. Walter Dickey asked Lutz whether or not he had considered contacting the offender's probation agent to fix this problem. Lutz replied that if this problem has its roots at a sub-episodic level, the answer could be in the database itself, which might be an easier fix. Dickey said that he did not want to unnecessarily complicate things, but that an answer may be found in the daily log of the parole agent. Bob Donohoo asked whether the overhead Lutz was referring to which illustrated this problem was a real record. Lutz confirmed it was. Steve Hurley said the anomaly could be generated by the reporting date. Judges Malmstadt and Lamelas offered that it could have occurred because of sentences of the same offender from different counties.

Hari Hariharan talked about how all of the modeling scenarios could be displayed. Data analysis will be by crime category. He said 14 crime categories account for 75% of the data. He discussed how forecasting would be done, using net new additions per category to the prison and probation systems. The forecasting would be done based upon 8 years of past data, which is all that was available. Forecasting will take 2 approaches: top-down, and bottom-up. The bottom-up is from each particular crime category, using an exponential forecast, and then aggregate the net additions each year for the future. In the top-down approach, the total net additions are arrayed over the various crime categories, which are each adjusted accordingly. Hari discussed the 3 scenarios described above on pp. 1-2. He talked about how the model relied on transitional probabilities among various states in the old and new worlds. Dickey asked about trends within quarters, for example, with release on parole. Hari responded that such trends had been taken into account by use of weighted averages.

Steve Hurley asked what limitations would exist on the model because DOC and CCAP data could not be linked. Hari said that was a difficult question. He thought the limitation would be on the amount of crimes within each category for the eight years of useable data. If that is a good representation, not having CCAP becomes less of a weakness. Dickey said that he did not think the model would take into account the impact on property taxes for resources consumed in county jail when the individual was given jail time as a condition of probation. Hari said the model would not take that into account. Brennan mentioned how CCAP is not on-line in 6 of the 72 counties, and of those 66 counties in which it is on-line, in many it has only been so for 1 year or less. He said that for conditional jail time, the model will have to take the amount of money that DOC allocates to the counties for that service, and divide it by the number of probationers implicated.

Judge Lamelas expressed concern about the types of offenses that the data would reflect for offenders who were sentenced after 1990 but completed their incarceration/supervision before 1998. Hari explained that assessments would have to be made for individuals sentenced to periods of time stretching beyond the date of the data extract. Judge Lamelas questioned if the data for the extract for the model was coming from the same source as the data for the sentencing guidelines numbers. Brennan confirmed that it was. Judge Malmstadt wanted to make sure that the modelers accurately predicted the sentences of those individuals incarcerated or supervised beyond the 8-year window of the data extract. Judge Lamelas also worried about the change in the mandatory release law, pre-1983. Dickey said these people were in categories of concern, like sexual assault and murder.

Hari explained how the transition probabilities between consumption rates were arrived at, and how the old world and new world scenarios could be displayed. He also discussed how resource consumption could be modeled for each scenario. Lutz described the key policy variables the committee will be able to adjust in arriving at scenarios. He discussed these variables at the scenario level (annual percentage cost increase for consumption types; percentage increase/decrease for new additions; ratio of offenders sentenced to prison vs. probation); at the consumption-type level (average sentence length or percentage change from current average sentence length; percentage increase/decrease for new adds; average revocation rate or percentage change from current rate); and at the category level (average length of percentage change from current average; percentage increase/decrease for new adds; average revocation rate or percentage change from current rate).

Judge Malmstadt inquired how the length of extended supervision could be modeled in the new world. Brennan responded that the model will be able to incorporate ES periods that replicate the periods of parole in the old world, as well alter those periods. Hari finished by showing how some of the output displays from the model will look. He emphasized that the displays incorporated dummy, not actual, numbers.

Code Reclassification Subcommittee Report

Subcommittee chair Tom Hammer discussed the work of the code reclassification subcommittee. He distributed color handouts

displaying the subcommittee's proposed classifications of approximately 170 criminal code felonies into the proposed Class A through Class I scheme thus far. He explained how the old world crime classes had an analog in the new world based upon the mandatory release converter: e.g., 26.8 maximum years for an old Class B would convert to 25 maximum years for a new Class C. With the addition of 3 new felony categories, crimes were adjusted up or down to best group crimes of similar severity together. The new categories were needed to best array existing criminal code felonies, the drug crimes, which would be classified for the first time, and the non-criminal code felonies.

Hammer said he assumed that there would be a maximum time period set on ES, to eliminate the anomaly of an offender being sentenced to 1 year of prison and 59 years of ES, as one could be under the new law as it is currently written. The committee has not officially acted upon that yet. Hammer reaffirmed the subcommittee's recommendation to leave the non-criminal code felonies situated where they currently reside in the statutes, rather than risk the confusion of losing crime-specific definitions. Hammer confirmed that all such crimes would be classified, however. Dickey thought that the ES terms were too short for the Class H and I felonies; instead, they should mirror the maximum period of time an offender can spend on probation, which is 5 years for the old world equivalent of a Class H felony, and 3 years for the old world equivalent of a Class I felony.

Tom Hammer emphasized that the classification of criminal code felonies distributed was in draft form, and that any individual committee members who thought a crime should be classified elsewhere should contact him, and he will relay the member's reasoning to the code reclassification subcommittee for consideration. Hammer offered observations about the putative classification of certain crimes, including burglary of a residence as a new Class E (10 years maximum prison, 5 years ES), unaggravated burglary as a new Class F (7.5 years maximum prison, 5 years ES); juvenile absconding (s. 946.50), which is currently classified according to the underlying crime (Class A for a Class A crime, etc.); and for the lower end property crimes, raising the misdemeanor-felony distinction from $1,000 to $2,000. Other crimes on which the subcommittee would continue to work included battery, fleeing, and miscellaneous injury offenses. The subcommittee was also working on a general aggravating circumstances statute, under which penalty enhancers would become aggravators at sentencing.

Hammer emphasized that the subcommittee had discussed the classification of each felony listed on the draft array, and the placement of those felonies represented the result of extensive discussion, hearing all points of view

The committee broke for lunch from 12:25 p.m. to 12:55 p.m.

Before the committee heard further reports, Mike Brennan asked for any comments or criticisms on the computer model based upon that morning's presentation. Judge Lamelas had concerns about the accuracy of the underlying DOC data. Walter Dickey said he had concerns, but he did not want to take up the committee's time with them then. Brennan emphasized that if the model will be used to present data scenarios at the May 13th-14th meeting, specific concerns or problems of members should be raised so that they could be answered and incorporated into the model for its use as a tool to debate policy, as the committee envisioned. Dickey said he had a lot of concerns, some of which could be fixed, some of which could not. He said many things had not been presented on, and details, such as real numbers, not discussed. Brennan said that the computer modeling working group had been meeting biweekly on Mondays at the DOC--bureau of technology management in Madison. He invited any interested members to attend those meetings and voice any suggestions or concerns they might have to ensure the best computer model possible. He asked for the help of the committee members to meet this goal. Steve Hurley thought that would be difficult to do, given that he was spending an average of a day a week on committee work. Tom Hammer said that there are committee members on the computer modeling subcommittee who should be working with the consultants on the model. Dickey said to say that "we meet on Monday. If you have something to say, be there", was not the right approach. He thought a different approach should be employed of finding a time for a meeting when everybody could make it. Tom Hammer's reaction was that this challenge should be met through the subcommittee structure; that the committee has to rely on the computer modeling subcommittee as the most effective avenue for concerns to be expressed. Walter Dickey said he did not think the work on the computer model had been structured in a way to invite the committee to be involved.

Extended Supervision Revocation ("ESR") Subcommittee

Subcommittee chair Judge Pat Fiedler began by discussing the subcommittee's working paper. The first section of the paper discusses ES procedure. The first area considered under procedure was presumptions regarding initial level of supervision. Two options were discussed: either DOC continues to use its current system, or all offenders enter ES at strict supervision. Judge Fiedler and Mike Brennan recently met with a group of assistant attorney generals who cautioned against language which may give an offender an entitlement to a less-restrictive level of supervision. The second area considered under ES procedure was the appropriate level of supervision, including considerations such as length of ES, dangerousness of the offender, movement between levels, treatment needs, and community environment/support network. The subcommittee wants the system set up so the offender has an optimum chance for success. The third area considered was the Intensive Sanctions Review Committee's final report. That committee was chaired by Judge Lamelas. That report recommended that a strict supervision model should be adopted. The ESR subcommittee agreed, and agreed that less restrictive stages should be added to it. The purpose of adoption of the strict supervision model is to increase the panoply of sanctions open to DOC to match the spectrum of possible ES violations. The subcommittee recommended that there be sufficient confinement beds to assure that offenders will be held accountable immediately. The subcommittee was still discussing the staff caseload for extended supervision.

Walter Dickey raised a concern regarding whether the old world offenders would receive the same intensive supervision as the new world offenders. Judge Fiedler responded that this has not yet been decided, but that the decision on this question would impact cost. Judge Lamelas raised a concern that Milwaukee has problems that are not being experienced in the other counties and has trouble convincing corrections that they need additional resources. Judge Fiedler replied that the subcommittee feels that extended supervision must be something that works in Milwaukee County or it will not be successful. Also, the public defenders must have the resources to put experienced attorneys on revocation cases.

Judge Fiedler discussed the second section of the working paper, which is the ES revocation process, including a proposed timeline. The subcomittee continues to work on the timeline and has asked for input from the public defender's office and the attorney general's office. Judge Fiedler explained the proposed revocation timeline as it relates to the decisionmaker: a hearing request is made to the administrative law judge on day 13, the judge sends out a notice of hearing on day 15, the DOC prepares a revocation packet by day 20, and a final hearing is held by day 35. The parties receive the administrative law judge's ("ALJ's") written decision by day 42. By day 52, an appeal is due, or if there is no appeal, the trial court is notified. The current appeal process would remain in place. If there is an appeal, the response is due on day 59. The administrator's decision is due on day 66 and the trial court is notified. The Department of Administration - division of hearings and appeals has the authority to review and reverse the decision made by the ALJ's on a discretionary basis if requested.

Judge Fiedler also discussed possible sanctions for ES violation, including revocation and return to prison, as well as alternatives to revocation. The subcommittee continues to discuss detention for disciplinary purposes for up to 90 days in a regional ES detention facility, and whether or not a full administrative hearing would be necessary before such a period of detention. Steve Hurley said that he is in favor of this alternative as long as Huber privileges are available. Judge Fiedler discussed the time period for a revocation decision. He noted that as a result of his meeting with the attorney general's office, it has been suggested that the rules be discretionary, not mandatory and the deadlines should not be strict, but remain in DOC/DOA's discretion.

Judge Fiedler addressed the third section of the working paper, which includes recommended statutory and administrative law changes. First, he addressed the criteria for a revocation referral by DOC, which include the nature of the violation, prior criminal history, including juvenile contacts and/or correctional history, and consideration of possible alternatives-to-revocation, which is required but not dispositive. The second area addressed was criteria for revocation decision by the administrative law judge, including: whether violation(s) occurred, whether DOC considered the criteria for revocation referral, whether confinement is necessary for public protection, treatment, or not to unduly depreciate the nature of the violation(s), and whether an alternative-to-revocation is appropriate. The subcommittee may recommend that the last provision be removed. Steve Hurley raised a concern that alternatives-to-revocation are not being adequately considered in all cases. Barbara Powell stated that the provision should be removed because the social workers are looking at alternatives-to-revocation throughout supervision, so if revocation occurs, alternatives have already been considered. Judge Lamelas stated that in her experience in Milwaukee County, there is tremendous institutional reluctance to revoke, and that decisions to revoke are based on the notion of prison overcrowding rather than community safety. Mike Tobin felt that the provision to consider whether an alternative-to-revocation is appropriate should be retained.

The subcommittee also thought that DOC should be allowed to seek certiorari review of the ALJ's decision not to revoke, as well as that the circuit court would specify the time period of revocation of extended supervision. The subcommittee intends to recommend that at the time of resentencing, the trial court has authority to specify a new bifurcated sentence which may not be longer than but may be equal to or less than the ES period in the offender's original sentence.

Public Comment

The committee heard from Cindy A., a crime victim who preferred that her last name not be used. Cindy is a member of the victim advisory committee of the Department of Corrections, as well as of the Dane County restorative justice committee.

As a victim and witness, Cindy testified in support of long-term confinement for offenders, especially sex offenders, as well as strict extended supervision.

Sentencing Guidelines Subcommittee

Subcommittee chair Judge Elsa Lamelas began by discussing the subcommittee's draft of a sentencing guideline for burglary. The subcommittee has attempted to incorporate some of the aspects of the guideline system that was not chosen to be used by the committee, in order to minimize the mechanical nature of the guidelines. The criminal history axis is now called "risk assessment based on criminal history and other factors." An item was added that asks litigants to identify and evaluate factors that bear upon the offender's future risk to public safety and directs the judge to determine which factors are relevant. This section is in the process of being developed by the subcommittee. The guideline also asks a series of questions regarding the offender's criminal history, and then points are assigned. At the end of this section, the judge is asked to consider whether the score improperly understates or overstates the offender's future risk to public safety. Judge Lamelas and Steve Hurley noted that the point values have not received thorough discussion by the subcommittee. The point values from the risk assessment have been left off of the risk assessment axis of the 9-cell burglary chart. On the offense severity axis, the title of the middle cell has been changed from presumptive to intermediate. A

description of an intermediate offense has been provided. Extended supervision ranges have been removed from the cells and the concept of ES is addressed below the chart. Judge Lamelas and Mike Brennan discussed whether it would be useful to add information on the number of offenders placed on probation, for this offense, to the chart. Below the chart, the circumstances/factors to evaluate with regard to offense severity were labeled as aggravating and mitigating, but those titles have been removed as it was decided that a single factor could be aggravating in one circumstance and mitigating in another. This section of the guideline will require some coordination with the work of the code reclassification subcommittee. Judge Lamelas offered this as an issue upon which she invited committee members to be heard.

Judge Lamelas also briefly discussed the numbers to be included in the sentencing guidelines chart. They remain an area of tremendous concern. The subcommittee has taken the former Wisconsin guideline monthly ranges and adjusted them for the time period actually served. But the resulting monthly ranges were so low as to cause concern among some members. She had a greater degree of confidence in the low-risk assessment, mitigated-offense end of the graph, but decreasing confidence in the numbers as the cells progressed upward in severity. Mike Brennan explained how the former Wisconsin sentencing guidelines with their 16 cell approach had been collapsed into 9 cells (3 cells vertically, 3 cells horizontally). Then the old indeterminate ranges were given to DOC, which responded with the actual time-served in months for the sentences in those ranges. For example, for the low-risk assessment, intermediate-offense severity offense severity, DOC might have said that the offender was serving 45% of his or her sentence. Accordingly, the former monthly ranges were multiplied by that figure, which resulted in the draft numbers in the cells.

Judge Lamelas expressed deep concern with some of the resulting monthly sentence ranges being too low. Judge Fiedler noted that many of these offenders have substantial sentence credit. Judge Malmstadt mentioned that the former Wisconsin sentencing guidelines were driven by averages, and that therefore the most severe box will never have a maximum in it: only an average. To Judge Lamelas, the key was that the numbers as arrived at would not be credible because they were too low. One of the things she contemplated was using a multiplier different than time-served, say mandatory release, for the more aggravated risk assessment columns. Steve Hurley thought this numbers issue should be discussed in subcommittee. Judge Lamelas agreed, but wanted the members of the code reclassification to hear some of the problems the guidelines subcommittee was facing, as their tasks seemed to be merging.

Judge Sykes thought that for the committee's work to be credible, the cell for the high-risk offenders committing the severest version of'the crime had to include the statutory maximum time in prison, and that the cell for the least-risky offenders committing the most mitigated version of the crime had to incorporate the statutory minimum of 1 year in prison. Judge Sykes felt strongly about this; otherwise, the system would have no credibility, and it would be impossible to sell to the legislature and to the public, and the public would not be protected.

Mike Tobin thought that if the maximum was put into every sentencing guideline, sentence inflation would result, because of the manner in which the crimes had been reclassified. He thought it would not be difficult for an offender to fall into the most-severe cell. Once the maximum is included in the guideline range, he thought judges would be encouraged to shoot for the maximum, and putting institutional pressures on judges to sentence to the maximum.

Judge Lamelas said that she had heard from a Milwaukee commission on sexual assault and family violence headed by Carmen Petri that was concerned that the penalties for crimes in those areas would be too low under the new proposed classifications.

Judge Lamelas also briefly discussed the structure of the sentencing commission the subcommittee was considering recommending to the full committee. She also talked about a sample conversion table developed which would numerically convert old world indeterminate sentences to new world determinate sentencing ranges. This was drafted based on very broad crime categories, to give judges an idea on where new world sentences could fall based upon their knowledge of old world sentence numbers. She expressed concern with the conversion table's use of averages from broad crime categories, as those categories incorporated so many crimes, decreasing sentences for severe crimes.and increasing sentences for less severe ones.

Bob Donohoo commented on reliance on the former Wisconsin guidelines. First, the data relied upon in those guidelines is 5, 10, sometimes 15 years old. Second, that data did not break up the sentences from different areas of the state. Third, those people in the criminal justice system who used the former guidelines knew that the ranges were based on old data, and adjusted their sentence recommendations and dispositions accordingly. Donohoo thought experts on the crimes should get together and come up with proper monthly ranges, rather than rely on old data. Judge Sykes also was in favor of this approach, as was Judge Malmstadt.

Steve Hurley mentioned that Mike McCann had come up with what Hurley thought was a good idea: having the Dickey-Smith "Rule-of-Law" guidelines approach developed for a couple of crimes, and comparing and contrasting them with the guidelines developed for other crimes under the Lamelas-Everts approach. Judge Sykes said that the committee had already decided on one system, the Lamelas-Everts system, and not two systems. Judge Lamelas' immediate reaction was that promulgating 2 guideline systems would be highly problematic, as it would require developing and training judges and litigants in two separate systems.

Matt Frank said we should not forget about the effect of these guidelines on the prison population. The impact of truth-in-sentencing on the entire criminal justice system, and how much it will cost, must be considered in the big picture. Judge Malmstadt

wanted to see the numbers on each of the crimes whose classifications were being raised or lowered to see what type of impact on the system the committee's recommendations would have.

Judge Sykes said it was a misnomer to say the committee would recommend raising the penalties on a lot of crimes by using the mandatory release converter. She said the subcommittee, by applying the mandatory release converter, had undone what the legislature did in extending the maximums in 1997 Wisconsin Act 283. The conversion idea was agreed to because there was an understanding the subcommittee could go through each crime to restore the very serious ones to the high maximums where the legislature said they should be; other, less serious crimes could be lowered as well. To look at the conversion document and say that a number of crimes were having their penalties raised thus was not true. She said that the legislature had 2 bills in front of it, one which basically used the MR converter, and one which did not, and the one that did not use the MR converter passed the legislature and represents the criminal justice policy of the state, and we have undone that with an eye toward properly arraying all crimes throughout a new system.

Judge Malmstadt wanted to ensure that no "old-world" rapists got out to put "new-world" residential burglars into prison for a little while longer. Judge Sykes thought that was Matt Frank's point, and that once the computer model was up and running, the committee could discuss any such trade-offs. Judge Malmstadt said he did not have much faith in the computer model, based upon what he had heard.

Judge Lamelas thought that perhaps a blind survey should be done for the proper penalty ranges for a number of different crimes. Judge Malmstadt thought that was a good idea. Judge Lamelas asked whether there was interest in such an idea. Steve Hurley thought that idea should first be considered at the subcommittee level. Bob Donohoo thought that was a good idea.

Mike Brennan asked how Carmen Petri's group had heard about the perceived, but untrue, lowering of sexual assault and family violence penalties. Judge Lamelas did not know. Bill Jenkins emphasized that there are many stakeholders in this committee's work. He thought it was important that our response to those stakeholders be coordinated. This is not to put a gag rule on committee members. But rumor control. and a planned education approach is necessary. Judge Sykes said the education subcommittee would meet and come up with such a plan.

Discussion Regarding Deadline Extension

Tom Hammer raised Senator Gary George's request for committee discussion of and comment on the potential 1- or 2-year delay in the implementation of truth-in-sentencing. Senator George's letter requesting such discussion had been distributed to all committee members. He alerted the committee that its representatives would testify before the Senate Judiciary Committee on April 20, 1999 regarding the request for an extension. Tom Hammer had discussed this issue at length with Judge Barland. They both felt strongly that the committee would finish its work in a timely fashion; the summer would be needed to finish its work and write the report, but that we would meet the August 3 1, 1999 requested deadline. Hammer had also discussed this issue with the code reclassification subcommittee and with Mike McCann, who shared this view. On a second issue -- whether or not the criminal justice system could be educated on the committee's proposed changes between the reporting deadline and the effective date of truth-in-sentencing of December 31, 1999 - Judge Barland and Tom Hammer felt that was a matter beyond the committee's control. Whether or not the legislature would pass the proposed legislation in September, whether or not the Governor would sign it, and whether or not the judiciary and all litigants could be educated in the remaining 3 months of 1999, are all issues beyond the committee's control, and upon which they could not comment.

Steve Hurley said that consideration of costs and resources in arriving at guidelines had been postponed until the computer model was finished. He did not see how cost or allocation of resources could be adequately considered in the space of a few weeks. Bill Jenkins said that that issue had been discussed several times. Each subcommittee was factoring cost into its reports, and the incomplete and inaccurate nature of the state's corrections data had been discussed. Bill Jenkins thought the computer presentation today was good; it was a brighter light on this issue than he had seen yet. He reiterated that the ESR subcommittee had certainly discussed cost. Steve Hurley associated himself with Judge Malmstadt's remarks about guidelines not letting out "old world" violent offenders for "new world" non-violent ones. Hurley thought it irresponsible not to have the cost analysis before we report to the legislature.

Mike Brennan thought it was an unstated assumption in the discussion that the computer model would not bear fruit, and he did not necessarily think that was the case; certainly, the consultants were not working under that assumption. He thought the committee should see what comes of the model before members give up on it. It will not be perfect, and he told the committee that after working with DOC, it was very difficult to get accurate data. But it did not mean that the hard work put in by numerous people, both consultants and state employees, and the months of work and thousands of dollars, should not be allowed to bear fruit. Rather than prejudging the committee's own work, he thought the committee should let the model work, and see if committee members found it useful.

Steve Hurley said he was not throwing up his hands and saying it would not work. He thought the committee would not have modeling scenarios, including cost projections, until the verge of the expected reporting deadline. Brennan said that if the committee

is able to review the program's output on May 13th and 14th, 1999, the committee would have from then through June, July, and August to use the model.

Judge Malmstadt thought that anybody who came to this committee when it started with even a small acquaintance with the issues involved knew that the legislature had provided a woefully inadequate amount of time within which to issue a report. Given what he had heard about DOC's data problems, each state agency has developed its own computer system to tell that agency what it wants to hear. Because these systems will never talk to each other, our committee cannot secure proper information. Sooner or later, the legislature will have to figure out what it should do about the cost of corrections. He thought the committee could complete its work by August 31st. But he thought the committee should be candid in the cost of the impact of truth-in-sentencing: that shoring up the inadequate probation supervision in Milwaukee would cost money, etc. Steve Hurley said somebody has to belly up to the bar and take responsibility.

Senator Huelsman said that for years, the legislature had received fiscal estimates of the cost impact of legislation. She also said that because the committee would set up temporary guidelines, the permanent sentencing commission can pick up from there and make any necessary adjustments to the guideline ranges. She added a final concern: when she thought of all of the hours that all of the people on the committee had put it in, it was her feeling that they put those hours in knowing the committee's work would end within a limited horizon, not 1 or 2 years down the road. If this were stretched out over a 2 year period, the committee would not meet as often, nor be as productive as it has been.

Steve Hurley said there was no fiscal impact statement attached to the truth-in-sentencing bill. Senator Huelsman replied that there was not because the bill had no impact in the first biennium after passage. Steve Hurley said the legislature passed the bill without having any knowledge of what the cost would be. Barbara Powell said that whatever the cost will be, in her 30 years of experience, the state has never given DOC enough money to properly provide the services asked of it. Bill Jenkins reiterated that other stakeholders tell him that public safety and quality of life have costs as well, and that while more difficult to value than the cost of a prison cell, they should be included in discussions about cost. Steve Hurley said he did not think he was suggesting that those things should not be included. Judge Lamelas was concerned that the instruments to measure costs will not be appreciably better in 1 or 2 years, and that she feared the committee would lose the forward momentum it had built up by working so hard, as well as the commitment from committee members.

The committee expressed its preferences with regard to a 1- to 2-year extension past August 31, 1999: all were against it except for Steve Hurley. Barbara Powell's only concern was producing the highest quality report. As long as the report was of high quality, she was not in favor of any longer of an extension than August 31st. Linda Pugh agreed with Barbara Powell's comments.

Mike Brennan announced that the committee members had been polled with regard to a meeting date in July, and that the most convenient date for the most number of people was July 9th, 1999.

Tom Hammer announced that the committee's next meeting, which will take place at 9:30 a.m. on Friday, April 30, 1999 in Room 4 17N of the State Capitol in Madison, Wisconsin, would involve almost exclusively subcommittee meetings.

At 3 p.m., the committee adjourned.

Olsen. Jefren

From: Dubberstein, Jennifer
Sent: Wednesday, May 05, 1999 2:36 PM
To: Alison Poe; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Bob Pultz; Cindy Archer; Cindy O'Donnell; David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Mark Grapentine; Mark Wehrly; Marline Pearson; Matt Bromley; Melissa Gilbert; Michael Miller; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George: Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; William Lundstrom
cc: Brennan, Mike
Subject: Thursday and Friday, May 13th and 14th Criminal Penalties Study Committee meeting

Below please find an open meetings notice and agenda for the above referenced meeting.
Also attached are the minutes from the last Criminal Penalties Study Committee meeting on April 30, 1999.

Jennifer Dubberstein
Program Assistant
Criminal Penalties Study Committee
(414) 227-5103
jennifer.dubberstein@doa.state.wi.us

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Thursday, May 13, 1999
10:00 a.m.
Friday, May 14, 1999
8:00 a.m.

Chula Vista Resort -- Sierra Vista Room
4031 River Road
Wisconsin Dells, WI 53965

1. **Call to order - Chair Judge Thomas Barland**

2. **Consideration of minutes of April 30, 1999 meeting**

3. **Review of agenda for 2-day meeting**

4. **Presentation of computer model:**
   a. **Presentation by Systems Seminar Consultants**
   b. **Committee discussion of results**

5. **Approximately 2 p.m., full committee breaks out into subcommittees; issues to be considered may include the following:**

   a. **Code Reclassification: Room 3001**
      1. **Placement of criminal code and non-criminal code felony crimes into proposed Class A-I structure**
      2. **Proposed omnibus battery statute**

   b. **Extended Supervision Revocation: Room 3101**
      1. **Working paper, including recent revisions**
      2. **Resentencing guidelines**

   c. **Sentencing Guidelines: remain in Sierra Vista Room**

1. **Narrative questions for draft sentencing guidelines**
2. **Meeting of judges to arrive at monthly ranges for guidelines**

6. Full committee considers subcommittee reports at 4:30 p.m.

7. On Friday, March 19th, beginning at 8 a.m., subcommittees again meet to discuss issues listed above for any further debate:

a. **Code Reclassification: Room 3001**
b. **Extended Sunervision Revocation: Room 3101**
c. **Sentencing Guidelines: Sierra Vista Room**

8. Full committee reforms to consider subcommittee reports and discuss future work

9. Public comments

10. Adjournment on Friday, May 14, 1999 at or before 3 p.m.

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Criminal Penalties Study Committee

April 30, 1999 Meeting Minutes
Room 417N, State Capitol Building, Madison, Wisconsin

Chair Judge Thomas Barland called the meeting to order at 9:30 a.m. Present were: Michael Tobin for Nicholas Chiarkas; Professor Walter Dickey; Matt Frank for Attorney General James Doyle; Greg Everts; Judge Patrick Fiedler; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman; Steve Hurley; Judge Elsa Lamelas; District Attorney Mike McCann; Barbara Powell; Linda Pugh; Judge Diane Sykes; and Judge Lee Wells. Absent were Brad Gehring, Bill Jenkins, and Judge Mike Malmstadt.

The committee approved unanimously the minutes from the April 16, 1999 meeting.

Judge Barland asked if there were any public comments, but there was none.

Jennifer Dubberstein, the committee's program assistant, reported briefly on the logistics for the committee's next full meeting, which will take place May 13" and 14" in the Wisconsin Dells at the Chula Vista resort. She noted that reservations for guest rooms and meals had been made for all committee members, and that if a committee member does not plan to stay overnight or attend all meals, that member should let Jennifer know that fact as soon as possible.

Judge Barland reported that he testified before the legislative Joint Finance Committee at its meeting in Osseo, Wisconsin on April 13, 1999. He spoke about the need of the Circuit Court Automation Project ("CCAP") for funds to continue to upgrade its computer system, and how such updated data will be needed by the new sentencing commission to do its work. He urged the Finance Committee to consider requiring all counties to be on CCAP as soon as possible.

Judge Barland also reported about his appearance on April 20, 1999 before the Senate Judiciary Committee, chaired by Senator George, in support of AB 200, the bill to grant our committee an extension in its reporting deadline from April 30, 1999 to August 31, 1999, as well as to continue its funding into the next fiscal year. On March 30, 1999, Judge Barland had submitted an interim report to that committee, as well as to the governor's office and to the legislative leadership. Judge Barland said that he had had a good discussion with the Judiciary Committee members concerning our committee's progress, and its need for an extension until August 31, 1999 to finish its report. He commented how the new sentencing commission could act as a bridge between the judiciary and the Department of Corrections to monitor events and legislation. He also mentioned the need to strengthen probation and parole supervision in Milwaukee, and the resources that would be needed to accomplish that. Judge Barland stated that the State does not have a comprehensive sentencing policy. There is minimal communication between the judiciary and the Department of Corrections. A Sentencing Commission could help bring about a more comprehensive and rational sentencing policy to the State.

Senator Huelsman commented on how there had been no amendments offered to AB 200, which she took as a good sign that the bill would pass. Judge Barland asked when the Senate would meet next. Senator Huelsman said probably for one day sometime around May 11, 1999.

Judge Barland also discussed the biggest question of the April 20, 1999 Judiciary Committee hearing - would our committee complete its work by August 31, 1999? He told the Judiciary Committee our committee's position that we thought we would complete

our report by that deadline. Our committee has been working very hard, and we would find it difficult to sustain that level of hard work or 1 to 2 more years. He told the Judiciary Committee that our recommendations would tide the state over until the new sentencing commission got underway in its work.

Judge Barland emphasized that a key element in the transition from indeterminate sentencing to determinate sentencing will be adequate and full education, especially of judges and prosecutors. Education of the public also is needed to understand the difference between the old, probably longer indeterminate sentences and the new, probably shorter determinate sentences. He also said that a critical element will be the continuation of our committee to educate and render technical assistance to the legislature as it considers the companion legislation to our committee's report.

The subcommittee chairs agreed that they did not need to reconvene as a full committee after the subcommittees met. Accordingly, it was agreed that the full committee would adjourn and meet in its various subcommittees. At 10:00 a.m., the committee adjourned and broke into its subcommittees from 10 a.m. until 2 p.m., breaking for lunch from 12:00 noon until 12:30 p.m.

The committee's next full meeting will take place on Thursday and Friday, May 13th and 14th, 1999, at the Chula Vista Resort in Wisconsin Dells, Wisconsin. The meeting will begin at 10:00 a.m. on Thursday, May 13, 1999.

Olsen, Jefren

From: Brennan, Mike
Sent: Sunday, May 30, 1999 9:36 AM
To: Olsen, Jefren
cc: 'judge barland'; 'tom hammer'; 'tom hammer at home'
Subject: Leg. Council Misdemeanor List/CPSC Report Drafting Schedule

Jefren --

I hope you are enjoying your Memorial Day weekend, and receive this message on Tuesday!
A couple of requests for your consideration when you return:

Item 1 - List of misdemeanors in electronic format

The code reclassification subcommittee has been making monumental progress in the last few weeks based on the strong foundation laid by its chair, Prof. Tom Hammer (whose duties also include acting as our committee's reporter). I think you will find the documents Tom has produced to be of the utmost clarity as you and your staff use them to draft our proposed legislation.

As part of the code reclassification subcommittee's work, it has reviewed the 101 current Class A misdemeanors as they relate to the new Class I felonies (just above misdemeanors in severity, punishable by 18m. prison and 2 y. extended supervision). We used what we have been colloquially describing the "Jefren Olsen list" of misdemeanors which was originally part of Leg. Council Staff Memo. 98-11.

Many, many months back, from someone in your office, I secured in electronic format the lists of felonies, classified and unclassified, which were also part of Memo. 98-11. Tom and I found those lists useful to manipulate in reclassifying the crimes. We would like to do the same with the list of misdemeanors. Would you be able to secure that list and e-mail it to me? I will forward it to Tom Hammer, and we will use it in delineating our proposed changes to misdemeanors (which, BTW, are not very many.)

Item 2 -- Report drafting schedule

I know you are quite busy with the budget, but I wanted to update you on what Judge Barland, Tom Hammer, and I are thinking about re: report drafting. As you may know, we have 3 full committee meetings left: **June 4, 25, and July 9th.** We will probably schedule one last meeting of the full committee in August for purposes of report revisions and approval. All of those meetings will take place in the Capitol. B/c of caucus needs, the 6/4 meeting will be in the North Hearing Room, rather than 417N, the GAR room. (FYI, On June 11, the sentencing guidelines subcommittee will be hosting a survey of about 20 judges concerning guidelines; that also will take place in the North Hearing Room.)

Assuming AB 200 is ever considered by the Senate, and is passed (it passed Joint Finance 16-O last week), our final reporting deadline will be **Tuesday, August 31, 1999.** Judge Barland, Tom Hammer, and I plan to do virtually all, if not all, of the drafting of the report. I'm suggesting that our office here act as the central clearing house through which revisions travel. During the first 2 weeks of June, Judge B., Tom, and I will agree on a drafting schedule. After the 614 meeting, we should be in a position to forward to you the proposed revisions to the classification system, the proposed classifications of roughly 400 of the 484 felonies, the slight changes to the misdemeanors, and some other matters for initial statutory drafting. Just let me know when you feel comfortable receiving those. Tom has done a wonderful job utilizing color graphics to graphically demonstrate our work. Further, all of his documents are in MS Word 97, making for easy transition to us for editing and on to you by e-mail.

Perhaps we should discuss, along with Tom, the most efficient manner in which this could be accomplished. For example, rather than handling ?'s -- of which I'm sure they will be plenty -- seriatim, perhaps we should agree on a format for doing so. Just an idea for now.

Thanks for your patience with this lengthy e-mail Jefren. I'll talk to you soon.

Mike

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Tuesday, June 01, 1999 4:03 PM
To: Alison Poe; Amanda Todd; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Bob Pultz; Charles Hoornstra; Cindy Archer; Cindy O'Donnell; David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Mark Grapentine; Mark Wehrly; Marla Stephens; Marline Pearson; Matt Bromley; Melissa Gilbert; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; William Lundstrom
cc: Brennan, Mike
Subject: Friday, June 4th Criminal Penalties Study Committee meeting

Below please find an open meetings notice and agenda for the above referenced meeting.
Also attached are the minutes from the last Criminal Penalties Study Committee meeting on May 13 and 14, 1999.

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, June 4, 1999
9:30 a.m.

North Hearing Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Bat-land**

2. **Consideration of minutes of May 13-14, 1999 meeting**

3. **Status of AB 200, legislation to extend committee's reporting deadline and continue funding - Judge Bat-land & Mike Brennan**

4. **Presentation on statistics from sentencing survey at 1999 Criminal Law & Sentencing Seminar in Eau Claire - Judges Barland, Lamelas, Sykes & Jennifer Dubberstein**

5. **Criminal Code Reclassification Subcommittee presentation on proposed classification of criminal code & non-criminal code felonies, as well as proposals on penalty enhancers, fines, and caps on periods of extended supervision - Professor Tom Hammer**
   -- Full committee reaction

6. **Extended Suuervision Revocation Subcommittee presentation of working paper - Judge Pat Fiedler**
   -- Full committee reaction

7. **Public comments**

8. **Adjournment**

Criminal Penalties Study Committee

May 13-14, 1999 Meeting Minutes
The Chula Vista Resort
Wisconsin Dells, Wisconsin

Thursday, May 13, 1999

Chair Judge Thomas Barland called the meeting to order shortly after 10:00 a.m. Present were: Judge Barland; Mike Tobin for State Public Defender Nicholas Chiarkas; Nicholas Chiarkas arrived for the meeting later that afternoon; Assistant Attorney General Matt Frank on behalf of Attorney General James Doyle; Professor Mike Smith on behalf of Professor Walter Dickey; Greg Everts, who was present on Thursday **but** had a court appearance on Friday; Judge Patrick Fiedler; Sheriff Brad Gehring; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman, who was represented on Friday by Ray Sobocinski; Steve Hurley; Bill Jenkins; Judge Elsa Lamelas, who had to leave at 2:30 p.m. on Thursday but returned on Friday; Judge Mike Malmstadt had to attend a funeral on Thursday but was present on Friday; District Attorney Mike McCann; Barbara Powell; Linda Pugh was present on Thursday but absent on Friday; Judge Diane Sykes, who was present on Thursday but had to leave at 2:30 p.m., and who participated via telephone conference call on Friday, and Judge Lee Wells.

The committee approved unanimously the minutes from the April 30, 1999 meeting.

Staff counsel Mike Brennan reviewed the committee's schedule for the 2-day meeting.

Computer Modeling Presentation

Brennan gave a short introduction to the presentation. He said the approach chosen for the computer modeling effort was limited by the committee's short time to issue its report, limited resources, and that Wisconsin's various justice and corrections computer systems are not linked, and could not be done so in the time-frame allotted to the committee to issue its report. Judge Barland reiterated that one test of the computer model is its utility to the future sentencing commission. The model presently constructed should be of use to the new sentencing commission. Brennan reiterated the preliminary nature of the data. He also emphasized that while there was a temptation to view the model's results as population numbers, because of the time, data, and resource limitations, it was necessary to construct a model which would track the consumption of corrections resources, rather than prison population.

Brennan discussed how in February 1999, a federal technical consultant had visited, spent 2 days with the computer modeling working group, and painted a very bleak picture about the ability to forecast the impact of the committee's policy choices on the Wisconsin corrections system. He specifically cited data constraints - the inability to link court system data with corrections data, as well as data deficiencies in those two systems. After roughly 12 hours of discussion and debate, Professor Mike Smith of the University of Wisconsin Law School offered a proposed solution: rely just on corrections data, and model that data to display resources consumed (e.g., "inmate-years" and "cost to supervise for 1 year"). Brennan explained that while the model's output displayed that day would not be in dollars, eventually dollar figures would be attached. He warned against the tendency to view the numbers as population figures, but rather to remember the calculations were done in terms of inmate-years, which would skew the calculations down.

Mike McCann sought clarification of what "resource consumption" meant. Brennan responded that the model had been constructed to map the probability of movement of an offender among a variety of legal statuses - e.g., incarceration to parole upon mandatory release, or probation to incarceration upon revocation - which could be calculated using exclusively DOC data. That is done for each of 44 crime categories:

1. **1st Degree Intentional Homicide**
2. **1st Degree Reckless Homicide**
3. **Other Homicide (e.g.: 2nd Degree Intentional Homicide; Felony Murder)**
4. **Substantial/Aggravated Battery**
5. **Battery**
6. **Other Bodily Security (e.g.: Mayhem, 1st and 2nd Degree Reckless Injury)**
7. **1st Degree Sexual Assault**
8. **1st Degree Sexual Assault of a Child**
9. **2nd Degree Sexual Assault**
10. **2nd Degree Sexual Assault of a Child**

11. 3rd Degree Sexual Assault
12. Kidnapping/Hostage Taking/False Imprisonment
13. Stalking
14. Intimidate Witness/Victim
15. Child Abuse
16. Other Crimes Against Children (e.g.: Incest, Child Enticement)
17. Armed Robbery
18. Unarmed Robbery
19. Burglary
20. Theft (including felony Retail Theft)
21. Receiving Stolen Property
22. Operating Vehicle Without Owners Consent
23. Criminal Damage to Property (including graffiti offenses)
24. Arson
25. Weapons/Explosives (e.g.: Felon in Possession of Firearm)
26. Other Public Safety Crimes (e.g.: 1st and 2nd Degrees of Recklessly Endangering Safety)
27. Gambling
28. Drug Manufacture/Delivery (but not Cocaine or Marijuana)
29. Drug Possession With Intent to Deliver - Marijuana
30. Drug Possession With Intent to Deliver - Cocaine
31. Drug Possession (but not Cocaine or Marijuana)
32. Drug Possession - Cocaine
33. Drug Possession - Marijuana
34. Other Drug Offenses (e.g. Maintaining Drug Trafficking Place)
35. Forgery
36. Issuance of Worthless Checks
37. Public Assistance Fraud
38. Other Fraud (e.g.: Food Stamps, W2)
39. Perjury
40. Escape
41. Bail Jumping
42. Extradition
43. Other Felonies (e.g.: election law violations, securities law violations)
44. Unidentified Felonies

Although premised on historical data, the computer model forecasts the "new," Truth-In-Sentencing world by using trends in the probabilities over time.

Judge Lamelas asked how this model differs from the models constructed by Minnesota and North Carolina. Brennan responded that their software followed a single actual offender throughout the corrections system to track the number of offenders who committed which crimes, were serving what sentences, and for how long. Hari Hariharan, one of the computer modelers, described how this could not be done in Wisconsin because of the inability to link court systems data - what was the disposition of an offender's case in court and what sentence an offender received on that disposition - to corrections data - what sentence an offender actually served, and what occurred during that sentence (e.g. being revoked on probation or parole). Instead, using DOC data, the median time spent using various corrections resources of all the offenders within a single crime category was determined and aggregated.

The committee received a presentation from its computer modelers, Hariharan and Bob Tyllo of Systems Seminar Consultants. Tyllo walked the committee through the model's preliminary results. A copy of the modelers' graphs, which they distributed to the committee, are in the committee's files.

Tyllo expressed concerns relating to certain issues, especially revocation rates, which looked low, but which they were still investigating. He described the model's initial template, by which the committee can change all assumptions and data input. This allows the committee to use the model to replicate different scenarios: e.g., rising or falling convictions in a certain crime category, rising or falling revocation rates based upon parole board chairmanship, changing initial sentencing to probation or prison.

Steve Hurley asked how court systems data - CCAP -- factored into the model. Hariharan responded that while CCAP and DOC data could not be linked, CCAP was used to determine the average length of time of an incarceration sentence or probation, the medians for those sentences for each of the 44 crime categories, and some other parameters used in the model. In response to a question from Judge Wells, Hariharan explained that the median figure was chosen over the average figure because the latter is overly sensitive to outlying issues, like rogue high or low sentences.

Tyllo discussed two different scenarios, each of which was a combination of assumptions about rates of incarceration,

probation, sentence length, revocation, and a variety of other factors. **Scenario 1** attempted to replicate what the resource consumption would be if judges statewide did not change their sentencing practices at all and the new Truth-In-Sentencing law became effective December 31, 1999. In other words, sentence lengths remained the same, periods of extended supervision ("ES") in the "new world" replicated parole lengths, and the ratio of probation to prison in each crime category remained the same. The scenario used separate colors, red and blue, to represent the "old world" population - resources necessary to incarcerate and supervise offenders convicted before 12/31/99, and "new world" population - resources necessary to incarcerate and supervise offenders convicted on and after 12/31/99.

Tyllo then walked the committee through **scenario 2,** under which judges adjusted "new world" - post 12/31/99 - sentences downward to reflect the prison time actually served by offenders for each crime category, and ES periods were always the minimum, 25% of prison time. Probation did not change in this second scenario. Mike McCann pointed out that reality should fall somewhere between these 2 scenarios: some sentences may go down as judges account for prison sentences being "real time," although some will not, and ES periods will be longer than 25% of prison time for some offenders.

The committee members expressed dissatisfaction with the raw numbers of occurrences the model seemed to be using to arrive at its calculations. The number of murders, for example, was higher than the number the model was using to establish its probabilities. Hariharan and Tyllo explained this is one difference between consumption and population models. The figures utilized represent inmate years, rather than actual population. Dissatisfaction was also expressed with the raw data DOC provided the computer modelers upon which the model was running. Certain committee members pointed out how, given their experience, the raw numbers in certain criminal categories just could not be correct. Concern was also expressed about the initial amount of "new world" resources in the first year of Truth-In-Sentencing, especially the resources that would be consumed for probation supervision.

Steve Hurley said that one of the figures DOC has told the committee is that 50% of new admissions are revocations. He asked whether the model showed that figure. Hariharan said it did not, and the modelers were having difficulty reconciling that figure with the revocation probability rates they were discerning from DOC data, which were much lower than 50%.

Members expressed concern over the low numbers the model was forecasting. The modelers had approached DOC-Bureau of Technology Management with the discrepancy between other published estimates and these numbers. DOC-BTM offered 2 explanations: (1) average inmate population - close to what the resource consumption model would display - was always a good amount lower than actual population at the end of a year, and (2) the data itself present in the extract upon which the model is running has not fully accounted for all offenders in the corrections system.

Matt Frank asked how the model accounted for rate of release by the parole board. Hariharan showed how that figure was adjustable, and that scenarios 1 and 2 assumed the historical rate represented in the data the modelers were given.

McCann commented that if the committee members, familiar with the new law, were having difficulties grasping these numbers, the legislature when it read the committee's report would have the same difficulties. Hurley commented that other states which have implemented Truth-In-Sentencing have controlled population by releasing more old prisoners than previously. He expected to see an optimistic decay curve of old world population for the first 3 to 5 years of Truth-In-Sentencing, but after that the curve would level off.

Tyllo also discussed some of the the graphic displays of "old world" and "new world" forecasts for the individual crime categories listed above. He warned the committee not to misinterpret the slopes of the lines for each crime, as the scalings are different on the vertical axis of each graph. Tyllo discussed the modelers' next steps. He asked whether the committee was satisfied with the input template - the "dials" the committee could adjust to run different scenarios. The members were satisfied. He acknowledged the need to "back test" the model against more historical years to discern the discrepancy in numbers which concerned the committee.

McCann commented that the major significance of what the modelers had done was that regardless of the accuracy of the underlying data, they had constructed software that can forecast a variety of crimes and total numbers of offenders incarcerated, on probation, and revoked. Judge Barland asked for further reactions of the committee members to the model itself, if not the data it was running on. Judge Lamelas asked that the "old world" and "new world" decay curves be broken out next to the graph combining them. She also asked that the vertical axis for the individual crime graphs be uniform. Tyllo agreed that both could be done.

McCann liked the model, and repeated that he thought reality lay somewhere between scenarios 1 and 2. Judge Sykes thought that while judges may not shorten already shorter prison sentences - 1, 2, and 3 years - longer sentences may decrease a bit to better reflect time-served; she also agreed with McCann. Judge Barland commented that how judges handle shorter sentences in the new world is a great unknown. Matt Frank said that the sentencing guideline subcommittee should promulgate some recommendations for such sentences.

Judge Fiedler asked Hariharan whether median time to first release included credit for pretrial incarceration. After some discussion. it was concluded that the model did so include.

At 12: 10 p.m. the committee broke for lunch, which members ate in the hotel.

At 1 p.m. the committee reconvened in a larger room to better accommodate presenters and visitors. Judge Barland asked Hariharan whether there was anything else he wished to report. Hariharan asked, given the constraints previously discussed, whether the model's approach - not so much the numbers - was satisfactory to the committee. Judge Barland asked whether anyone had an objection or question as to the basic model itself. Nobody did. Judge Lamelas thought the problem could be with the data. Senator Huelsman asked if the model could forecast whether and when a new prison was needed, and if so, how much it would cost. Hariharan responded that the model tracks fixed and variable costs for prison construction, and at predetermined figures - say 500 offenders - can state how much more prison space is needed, and roughly forecast how much that new prison space, and/or new ES supervision, would cost.

Hariharan stated that the model's strength lies in is its ability to examine each crime category, and build forecasts up from the particular to the general, rather than to dictate an across the board percentage decrease, and let the model control which categories or variables should be changed (although it could accomplish that latter function as well). Brennan commented that there are many variables that may be changed in the template, and those changes each had many ramifications. Percentage changes in the consumption or category level makes for a finer forecast than a scenario-wide percentage change.

Judge Barland thought it clear from the discussion that morning that the model could do what the committee would ask of it, but that the data used was of questionable validity. He thought there were sufficient questions as to the data now that he would not then feel comfortable forwarding projections made on that data to the legislature. Bill Jenkins asked, if there was no other starting point other than questionable DOC data, what should the committee do to forecast the impact of its policy recommendations upon the corrections system?

McCann thought there was a problem with the revocation rate, and Judge Barland commented that some of the raw numbers of occurrences of specific crimes were low. Judge Lamelas suggested checking those numbers on CCAP. Brennan offered that certain problems could be fixed within the data itself, and then it could be re-extracted and the model run upon it again. Mark Loder of DOC-BTM wanted to investigate the data problems identified, for example, a disparity in actual and modeled rates of revocation.

Judge Barland asked how the committee could validate the data. Mike Smith thought there are a couple of areas in which doubt may exist about the data: (1) raw numbers, and (2) probabilities of transitions between legal statuses. Both of these are being derived from examination of past data. He asked in which of these, if either, the modelers had confidence. Brennan thought more confidence existed in (2)than in (1), as there was probably a large enough statistical sample to arrive at (2). Hariharan said that the modelers had had this conversation with DOC representatives several times in solving a "date overlap" problem - the record of an offender's episode occupying more than one legal status at a time when it should not. Smith thought that all the model is trying to do is to use yesterday to predict tomorrow. So Smith thought the committee should attempt to model yesterday better, which will allow a more accurate prediction of tomorrow.

Brennan thought wise persons could meet and discuss median sentence lengths, and check raw numbers against published reports. But the probability determinations of an offender moving among legal statuses is an aggregate figure that few could necessarily accurately recognize - e.g., how many defendants convicted of possessing cocaine had their probation revoked and were sentenced to prison for a certain amount of time but then had their parole revoked as well. He thought there were 2 ways to use a group of wise persons: (1) validating the median sentence lengths for different crime categories, or (2) based upon anecdotal experience, check the transition percentages from incarceration to parole, or from probation to incarceration, etc. Such a group could do (1) well, but (2) would be more difficult.

Bill Jenkins thought someone should aid Brennan in this effort, perhaps a representative from each subcommittee, since the committee is already going forward with its work, not waiting for the model.

Judge Wells expressed concern about use of median numbers, given that they can differ greatly for short versus long sentences. Hariharan mentioned that using the modal figure might therefore be helpful, although he thought in this data the modal figure would be close to the median. Wells thought the key sentences would be 4 years and under, and he wanted accurate data for those shorter sentences.

Judge Sykes discussed how she, Judges Barland and Lamelas, and Mike Brennan would be surveying the judges attending the Criminal Law & Sentencing Seminar, which will take place on May 20, 1999. There, they would ask the judges gathered to pronounce indeterminate and determinate sentences for numerous scenarios involving different crimes and defendants. She thought an analysis of these survey responses would be helpful to the committee.

Senator Huelsman thought Bill Jenkins's suggestion of a subcommittee for computer model assumptions was a good idea. She thought we should wait until after the May 20th survey of the judges. Judge Barland thought the full committee seemed to agree with this idea. Judge Fiedler sensed more difficulties with the data, and that the committee was content with how the set-up of the model. He especially liked the 2 scenarios chosen. Judge Sykes agreed.

Judge Barland referred to the sample conversion table developed by the sentencing guidelines subcommittee in its work. Judge Barland will seek the numbers of offenders receiving shorter (3 years and less) prison sentences in each of the main crime categories DOC tracks: assaultive, sex assaultive, drug, and property/other. Mark Loder agreed to provide that information.

Mike Smith pointed out that if the resources available to contain the behavior of offenders is dramatically different between probation and ES, it could change the behavior of many judges. Steve Hurley thought, for example, if substantially greater resources are available for ES than for probation, a judge may be induced to give prison time with ES rather than probation with jail time as a condition. Smith said he meant to suggest that given probation's inadequacies, upon which the committee appears to have a consensus, this would suggest high rates of revocation from probation. And that might be accelerated by knowledge that parole, now that it is ES, may be more meaningful.

Judge Barland said that while our committee is not charged with examining probation and parole, it had become increasingly clear that the committee will recommend strengthening and/or reinventing probation and parole, as it has and will have a significant impact on prison population. He said concerns about probation and parole had surfaced at each committee meeting, and he thought it was an issue that would have to be included in the committee's report.

At 2 p.m. the committee broke into its various subcommittees, which met until 4:30 p.m.

Subcommittee Reports

At 4:30 p.m. the committee reconvened and received short reports from the subcommittee chairs. On behalf of the code reclassification subcommittee, Tom Hammer said that subcommittee had continued its work classifying the criminal code felonies, and would continue to do so on Friday. He also said the subcommittee would attempt to begin classifying the non-criminal code felonies after that.

On behalf of the extended supervision revocation ("ESR") subcommittee, Judge Fiedler said that the subcommittee continued to work through its working paper, and discuss ramifications of its recommendations with individuals from DOC, Department of Justice, the administrative law judges ("ALJ"), and the state public defender's office ("SPD"). The subcommittee will recommend changes that would shorten the revocation process from an average of 84 days to 71 days. The subcommittee was examining an intermediate step between an alternative-to-revocation and full revocation - a "time out" which would include detention in an incarcerative facility, but for a short period of time to let an ES supervisee know that violations of ES conditions would be punished, but could be done so short of full revocation. Mike Tobin and Marla Stephens of the SPD's office discussed how speeding up the revocation process too quickly could adversely impact their attorneys' caseloads. Marla Stephens mentioned that the "time out" probably would not impact either the SPD's or the ALJ's.

On behalf of the sentencing guidelines subcommittee, Greg Everts diplomatically termed their discussion frank and useful. Some movement was made in the format for the guidelines, but some issues previously discussed were also rehashed. It was agreed to move the graph to the end of the guideline, and to clean up the form by transferring some information to be "checked off' to a companion laminated card. As for the replowing of old ground, he said there was still resistance to the idea of scoring criminal history. It was agreed that all amendments to the draft guidelines would be put in writing for further discussion.

At 5:00 p.m. the committee broke for the evening, and ate dinner together at the hotel.

Friday, May 14,1999

At 8:00 a.m. the subcommittees met in the same locations they had on Thursday.

Subcommittee Reports

At 11:OO a.m. the full committee reconvened to hear reports from the subcommittee chairs,

Judge Fiedler, for the ESR subcommittee, reported that yesterday's work continued. He said all changes to the working paper would be made for its distribution to the full committee at its next meeting.

Judge Lamelas, for the sentencing guidelines subcommittee, said that the guidelines' format had been altered to remove criminal history scoring, and to incorporate instead a ranking of "low, medium, or high" risk. Judge Barland along with Mike Smith had worked on these revisions. She realized that this new format was somewhat inconsistent with the vote taken at the March 1999 full committee meeting in Waukesha. She thought that when the full committee examined the new format, members would either like it or be so worn out by the process that they will simply go along with it. She also thought that in addition to the sample conversion table, there would be another sheet accompanying the guideline which will list aggravating and mitigating factors, not necessarily denominating them as such, but which could be legitimately considered at the time of sentencing to trigger participants' memories as to what factors they might consider in deciding to place a defendant in a low, medium, or high risk column.

She thought the subcommittee had made much progress on the format of the sentencing commission. Those recommendations had been reduced to writing and had been forwarded to the Department of Administration for evaluation and cost estimates, which would be distributed to the full committee upon receipt. Also, on June 11, a focus group of judges from around the state would be surveyed as to their ideas as to proper sentence lengths for a variety of the most-litigated crimes. Former Wisconsin Supreme Court justice Janine Geske has agreed to moderate that survey. Judges from around the state will be invited to attempt to achieve some geographic balance in the opinions surveyed. A list of 42 judges to invite had already been developed, but she anticipated that some judges may not be able to attend due to its close date. The idea behind the focus group is for the judges to examine the draft guidelines with fact scenarios in mind, develop numbers for the cells in the graph, and contrast how those numbers related to the former guideline numbers adjusted downward for time-served.

Matt Frank asked whether the subcommittee is moving away from listing crime-specific aggravating and mitigating factors. Judge Lamelas said the form would include a line on which the judge considered relevant prior criminal history, and that such aggravating and mitigating factors would be taken off of the form and listed on an accompanying sheet. Frank expressed concern that the code reclassification subcommittee was operating under the assumption that most penalty enhancers would be listed as aggravating factors on the form, and that without that being done, such penalty enhancers would have to remain as statutes to be pleaded and proved. Frank also asked whether the projection model would be used to assess the impact of the numbers chosen for the cells in the graph. Judge Lamelas said that question had not yet been addressed, as the subcommittee was still discussing the format of the guidelines. Mike Smith thought that Matt Frank's suggestion would be beyond the capacity of the model as constructed, but that there must be confidence that the model correctly predicts current sentencing behaviors.

Judge Lamelas would like the guidelines subcommittee to address the ten crimes which consume the greatest amount of prison resources, which she understood to be about 75% of those resources. This list included some drug offenses. McCann thought that judges would not adjust shorter drug sentences downward. He had talked with Secretary of Corrections Jon Litscher about a different type of minimum-security facility, which would emphasize education, for certain drug offenders. Secretary Litscher had not yet gotten back to him with a proposal. McCann did not see Milwaukee adjusting its sentencing recommendations downward for time-served as to certain drug crimes, e.g., adjust a 2 year sentence down to 6 months, which the offenders are currently serving. He thought that example he gave of drug offenders without prior records included about 200 offenders. Smith said that not changing that policy would mean the necessity for 600 more beds: 200 offenders staying 3 times as long.

Judge Wells could not predict what judges would do, but his gut feeling was that they would not adjust sentences downward. He thought McCann was on the right track to make some sort of minimum-security facility recommendation for some drug offenders. Judge Barland mentioned that a program in Arizona for mandatory treatment for drug possessors had come to the committee's attention. He also mentioned that the committee could recommend that the minimum time in prison be reduced to something less than 1 year, so an offender could be sentenced to 9 or 10 months in prison.

Judge Lamelas thought that there should be another type of supervision judges could use. She thought it would be difficult to sell politically if we would only recommend such a minimum-security facility for 1 type of offender - who violated certain drug offenses, and who did not have a prior record - and not for other types of offenders, like property criminals. Barbara Powell agreed.

McCann and Hurley discussed offenders receiving 1 year sentences, including how quick paroles for drug offenders on these sentences can disproportionately affect Milwaukee. Hurley thought if such offenders were only serving a portion of that sentence, the "new world" sentence should be dropped accordingly. McCann distinguished between a marijuana dealer receiving that sentence in Rothschild, Wisconsin and a street-level cocaine dealer in Milwaukee. McCann thought that while the former's sentence could be decreased in the "new world," the latter should serve at least 1 year in prison. Hurley thought that had the potential to cost more than the state could afford, and he thought the committee should give some guidance on that question.

Judge Barland said shorter term sentences, especially for drug offenders, was a complex problem to address. That is why the committee is securing the numbers of shorter sentences per DOC-tracked categories to study the problem.

Mike Tobin said that by and large, the SPD's did not see cases involving violence and gang activity, but offenders who used drugs and were addicted. He said undercover cops are not picky about who they pick up, and many people of limited mental ability were being captured in the law enforcement net. Judge Lamelas said that drug use is tied to a vast majority of homicides, which have increased again this year and which are a real problem. Tobin thought there were offenders being charged with possession with intent to deliver who were going to consume the drug with a few people they know, and he did not think they should be charged with possession with intent to deliver.

Judge Barland reminded the committee that members had discussed this issue at length at its December 4, 1999 meeting, and that the code reclassification subcommittee had not yet classified drug crimes. Judge Lamelas said that while she saw one offender convicted for passing a marijuana cigarette, he was a Latin King gang member who later came before her on a homicide charge. An offender's background influences with what he is charged. As to the mental limitation issue, she has seen offenders of limited mental ability who are still very dangerous.

Tom Hammer, for the code reclassification subcommittee, reported that they had just about finished classifying the criminal code felonies, and that the subcommittee would meet on May 27" to do so and then to classify the non-criminal code felonies. At the next meeting he expected the subcommittee would present to the full committee proposed classifications for all felonies except for drug crimes.

Mike McCann asked whether Tom Hammer could relay the putative classifications for the 10 most used crimes to Judge Lamelas for use as the guidelines subcommittee does its work. Tom Hammer said he could do so.

At noon, the committee adjourned for lunch, and until its next meeting, which will take place on Friday, June 4, 1999, at 9:30 a.m., in the North Hearing Room of the State Capitol, Madison, Wisconsin.

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Tuesday, June 15, 1999 8:45 AM
To: Alison Poe; Amanda Todd; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Bob Pultz; Charles Hoornstra; Cindy Archer; Cindy O'Donnell: David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; James Johnston; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Mark Grapentine; Mark Wehrly; Marla Stephens; Marline Pearson; Matt Bromley; Melissa Gilbert; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; William Lundstrom
cc: Brennan, Mike
Subject: June 21, 1999 Code Reclassification Subcommittee Meeting

Attached please find the Agenda and Notice of Meeting for the above referenced meeting.

Jennifer Dubberstein
Program and Planning Analyst
Criminal Penalties Study Committee
(414) 227-5103
jennifer.dubberstein@doa.state.wi.us

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Code Reclassification Subcommittee

Monday, June 21, 1999
9:30 a.m.

The Country Inn Hotel & Conference Center
2810 Golf Road (take Exit 293, Hwy. T, off of Interstate 94)
Waukesha, Wisconsin 53187
Suite 205

1. **Call to order - Subcommittee Chair Professor Tom Hammer**

2. **Review controlled substances felonies for classification in the A-I system.**

3. **Conclude review of Criminal Code felonies and felonies codified in Chapters 11 to 70 of the Wisconsin Statutes.**

4. **Adjournment**

Olsen, Jefren

From: Dubber-stein, Jennifer
Sent: Tuesday, June 22, 1999 3:00 PM
To: Alison Poe; Amanda Todd; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Bill Grosshans; Bob Pultz; Charles Hoornstra; Cindy Archer; Cindy O'Donnell; David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; James Johnston; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jessica Weltman; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Mark Grapentine; Mark Wehrly; Marla Stephens; Marline Pearson; Matt Bromley; Melissa Gilbert; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; William Lundstrom
cc: Brennan, Mike
Subject: June 25, 1999 Criminal Penalties Study Committee Meeting

Attached please find the agenda for the above referenced meeting and the minutes from the June 4, 1999 meeting.

Jennifer Dubberstein
Program and Planning Analyst
Criminal Penalties Study Committee
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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Friday, June 25, 1999
9:30 a.m.

North Hearing Room
State Capitol Building
Madison, Wisconsin

1. **Call to order - Chair Judge Thomas Bat-land**
2. **Consideration of minutes of June 4, 1999 meeting**
3. **Discussion of 1998 felony conviction data provided by Robert Brick - Judge Barland**
4. **Sentencing Guidelines subcommittee report and discussion of guideline format- Judge Elsa Lamelas**
5. **Presentation of Computer Model - technical consultants Hari Hariharan, Russ Lutz, and Bob Tyllo**
6. **Any public comments**
7. **Adjournment**

Criminal Penalties Study Committee

June 4, 1999 Meeting Minutes
North Hearing Room, State Capitol Building, Madison, Wisconsin

The committee's chair, Judge Thomas Barland, called the meeting to order shortly after 9:30 a.m. Present were: Nicholas

Chiarkas; Professor Walter Dickey; Matt Frank for Attorney General James Doyle; Greg Everts; Judge Patrick Fiedler; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman; Steve Hurley; Judge Elsa Lamelas; Judge Mike Malmstadt; District Attorney Mike McCann; Barbara Powell, Linda Pugh, Judge Diane Sykes; and Judge Lee Wells. Absent were Brad Gehring and William Jenkins.

The committee approved unanimously the minutes from the May 13-14, 1999 meeting in Wisconsin Dells.

Judge Barland spoke briefly concerning the status of AB 200, which would extend the committee's reporting deadline to August 3 1, 1999, and provide additional funding for the new fiscal year. The bill passed the Assembly by a vote of 89-8 on March 16, 1999, passed the Joint Committee on Finance by a vote of 16-O on May 27, 1999, and is scheduled to be considered by the Senate when it reconvenes. Judge Barland also mentioned that he has been working with Secretary of Administration Mark Bugher and Budget Director Rick Chandler to secure an additional $20,000-30,000 to finish the computer model and address some of the committee's concerns about the model at the May 13-14, 1999 meeting at the Chula Vista resort.

Judge Barland led a discussion concerning future meeting dates beyond those the committee had already scheduled. It was agreed to schedule meetings on **Friday, July 30, 1999, at 9:30 a.m.,** and **Friday, August 20, 1999, at 9:30 a.m. (if necessary).**

Judge Barland said that he, Tom Hammer, and Mike Brennan had circulated a preliminary draft outline for the committee's report among themselves, and that in the next 2 weeks they would begin drafting the committee report.

Presentation on Judicial Survey at
1999 Criminal Law & Sentencing Seminar

Judges Barland, Sykes, and Lamelas, and committee program and planning analyst Jennifer Dubberstein discussed the truth-in-sentencing presentation at the 1999 Criminal Law & Sentencing Seminar in Eau Claire on May 20, 1999. 104 judges participated in a series of sentencing exercises which Judges Barland, Sykes, and Lamelas developed. Judge Barland also led a discussion concerning truth-in-sentencing.

Judge Sykes described the sentencing exercises for burglary, armed robbery, sexual assault, and drug cases. Each crime had 'mitigated, intermediate, and aggravated fact scenarios, which the judges considered using low-, medium-, and high- risk offender profiles. The room was divided in half, so ½ the judges scored ½ the scenarios under current law, while the other ½ of the judges scored ½ the scenarios under truth-in-sentencing. Then halfway through the scenarios, the judges switched, and scored under the other system. A spreadsheet analysis of the judges' sentences was distributed to the committee, a copy of which is in the committee's files. In general, judges sentencing offenders under the new truth-in-sentencing law lowered the prison component of the new bifurcated sentences for burglary, armed robbery, and drug dealing, but not for sexual assault. Overall sentence lengths increased, as judges gave lengthy extended supervision ("ES") periods for some scenarios. Judge Malmstadt pointed out that the overall period of state involvement with an offender is increasing in the truth-in-sentencing sentences.

Walter Dickey asked whether or not the topic of the length of ES came up. Judge Sykes confirmed it did in the discussion after the sentencing scenarios. The issue of confidence in community supervision also was raised, and a substantial minority of judges did not express confidence in probation/parole supervision.

Dickey asked whether or not judges discussed what the parole time on an "old-world" sentence would be when they wrote down what they thought the "new world" sentence should be. Judge Lamelas responded that judges raised such questions informally. Some judges thought the legislature wanted them to reduce sentences, but never expressly said so. Some judges thought the legislature wanted the judges to "take the heat" for reducing sentences in the truth-in-sentencing world. Judge Lamelas's reactions were that: (1) judges mostly decreased the prison component of the sentence in the truth-in-sentencing sentences, and (2) these sentences were written down without any guidance system, which could educate judges on certain parameters for typical cases.

Matt Frank asked whether or not these figures could be run through the computer model. Mike Brennan responded that the sample those figures represented was much smaller than the actual data the model uses. Frank said that although he found these results interesting, this exercise involved judges answering questions anonymously in a collegial setting in an educational exercise. That was much different than sitting in court pronouncing sentence after advocacy and with the defendant, crime victim, and press present. Judge Barland agreed that this was a "gut reaction" by judges. Judge Lamelas questioned how valuable this information would be run through the computer model because judges asked questions such as "did the defendant go to trial?," and "what was the prosecutor's recommendation?'

Tom Hammer noted that the truth-in-sentencing maximum penalties the judges utilized were those after Act 283, but before this committee's recommendations: for example, 10 actual years of incarceration for burglary, vs. 7 1/2 years as the code reclassification subcommittee has recommended.

Judge Lamelas's anecdotal review of the scoresheets yielded that out-state judges who see less violent crime seemed to give

longer truth-in-sentencing sentences than urban judges, who might have more experience with a regular rather than an aggravated armed robbery. Matt Frank commented that he and Mike Brennan would run a similar, although shorter, experiment with prosecutors' recommendations in Door County on June 16, 1999 at the State Prosecutors Education and Training conference.

Judge Barland asked Judge Lamelas whether or not the judges offered her other comments about truth-in-sentencing. She said that judges uniformly disliked guidelines. She explained to them that developing sentencing guidelines was part of Act 283's mandate, and thus the legislature's idea, not the committee's. Judge Fiedler asked whether or not judges seemed to comment that the legislative intent was that sentences should be longer. Judge Sykes said some judges seemed to think so, but some judges also said that they were not going to take the political "hit" for reducing sentences.

Judge Wells attended the Eau Claire seminar and said that the truth-in-sentencing sentences given by the judges seated in his row, not from Milwaukee County, appeared long. But judges also commented to him that they would adjust their sentences downward to reflect the period of incarceration the offender would have served under current law.

Judge Lamelas asked Senator Huelsman whether or not the legislature would criticize such reductions in sentences. Senator Huelsman agreed that would be a problem if legislators criticized lower truth-in-sentencing sentences which were in fact the same length or longer than current law sentences. She thought the committee's education efforts should attempt to prevent that possibility.

Matt Frank commented that although we might not know exactly what will happen when truth-in-sentencing goes into effect, we do know that in states which have implemented truth-in-sentencing, prison population and corrections costs have increased. He thought this committee had to inform the legislature as to what these changes may cost the state.

Judge Sykes thought there was no uniformity in how the prison component of "new world" sentences was decreased, or whether the judge used first release eligibility or mandatory release under the current law as the period of time for the truth-in-sentencing sentence. She thought it accentuated the need for a good guideline system that would increase predictability. She said the issue of the variance in the sentences cannot be overemphasized, because in some cases it was decades different.

Walter Dickey wondered about the power of any guidance system. He thought that given this committee's recommendations, judges will do what they wish anyway. He thought judges might do a conversion, perhaps guided somewhat by this committee's work, and they might increase ES. Dickey thought the committee was overestimating the power of the guidance system, and he wondered why the committee thought judges would follow it. Judge Sykes thought because the guideline will provide a starting point from which judges would depart in certain cases.

Judge Fiedler noted that another factor which will affect consumption of corrections resources is that on a current 18- or 24-month sentence, an offender serves substantially less time than that, while every day of a truth-in-sentencing 1, 2, or 3 year sentence will be served. He did not think in the "new world" that judges would shy away from giving such shorter prison sentences if the offender deserved it. Judge Lamelas reminded the committee of the Brillion police officers who testified before the committee on February 19, 1999 about the Rogers' child abuse case and how important it was to them whether the defendant served time in prison or on probation.

Judge Sykes thought it important to educate judges on the proper use of ES such that it not be misused by giving lengthy ES periods, as occurred with intensive sanctions. Walter Dickey thought one of the great unknowns was how judges will structure and stack sentences in the "new world" in multiple count cases, as each of the sentencing exercises was single counts.

Judge Malmstadt referred to the truth-in-sentencing sentences in the spreadsheet, and concluded that the lower-end crimes had prison terms decreased the least, and higher-end sentences had prison terms decreased the most. He found that scary because that means the least-serious offenders would use increased corrections resources. He would prefer that the more serious offenders use more corrections resources. Malmstadt also said that the sentencing disparity present at such conferences always concerns him, as while judges wave the flag of judicial independence, it also can look like judges are sentencing merely on whim. Steve Hurley thought that part of the scoring might be explained by the lack of advocacy before the scenarios were scored. He thought advocacy tends to produce more similar results than disparate results.

Judge Barland added that at least 1/3 of the judges present at the Eau Claire conference expressed a lack of confidence in probation and parole supervision. Also, most judges do not want a lot of paperwork to be required to be filled out at sentencing.

Code Reclassification Subcommittee Report

Subcommittee chair Tom Hammer reported on the work of the code reclassification subcommittee. One week before the meeting, he had distributed color handouts displaying the subcommittee's proposed classifications of approximately 400 criminal code felonies into the proposed Class A through Class I scheme thus far. At the meeting, he had handed out an array classifying Class A misdemeanors. Copies of these materials are in the committee's files.

First Hammer referred to the main classification document which arrays a majority of the felonies in the criminal code into the new Class A-Class I system. He discussed the reactions from certain committee members to the classification of certain crimes. He took those recommendations and questions to the subcommittee, and in most instances the subcommittee adopted the recommendations and suggestions of the committee members not on the subcommittee. One example is to preserve the aggravated-unaggravated distinction in the current law for the crime of burglary, and classify those 2 crimes differently, rather than to employ a residential aggravator and then classify the crimes, as the subcommittee had initially concluded.

Hammer pointed out that the violent crimes are classified at the upper end of the A-I scale, and that property crimes populate the lower 2 classes, H & I. He pointed out the new threshold dollar levels for crimes such as theft, retail theft, and receiving stolen property: $2,000 for a Class I felony (18 months prison, 2 years ES), $5,000 for a Class H felony (3 years prison, 3 years ES), and $10,000 for a Class G felony (5 years prison, 5 years ES).

Hammer appreciated committee members' past comments upon the master list of crimes, and he hoped that members would continue to review it and give him reactions on the placement of certain crimes, as the document was rapidly evolving from draft status to becoming the full committee's recommendation. He also said that the list is footnoted heavily with concerns about certain crimes, and that the document includes a list of things the legislature will need to consider if the committee's proposal is adopted.

One issue the subcommittee is still considering is the proper classification of first-degree reckless homicide and second-degree intentional homicide. The subcommittee has debated at length whether these crimes should be classified at the same level, or at different levels, and what that classification should be. The subcommittee has heard extensive arguments from the Attorney General's office and the State Public Defender on these topics. Also, the subcommittee has discussed at length how to classify the crime of juvenile absconding, which currently appears in each crime classification.

Judge Wells asked if the master list reflected whether the amount of punishment time for the crimes as classified went up, stayed the same, or went down. Judge Barland thought that was an important fact which legislators will want to know: where has the committee increased maximum penalties over the present law, where have penalties decreased, and where have penalties stayed the same? Legislators have their favorite crimes, and they will want to see where those crimes have been classified. Hammer said that each crime printed in green on the master list has had its maximum penalty increased from the current law, each crime printed in red has had its maximum penalty decreased, and each crime printed in black has stayed the same.

Judge Malmstadt asked Walter Dickey whether the question of whether or not to group first-degree reckless homicide and second-degree intentional homicide in the same class together had arisen on a committee on which they had both served sometime back. Dickey said that it had.

Dickey thought the question the subcommittee should be prepared to answer is what principles should guide classification. He had not heard those principles articulated yet. He said traditionally there are two such principles: fault expressed through mental state, and degree of harm caused. He did not see a lot of consistency in the application of those principles in the master list. He thought that who the crime victim was seemed to matter most. Because it was difficult to discern what principles have informed these classifications, it invites the criticism that a certain group of people just sat around and thought the crimes should be classified as they had been. Dickey heard a mixture of principle, political considerations, and empirical facts which may or may not be true. He found that troubling. He recognized that given the state of the criminal code, such an effort is enormously difficult, but he thought it should be the goal for the committee.

Hammer responded that the legislature to date has not been consistent as to whether classification should proceed according to harm or mental state. In some crimes, those distinctions are set up nicely, but in others of more recent vintage a strict liability mental state has been imported which can skew classifications. Hammer said the subcommittee looked at offenses, as Act 283 asked, to group them by similar severity. For example, Hammer referred to a color chart depicting homicide and serious-injury felonies. By placing crimes in different colors but next to each other on the chart, the subcommittee could compare and contrast different crimes to determine whether similar crimes were in the same classification, both as to mental state and to harm.

Dickey appreciated that the master list was the subcommittee's best call, but he would feel better if he could identify principles by which these decisions were consistently reached. He said a related point was that the lesser-included offenses statute does not work at all. Hammer said the subcommittee found rewriting that statute to be beyond its workload capacity.

Dickey said an unaddressed question in the committee's work is guidance for prosecutors in the charging decision, including as to lesser-included offenses. He thought this left a large gap in the committee's work, and that an important piece of work for resource consumption and for guidance is the charging decision and the lesser-included offense statute. Hammer said that there are a number of projects the subcommittee has identified for the legislature to tackle.

Steve Hurley asked whether or not the subcommittee had considered if a no-contact provision as a bail condition should allow a misdemeanor charge to become a felony charge. Hammer said the subcommittee would consider that issue.

Matt Frank responded to Walter Dickey's points by stating that at a number of the early meetings of the code reclassification subcommittee its members had discussed at length the proper principles to be employed in classification. Frank thought it important that those principles be articulated in the committee's report such that the legislature and the public not conclude that the classification of crimes was just at the whims of committee members. Those principles included: (1) higher classifications for violent crimes which affect the victim's bodily integrity; (2) lower classifications for property crimes which do not affect the victim's bodily integrity; (3) deference to past legislative judgments, since the subcommittee did not feel the need to write on a clean slate; and (4) the worst-case factual scenario for a crime, including any penalty enhancer which might be folded in, to classify the crime's maximum.

Judge Barland asked Walter Dickey whether or not he had any suggestions for the committee on how to solve problems with the lesser-included offense statute. Dickey responded that he did not think this committee would solve those problems, but that rather than search for a generalization that covers the whole code, he would delineate which crimes are lesser included offenses of others, not unlike the cascade charts Hammer developed.

Hammer discussed the classification of Class A misdemeanors. The subcommittee had considered all 101 such crimes, and largely concluded that they were classified properly, except for a few crimes such as stalking, criminal damage to railroad property, and some weapons offenses in school zones, whose penalties they recommend should be increased to Class I felonies.

Hammer also discussed fines. The criminal code's uniform system of fines has not been altered since 1977. There was some concern that some serious crimes did not have high enough fines: **e.g.,** homicides by corporations had a limit of $10,000 fine per count. The subcommittee proposed the following fine structure, with exceptions for certain crimes, including some drug crimes:

Class A felony	No provision for a fine
Class B felony	No provision for a fine
Class C felony	$50,000 maximum fine
Class D felony	$50,000 maximum fine
Class E felony	$50,000 maximum fine
Class F felony	$25,000 maximum tine
Class G felony	$25,000 maximum fine
Class H felony	$10,000 maximum fine
Class I felony	$10,000 maximum fine
Class A misdemeanor	$10,000 maximum fine

If a crime's fine already exceeds these amounts, the subcommittee does not recommend changing the existing fine.

On the issue of caps for periods of extended supervision, the subcommittee considered lengthening the ES period for lower class felonies, and agreed to recommend that the period of ES on a Class I felony be increased from 18 months to 2 years. The subcommittee also recommends that statutory caps be placed on the maximum amount of extended supervision time the judge may impose at sentencing as follows:

Class A felony	ES eligibility up to court
Class B felony	20 years
Class C felony	15 years
Class D felony	10 years
Class E felony	5 years
Class F felony	5 years
Class G felony	5 years
Class H felony	3 years
Class I felony	2 years

Judge Barland raised a concern as to whether or not the ES periods for the lower end felonies were long enough to allow the offender to repay the victim any restitution ordered as a condition of ES. Hammer confirmed that that question had been discussed in subcommittee, but members expressed concern about maintaining supervision over an offender purely to collect restitution.

Steve Hurley wanted to confirm that the ES caps were driven by the worst possible case of that crime, rather than reclassifying one crime resulting in all crimes of similar severity also receiving increased penalties. Judge Barland thought that was an important point, especially as it related to time for penalty enhancers being included in the crime's classification.

Hammer said that he could not find a provision in Act 283 which spoke to whether misdemeanants who are placed in prison (such as habitual criminals) serve ES. Walter Dickey thought it important that such offenders serve a period of ES to transition back into the community.

On the issue of penalty enhancers, Hammer referred to a prototype sentencing statute that might incorporate some penalty enhancers which the committee may consider eliminating in light of the longer time periods for the crimes to which those enhancers might apply. He made it clear the subcommittee knew that such enhancers would have to be moved elsewhere but remain in the **statutes to** be acceptable to the legislature. He also alerted the committee that certain penalty enhancers are not being considered for transfer to a prototype sentencing statute, including those for dangerous weapons, crimes in school zones, habitual criminality, and hate crimes, as well as certain domestic abuse offenses. The subcommittee was clear that if aggravating circumstances were not going to be expressed as such in the sentencing guidelines, they did not want the penalty enhancers being transferred to a prototype sentencing statute.

Matt Frank stated that while for many crimes the worst possible case included facts implicating a possible penalty enhancer, he emphasized that the subcommittee was concerned that those aggravating factors which can include a penalty enhancer would not be denominated as such in sentencing guidelines. If not listed as aggravating factors, the subcommittee favored leaving the penalty enhancers as is. The reason is that if the committee is recognizing that the penalty enhancers are judgments that certain cases should be treated more harshly, then the guidelines should take those cases into account. Mike Brennan pointed out that under Act 283, penalty enhancers lengthen the bifurcated sentence past the statutory maximum period.

Judge Wells asked about penalties for drug crimes. Hammer said the subcommittee would meet to discuss those soon. Judge Bat-land complimented Tom Hammer on the high quality of the subcommittee's report.

The committee recessed for lunch from 12:lO p.m. to 12:45 p.m.

Extended Supervision Revocation ("ESR") Subcommittee Report

Subcommittee chair Judge Pat Fiedler gave a subcommittee report using handouts and overheads. The handouts included the subcommittee's working paper, a document which the subcommittee began drafting last fall and which has gone through various drafts throughout the subcommittee's meetings.

In its debate and consideration of the issues implicated by its statutory charge, the ESR subcommittee heard from various individuals from the Departments of Administration, Corrections, Justice, and the State Public Defender. These individuals spent much time educating subcommittee members and providing information for subcommittee debate.

Fiedler noted how it is obvious to committee members that in certain areas of the state, there is not much confidence in probation and parole supervision. The subcommittee made specific recommendations regarding **ES procedure,** including the costs of its procedures, with an eye toward people having confidence in ES.
The subcommittee recommends that all offenders enter ES at a strict level of supervision. Considerations in arriving at the appropriate level of supervision should include length of ES, dangerousness of the offender, movement between levels, treatment needs, and community environment/support network. The subcommittee wants the system set up so the offender has an optimal chance for success. The purpose of adoption of the strict supervision model is to increase the panoply of sanctions open to DOC to match the spectrum of possible ES violations. The subcommittee recommended that there be sufficient confinement beds to assure that offenders will be held accountable immediately, and noted that this will require sufficient funding. The recommendation concerning staff caseload is 20 offenders per agent.

The subcommittee also considered **possible sanctions for violation(s) of an ES condition(s).** Judge Fiedler walked through the various alternatives-to-revocation. Another sanction the subcommittee recommends is "time out": confinement for an amount of time not to exceed 90 days in an ES regional detention facility if available, or if not available, a county jail. This could only take place if a violation is alleged and there is a signed admission of same. Fiedler discussed the cost problem associated with this recommendation. It will require that regional ES detention facilities be developed to temporarily house ES supervisees. If not, they may need to be housed in county jails, and county sheriffs are concerned that they will not have sufficient room to do so. The reasoning behind "time out" is to provide corrections with a punishment mechanism that is shorter than full revocation, and which is more timely than revocation (i.e., does not take 70-80 days or more to accomplish). Currently, if an agent wants to accomplish the same end as "time out," the agent needs to start the revocation process, even if the agent has no desire to actually revoke. "Time out" lasting O-45 days must be approved by a DOC supervisor, and lasting from 46-90 days must be approved by 1 of the 8 regional DOC chiefs. Because confinement in "time out" is involuntary, some due process is required. It was agreed that this procedure would comport with due process because the supervisee has signed an admission of the violation(s), and the "time out" is in lieu of revocation. The attorney general's office has confirmed it can defend a basic disciplinary model such as this.

Tom Hammer asked whether if the supervisee does not sign an admission the supervisee can be placed into "time out." Fiedler said no, they cannot be placed there. Without a signed admission of a violation, the agent would have to begin the revocation process.

Judge Wells asked what will happen if the initial idea is for a "time out" placement, the offender admits the violation, but the sheriff says he has no bed space for such a placement. Judge Fiedler said that DOC badly wants this "time out" as an intermediate

option between an alternative-to-revocation and revocation; that the subcommittee thinks "time out" is a good idea; and that therefore it is incumbent upon DOC to come up with the detention spaces, and for the state to provide the funding. The subcommittee does not look at this concept as being an unfunded mandate to the counties or to the sheriffs. The subcommittee is not advocating one entity over the other. Walter Dickey pointed out that if 90% of offenders agree to this sanction, and 10% of offenders do not, you still have a new sanction to use short of revocation.

Fiedler also discussed **revocation of ES and return to prison. The** ALJ would continue to conduct the revocation hearing, would prepare a report containing specific findings of fact, would make the revocation decision, and if the ALJ decides to revoke, would recommend a period of prison time for the offender to serve. The circuit judge would actually decide the period of prison time, and subsequent ES time, which the offender would serve out of the ES component of the original bifurcated sentence. This would leave unchanged the current writ of certiorari path for circuit court review of the revocation decision. Judge Fiedler discussed the time frame for this procedure, and how the subcommittee had worked to decrease the period of time from hold to the decision being ripe for circuit court decision from 84 to 7 1 days. Judge Fiedler also briefly described the **recommended statutory and administrative law changes** contained at the end of the ESR working paper. A copy of this draft of the working paper is contained in the committee's files.

Matt Frank thought that the subcommittee's recommendations were excellent improvements procedurally in this system, but that the point must be made to the legislature that unless there are facilities to house these offenders, "time out," for example, would not work. Barbara Powell pointed out that construction recently began in Milwaukee on a new 1,042 bed probation and parole holding facility, which would be analogous to an ES regional detention facility. Judge Barland said that he has asked Bill Grosshans to prepare concrete recommendations for this committee to make to strengthen community corrections, and he hoped that Grosshans could give those recommendations at the committee's June 25" meeting. Judge Barland complimented Judge Fiedler on the ESR subcommittee's report.

At 1:45 p.m. the committee adjourned until its next meeting, which will take place at 9:30 a.m. on Friday, June 25, 1999 in the North Hearing Room of the State Capitol in Madison, Wisconsin.

Olsen. Jefren

From: Dubberstein, Jennifer
Sent: Monday, June 28, 1999 10:12 AM
To: Alison Poe; Amanda Todd; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Charles Hoornstra; Cheri Dubiel; Cindy Archer; Cindy O'Donnell; David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; James Johnston; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Mark Grapentine; Mark Wehrly; Marla Stephens; Marline Pearson; Matt Bromley; Melissa Gilbert; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Sykora; Robert Pultz; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; William Grosshans; William Lundstrom
cc: Brennan, Mike
Subject: July 2, 1999 Code Reclassification Subcommittee Meeting

Attached please find the Agenda and Notice of Meeting for the above referenced meeting.

Jennifer Dubberstein
Program and Planning Analyst
Criminal Penalties Study Committee
(414) 227-5 103
jennifer.dubberstein@doa.state.wi.us

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AGENDA AND NOTICE OF MEETING
STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE

Code Reclassification Subcommittee

Friday, July 2, 1999
9:30 a.m.

The Country Inn Hotel & Conference Center
2810 Golf Road (take Exit 293, Hwy. T, off of Interstate 94)
Waukesha, Wisconsin 53187
Suite 205

1. **Call to order - Subcommittee Chair Professor Tom Hammer**
2. **Continue classification of controlled substance offenses**
3. **Continue classification of non-drug non-Criminal Code felonies**
4. **Conclude classification issues for Criminal Code offenses**
5. **Adjournment**

Olsen, Jefren

From: Brennan, Mike
Sent: Wednesday, June 30, 1999 8:38 AM
To: Olsen, Jefren
cc: 'tom hammer'
Subject: RE: Code reclassification subcommittee draft

Jefren --

1) Yes;
2) Each of the 484 felonies in the statutes, those inside and outside the criminal code, will be classified with a letter code, Class A through Class I. That letter code will correspond to a maximum sentence, which will include a maximum initial imprisonment component and a maximum ES component.

Mike

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
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Milwaukee, WI 53203
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-----Original Message-----
From: Olsen, Jefren
Sent: Tuesday, June 29, 1999 10:37 PM
To: Brennan, Mike
Subject: Code reclassification subcommittee draft

Mike,

As time permits, I've been working on the code reclassification subcommittee draft over the last few days. I am using the subcommittee's 5/28/99 draft as drafting instructions. That draft includes treatment of "fleeing" in the traffic code. I assume that the "fleeing" crimes are those in s. 346.74 (5), which prescribes penalties for violation of s. 346.67 (1). Is that correct?

Also, is the subcommittee contemplating that every felony in the statutes will get a letter classification, or will letter classifications still be limited to crimes in the criminal code? If the latter, the draft I am preparing won't be able to amend the "fleeing" crimes to refer to their appropriate classification but will instead have to spell out the amounts of the fine and imprisonment (as the statutes do under current law). Also, to pick up the maximum ES for crimes outside the criminal code, the draft will either have to include the maximum ES in each penalty provision that is outside the code or amend s. 973.01 (2) to specify the maximum ES for offenses outside the criminal code.

Thanks for your help.
--Jefren

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