Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Wednesday, July 07, 1999 3:06 PM
To: Aiison 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; Maria 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: Friday, July 9, 1999 Criminal Penalties Study Committee Meeting

Attached please find the agenda for the above referenced meeting as well as the minutes from the June 25, 1999 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

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

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

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

2. **Consideration of minutes of June 25, 1999 meeting**

3. **Presentation on ideas for extended supervision and community corrections- representative(s) of the Department of Corrections**

4. **Code Reclassification Subcommittee presentation:**
   a. **recommendations for classification of controlled substance offenses**
   b. **recommendations for classification of non-criminal code, non-controlled substance offenses**
   - Subcommittee Chair Professor Thomas Hammer

5. **Discussion of sentencing guidelines format- Subcommittee Chair Judge Elsa Lamelas**

6. **Any public comments**

7. **Adjournment**

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Criminal Penalties Study Committee

June 25, 1999 Meeting Minutes
Room 417 North, State Capitol Building, Madison, Wisconsin

The committee's chair, Judge Thomas Barland, called the meeting to order at 9:40 a.m. Present were: Michael Tobin for Nicholas Chiarkas; Professor Walter Dickey; Matt Frank for Attorney General James Doyle; Greg Everts; Brad Gehring; Professor Thomas Hammer, the committee's reporter; Senator Joanne Huelsman; Steve Hurley; Judge Elsa Lamelas; Judge Mike Malmstadt; Judge Diane Sykes; and Judge Lee Wells. Absent were Judge Pat Fiedler; Bill Jenkins; District Attorney Mike McCann; Barbara Powell; and Linda Pugh.

The committee approved unanimously the minutes from the June 4, 1999 meeting.

Report on 1998 Felony Conviction Data

Judge Barland discussed a short report from Robert Brick which analyzed conviction information for the offenses of burglary and operating a vehicle without the owner's consent. The report showed a marked difference between Milwaukee County and other counties. In 73% of the cases in Districts 2-10 the charges were not reduced, but this was true in 86% of the cases in Milwaukee County. Of those cases in which the charge was not reduced, 36% were either dismissed or found not guilty in Districts 2-10, but only 16% of the cases were dismissed or found not guilty in Milwaukee County. Thus, of all the burglary and auto theft cases disposed of, whether the charges were eventually reduced or not, only 47% resulted in a conviction in Districts 2-10, while almost 73% resulted in a conviction in Milwaukee County. As for the use of probation for these crimes, in l-judge through 7-judge counties, 69% of offenders were likely to be placed on probation. In Brown, Dane, and Racine Counties, 66% of such offenders received probation. In Milwaukee, only 51% of such offenders were placed on probation.

Judge Wells commented that he never got the feeling from lawyers who practiced in front of him that Milwaukee County's sentencing practices were any tougher on burglars than any other county.

Sentencing Guidelines Subcommittee Report and Discussion
Report on June 11, 1999 Judicial Survey

Judge Elsa Lamelas reported on the June 11, 1999 survey of some circuit judges from around the state to determine sentence ranges for the graph to be used in the temporary advisory sentencing guidelines recommended by this committee.

Based upon an idea by committee reporter Tom Hammer, 47 judges who were thought to represent different viewpoints, different areas of the state, and who are well-regarded and experienced in felony sentencing were invited to Madison for a survey on June 11, 1999. Of the invitations extended, 18 judges accepted and attended the meeting, which was facilitated by former Wisconsin Supreme Court Justice Janine Geske.

At the meeting, the judges' opinions were solicited as to what were the characteristics of low-risk, medium-risk, and high-risk offenders, and what were the mitigated, intermediate, and aggravated forms of the 11 crimes which consumed the greatest amount of corrections resources. The statutory maximums recommended by the code reclassification subcommittee were used. The characteristics of each crime were discussed, and following each crime the judges wrote ranges of punishment into each cell of a 9-cell graph to be inserted into whichever guideline format the committee chooses. For each crime, Justice Geske led a discussion among the judges as to what ranges they placed in which cells and why. Judges were encouraged to rethink the ranges, and then submitted these draft graphs for tabulation by committee staff.

Medians were used to calculate minimum and maximum numbers for each of the cells in the graphs. There was horizontal and vertical overlap between the ranges in the cells: e.g., the highest number in the cell for a low-risk offender, committing a mitigated version of an offense, would be higher than the lowest number for a medium-risk offender committing the same version of the same offense. Also, the judges were surveyed as to whether or not they would recommend using the statutory minimum of 25% of the period of incarceration to be the period of time the offender should serve on extended supervision. The judges' responses to that inquiry - overwhelmingly "no" - were listed on the bottom of the draft graphs distributed to the committee members. Most thought that the amount of ES time should vary based upon the offender's risk characteristics, and the offense severity. The draft graphs were distributed to committee members on June 25, 1999 for their review and consideration.

Topics of discussion among the judges at the survey included how many cells should include probation as the lower number in the range in the cell, and whether or not the maximum number of years for the crime should be the highest number in the range in the cell in the most aggravated form of the crime for the highest-risk offender. The judges who attended worked hard and patiently in order to come up with sound, middle-of-the-road ranges for the cells in the graphs for the various crimes.

Judge Lamelas reported that the draft graphs were the topic of discussion at a June 18, 1999 sentencing guidelines subcommittee meeting. At that meeting it became evident that the judges who attended the survey had not considered everything, and adjustments were made in the monthly ranges in the graphs. A symmetry emerged in the monthly ranges in the cells. For each crime,

the median low was probation, and the median high was the statutory maximum. For most crimes, for a low-risk offender committing an aggravated version of an offense, a range of punishment was given identical to a range of punishment for a medium-risk offender committing an intermediate version of the same offense. Also, judges tended to give a higher sentence to an offender with an extended criminal history even though the offender had committed a more mitigated version of an offense, in contrast to a first-time offender or low-risk offender who had committed the most aggravated form of an offense.

The consensus among the judges who attended the June 11, 1999 survey, as well as the subcommittee members who attended the June 18, 1999 meeting, was that they wished to see relatively broad ranges in each cell to maintain a great deal of flexibility. Judge Lamelas thought that was consistent with the views of many of the people on the committee.

Matt Frank asked if there was any sense as to how many offenders would fall into each cell in the graph. Judge Lamelas said judges recognized that few offenders may fall into certain cells, but that judges concentrated on those 3 cells which could be most heavily populated - a low-risk offender committing a mitigated version of the offense, an intermediate offender committing an intermediate version of the offense, and a high risk offender committing an aggravated version of the offense. She said there was also much attention paid to the minimum number listed for the range in each cell because a judge may not want to sentence less than that minimum because of adverse public reaction.

Walter Dickey said that he was imagining himself as a judge filling in the graphs, and he imagined himself doing different things: sentencing as he would normally sentence an offender; sentencing as he thought that offender ought to be sentenced; and setting up ranges of guidelines for judges to use when sentencing. Judge Lamelas responded that she thought judges were drawing on their experience sentencing a variety of offenders who had committed these various offenses in their various permutations.

Judge Malmstadt said an attempt was made to brainstorm as to the various indicia of a low-, medium-, and high-risk offender who had committed that offense, as well as to list the indicia of a mitigated, intermediate, and aggravated version of the offense. Judge Sykes pointed out how the list of those indicia had been distributed to the committee members that day, and were available for review. While there was not always universal agreement - **e.g.,** some judges thought an addiction was an aggravating factor, others thought it was a mitigating factor -judges agreed on almost all of the indicia of a criminal's risk and an offense's severity.

To answer Walter Dickey's question, Judge Malmstadt thought the judges were writing in their normative judgments as to the proper sentence range for each cell. Judge Sykes thought so as well. She thought the judges paid special attention to the minimum in each cell. She also thought the judges recognized the practical reality of a judge not wanting to sentence less than a cell minimum because of adverse public reaction.

Judge Lamelas said the judicial survey did not purport to be a scientific process. Rather, it was an attempt to get a general reaction from judges as to what type of numbers they would place in a graph like the committee is contemplating inserting into whichever guideline format the committee recommends. She emphasized that the indicia of each cell, both offender risk and offense severity, were scrutinized, and that judges were encouraged, after they initially filled out the graph, to change the numbers they inserted if they changed their minds after group discussion of the numbers.

Walter Dickey asked whether when the judges were scoring, did they consider aggravating and mitigating circumstances when moving within the range in the cell, or moving between cells. He asked because the cells themselves already reflect the aggravating and mitigating factors listed, and to consider the same factors when within the cell could result in counting the same factor twice. Steve Hurley thought that was where the role of advocacy came in. A defense attorney should attempt to convince the judge that certain aggravating and/or mitigating factors were or were not present, and this would effect in which cell the analysis of an offender's sentence should begin. This would avoid the problem Dickey posed.

Judge Lamelas thought the survey demonstrated a fair amount of agreement among judges, even from different places and different points of view, how like offenders committing the same offense should be treated. She commented, and Judge Malmstadt agreed, that it was not possible to list all of the indicia for a certain cell, and therefore that judges would be free to move among them based upon advocacy. Judge Malmstadt agreed, but said that at some point a judge will have to state why the judge has begun his or her analysis of a particular offender in a certain cell. Judge Sykes emphasized that these guidelines are just a starting point for the judiciary, because they are advisory.

Judge Lamelas noted another concern which surfaced at the June 11" survey: some judges considered a certain characteristic to be related to offense severity, while other judges considered the same characteristic related to offender risk. She said that in the guideline format she proposes, such ambiguous characteristics were listed at the end, and identified as related to neither offense severity nor offender risk.

Walter Dickey said a critical eye cast on this exercise would say that a bunch of judges were gathered, generally described offenders, and filled in the graph cells. Certain factors were reflected in the graph, but judges can deviate from them if the judge feels strongly. Members of the public, and lawyers, were not present at the exercise. Why would you want to be guided by that? Judge Lamelas responded that one could examine the product, and determine if the end result made sense. Dickey said that by getting a

bunch of people together who said these numbers were right would not prevent another group of people gathering and saying their numbers were right. Judge Malmstadt said that at the subcommittee level, that weakness was recognized, but that given time and resource constraints, this was the equivalent of the wise person approach advocated by Kay Knapp from Minnesota. Judge Malmstadt said that while this process may be open to criticism, so is Act 283, the committee's enacting legislation, including the deadline for the committee's report.

Steve Hurley said that he and his colleagues have done a lot of sentencing as well, and that the graphs do not necessarily reflect their experience. He said he viewed the graphs as information. He said he was not going to delegate his responsibility to a bunch of judges who happened to get together one day and come up with these numbers. He said that if that was the proposal, he would not go along with it.

Judge Lamelas said that was not the proposal. She also viewed the survey as information for consideration by the subcommittee, and that if subcommittee members have a problem with the numbers, it should be aired in subcommittee. She also welcomed the views, preferably in writing, of members not on the guidelines subcommittee. She said that Walter's problems with the process by which the numbers were arrived at would always be there, but she did not know of any practical alternative.

Dickey thought the objective of the exercise was to guide decisionmaking to get better practice by lawyers and judges. He did not think these graphs or this exercise led to better practice. He thought people would do tomorrow what they did yesterday, unless something changed or happened. That is what he saw in these graphs. Mike Brennan pointed out that the committee had run two large sentencing exercises, with over 100 judges and 100 prosecutors each, in which after an education effort to explain the new law, the participants in the exercises decreased the length of the prison component of their Truth-in-Sentencing sentences. Judge Malmstadt responded that while the length of "new world" prison sentences did decrease in those exercises, he did not think they were dropping to what offenders were now actually serving to first release.

Matt Frank thought the June 1 1th exercise was a good idea. He thought the guidelines subcommittee should use the computer model to project the cost estimates using its proposed guidelines. He had a real difficulty with not being able to give the legislature an idea what the committee's recommendations would cost. He thought that if all the sentences will be going up, and the guidelines subcommittee had not considered the possible impact of those guidelines on prison population, the package the committee would be recommending to the legislature would not be able to project cost. Mike Brennan answered Frank that that day the committee would be presented with 5 forecasting scenarios. While the strength of the model is not its forecasting ability, due to data problems, it can do so. The model's strength is its ability to demonstrate the changes in various criminal categories relative to each other.

Presentation on Lamelas-Everts Format

Judge Barland asked Judge Lamelas to present her guideline format for review and consideration by the full committee. Judge Lamelas began with the debate at the Country Inn in Pewaukee in March 1999 over two formats - the Lamelas-Everts, and the Rule-of-Law, drafted by Walter Dickey and Mike Smith, and presented by Steve Hurley. One of the criticisms of the latter was that it did not have a form. Since then, Judge **Barland** and Mike Smith worked on drafting such a form.

Judge Lamelas used an overhead transparency to describe the Lamelas-Everts format, which included an **offense severity assessment** with statutory aggravating factors, non-statutory aggravating and mitigating factors, and crime-specific factors. This assessment ranks crimes as mitigated, intermediate, and aggravated. The format also incorporates **a risk assessment based on criminal history and other factors,** which utilizes a point system to assess points to prior violent crimes, and which includes an "out" question for the judge to indicate whether the score understated or overstated the offender's future risk to public safety. This risk assessment is ranked low, medium, and high. A **9-cell** graph is consulted based upon where these two assessments intersect. **This** gives the judge an advisory starting point from which to begin to sentence the offender.

Presentation on Barland Format

Judge Barland used an overhead to present his guideline format to the committee for review and consideration. The Barland format attempts to incorporate several points of view into a single guideline, and attempts to take a logical, step-by-step process in sentencing. The first issue is what did the person do that brings the person to court? Under this issue, a series of questions taken from the earlier Dickey-Smith approach are asked. The questions' intent is to cause the judge to evaluate the nature of the criminal act. Statutory aggravating factors are considered part of the offense severity. In the second step, a risk-assessment, or dangerousness analysis, is done of the offender. The principal difference between the two proposals was at that point **-** the Lamelas-Everts format uses point-scoring to rank an offender, while the Barland format asks a series of questions, some of which include past crimes, as well as other factors such as emotional stability, dysfunctional family, and history of employment. Judge Barland avoided point scoring in this area because in his judgment it put a scientific caste which does not exist onto this assessment. After the risk assessment is done in the Barland format, the duration of that person's dangerousness is determined.

Continued Discussion of Sentencing Guidelines Format

Mike Tobin asked whether or not in both systems a judge could place an offender in whichever risk category the judge decided. Judge Lamelas said yes. He asked Senator Huelsman whether or not the legislature might be satisfied with keeping penalty enhancers in the statutes as aggravating factors. She thought that keeping the aggravating factors in the statutes would be the most reasonable way of approaching the topic of enhancers.

Matt Frank asked whether it would be double-counting to do a risk assessment which included prior criminal history, but make habitual criminality a statutory aggravating factor. Judge Lamelas and Judge Barland agreed that you can make the same argument now -- the sentencing judge can take past criminal history into account in these two ways.

Steve Hurley took issue with some of the comments Judge Lamelas made in her preface. He said the full committee was never made aware of the fact that the Rule-of-Law approach received a plurality of votes in the guidelines committee deliberations in Pewaukee in March 1999. Judge Lamelas disputed that fact. Hurley gave an example of how he believed the criminal history scoring in the Lamelas-Everts approach was artificial: In the first case, a defendant has a prior conviction for a violent felony of battery, as when he was 17 years old he punched someone in a schoolyard fight and broke the victim's tooth. In the second case, the defendant entered a house at night for the purpose of committing a sexual assault, and although he had no prior convictions, after his arrest the defendant's wife came forward and told how the defendant had battered her for a lifetime. Under these examples, the first case gets a higher criminal history score than the second case. Hurley anticipated the Lamelas-Everts response - a safety valve question allows the judge to override an overstated or understated criminal history. Hurley's response is why set up a system that in practice produces this disparity and then asks a judge to go back and correct it?

Judge Sykes did not think the Lamelas-Everts format would produce the disparity Hurley illustrated because the second case would, by any definition, constitute an aggravated form of an offense, which would place the offender into the high-risk category, and the prior violent felony in the first case would only place that individual into the medium-risk category. Hurley disagreed. He thought the Lamelas-Everts approach establishes the starting point, and with disparate circumstances, like in his example, the starting points do not make sense. Hurley also thought the Lamelas-Everts approach did the same thing as the federal system in mechanistically scoring offender risk. In 12 years experience with the same kind of scoring, Hurley said, one of the originators of the federal system has now repudiated it.

Judge Sykes said the Lamelas-Everts approach was nowhere near the federal system. Only the offender risk assessment is scored in the Lamelas-Everts approach, not the offense severity. And criminal history is the most reliable predictor of future recidivism that exists. Also, it results in treating people with similar prior records similarly, which results in far more proportionality - something that must be done on the front end, rather than the back end where it had been done by the parole commission. Hurley said no data exists to support Judge Sykes's position.

Greg Everts did not know what data Hurley was referring to, but he thought Hurley was caricaturing the Lamelas-Everts approach, which does not, like the federal system, count up numbers and place the defendant into a row in which he must remain. The Lamelas-Everts approach does recognize that prior history is an important factor, and attempts to quantify that in some objective sense. But once that is done, it asks the judge to use his or her discretion, and if the number does not properly represent the history, allows for adjustment for other factors that relate to offender risk. The approach recognizes that criminal history is a significant factor in offender risk.

Tobin said the Lamelas-Everts approach does highlight criminal history because offender risk is not reduced, for example, by keeping a job for a certain number of years. Judge Lamelas thought that was a fair criticism. Tobin pointed to the various anomalies present in any system in which how old the actors are in a playground fight can determine whether a crime is a juvenile offense or a felony battery.

Judge Lamelas did not think it was a fair criticism, however, to say that the Lamelas-Everts approach counts criminal history in the same way that the federal sentencing guidelines do. Hurley said it did, because across the top of the federal graph was risk assessment, just like in the Lamelas-Everts approach, and along the side of the federal graph was offense severity, just like in the Lamelas-Everts approach. Judge Lamelas believed that the way criminal history was scored in her approach attempted to address precisely the disparities many criticized, including overcounting prior less-serious crimes.

Walter Dickey asked Judge Lamelas whether during the June 11" judicial survey she was contemplating transposing the numbers from that survey into her format. She said the numbers would fit into whichever format the committee chose.

Mike Brennan said that a question left unexplored was how a series of open-ended narrative questions leaves any less disparity in risk assessment. He did not hear an argument being made how narrative questions in the offender risk assessment results in more guidance to the judge than criminal history scoring. Judge Barland said the same argument could be made as to the offense severity analysis. Walter Dickey offered an answer: risk assessment requires some higher level of analytical thinking. This would include fact-finding, requires inferences, and would cause a judge to be guided by the narrative rather than a score, since the narrative would cause the judge to think about things he had not thought about before, and maybe in a different way.

Dickey discussed a broader issue of a judge being able to accomplish a rehabilitative end with an offender on extended supervision which probation could not. That discrepancy in results could cause judges to send people to prison who they think would be a resident in the community if they were on extended supervision, which he found troubling. Judge Barland agreed it could be troubling, but he did not think that distinguished the guideline approaches. Dickey agreed.

Brennan followed up and asked Dickey where in section III of the Barland format - which poses narrative questions to determine offender risk - does it cause two judges to put a similar offender in the same risk level, thereby alleviating disparity, which he understood to be one of the goals of the guidelines format. Hurley said nobody agreed on that. Dickey did not think anybody agreed either, but that did not mean because we did dumb things with some people, we should do dumb things with other people as well.

Judge Sykes thought that was too cynical. One of the committee's charges was to ensure that the punishment fits the crime, and that was being done in two ways: by the code reclassification subcommittee when it set maximums, and by the guidelines subcommittee, which is attempting to achieve proportionality and to reduce disparity for similarly situated offenders. She returned to the original goals of the entire exercise: (1) preserve individualized sentencing; (2) preserve judicial discretion; (3) achieve some proportionality so that the punishment fits the crime and similarly situated offenders are treated similarly; and (4) produce some predictability for policy makers so they can plan. She thought a significant difference between the two formats was that the narrative system does not weigh anything, including the most obvious factor about chance of future criminal risk - have they committed crimes in the past? She thought every common sense judge would tell you that a repeat offender is more likely to commit another crime than a non-repeat offender is.

Hurley thought it unfair for Judge Sykes to say that the Barland approach does not give weight to criminal history. He thought how a judge thinks about prior crimes cannot be quantified. He thought that if there was one thing learned from the federal system and other states was that quantification does not produce predictability, and that to the extent that quantification is forced, it produces disparate treatment.

Everts said the chief concern he had about the narrative approach is what type of guidance it truly provides. If the goal of the format is to provide more nuanced guidance, he did not understand, for example, what type of guidance the question "what type of burglary was this?' would give without extensive commentary. He thought the Lamelas-Everts approach, by listing factors for offense severity, allowed for more particularity in the guidance.

Tobin thought that while criminal history scoring would be easier, narrative questions would make the judges and advocates think more, and result in a better level of practice.

Dickey agreed with Everts that more commentary of a narrative kind would stimulate the kind of thoughts he was discussing. Dickey argued for a supplement which advocates and judges could look at to stimulate those thoughts. He thought one answer to that was that the committee does not have the time. He was disgusted by that answer because people's lives and much money was at stake. If it was his child being sentenced, he would want a judge to engage in the type of processes he was advocating. He found it troubling that the answer to a more demanding proposal was that the committee did not have time. He thought we should make the time. He also did not find any of the goals that Judge Sykes mentioned, although each desirable, in the committee's six statutory charges. Although they may be inferences drawn from those charges, he thought there was nothing magic about the objectives she listed.

Judge Malmstadt did not think that either of these proposals had a serious chance of giving the legislature or the policy makers in this state meaningful information about prison costs and the costs of the criminal justice system. He thought the committee could get out of this dilemma by revisiting Judge Wells's proposal to adopt the former Wisconsin sentencing guidelines, and include in them some Rule-of-Law-type features. But he would be more supportive of the Barland format if it did not have a graph.

Judge Lamelas had presided over a Chapter 980 case that week and had heard considerable testimony regarding risk assessment of sex offenders. One defense expert said an important factor to consider in risk assessment is whether or not the offender had been caught in the past. For if the offender had been caught, and punished, and had committed the crime again, the offender was a much higher risk than someone who had never been caught before.

Judge Wells thought we were trying to perfect something which could not be perfected. He thought it unreasonable to expect a judge to go through the same long litany at every sentencing when the judge might be considering all the same factors but not necessarily articulating them. He was bothered by the open-ended nature of the questions on the Barland format, and how long it would take for judges to fill out such a form. Judge Barland called his attention to the initial instruction on the form which gave the judge the option of answering the questions orally on the record, or in writing.

Committee Vote on Sentencing Guidelines Format

The committee voted on the two formats by a show of hands. Voting for the Lamelas-Everts sentencing guidelines format were: Matt Frank, Judge Diane Sykes, Senator Joanne Huelsman, Judge Elsa Lamelas, Greg Everts, and Tom Hammer. Voting for the

Barland sentencing guidelines format were: Judge Lee Wells; Brad Gehring; Judge Mike Malmstadt; Mike Tobin; Steve Hurley; and Walter Dickey. Absent and not voting were Judge Fiedler, Bill Jenkins, Mike McCann, Barbara Powell, and Linda Pugh.

Judge Barland broke the 6-6 tie by voting for his format. The final vote was 7 votes for the Barland format, and 6 votes for the Lamelas-Everts format.

Judge Sykes proposed that on an issue of this significance, the proxies of the absent members be gathered. Judge Barland said that Roberts' Rules of Order discouraged proxies. Under those rules, a motion to reconsider can be entertained upon a two-thirds vote. He also said that given the split in the committee on this issue, both formats should be submitted to the sentencing commission.

The committee broke for lunch from 12:15 to 12:45 p.m.

Computer Modeling Presentation

After lunch, Hari Hariharan, Bob Tyllo, and Russ Lutz of Systems Seminar Consultants presented the computer model they had built for the committee. After the presentation at Chula Vista Resort in Wisconsin Dells on May 13th, the modelers revisited their assumptions and had the benefit of advice from Walter Dickey and Mike Smith, as well as people from the DOC. A number of refinements were made, including that the model assumes new additions of 4% per year (an average determined from 8 years of historical data); the charts displaying "old world" and "new world" populations had been separated, as well as combined for each scenario; and 5 scenarios had been developed and printed out for the committee's review and consideration:

Scenario 1: **JUDGES DO NOT CHANGE SENTENCES**
Judges sentence offenders to same prison terms in the old world and the new world.
ES in the new world = parole in the old world.

Scenario 2: **JUDGES ADJUST SENTENCES DOWN TO TIME-SERVED**
In the new world, judges adjust sentences down to time-served periods for the same crimes in the old world,
ES =25% of prison time served.

Scenario 3: **VIOLENT CRIMES=CURRENT SENTENCES; NON-VIOLENT CRIMES = TIME SERVED SENTENCES**
For violent crime categories (including drugs), judges sentence offenders to same prison terms in the old world and the new world, and ES in the new world = parole in the old world.
For nonviolent crime categories in the new world, judges adjust sentences down to time-served periods for the same crimes in the old world and ES = 25% of prison time served.

Violent crime categories (including drugs) = 1-12; 15-18; 29-35 (from a handout to the committee)
Nonviolent crime categories = 13-14; 19-28; 36-47 (same)

Scenario **4: TOP 12 CATEGORIES = CURRENT SENTENCES**
For the 12 crime categories which produce the most new additions to the prison population, judges sentence the same in the old world and the new world, and ES in the new world = parole in the old world.
For the remaining crime categories, in the new world judges adjust sentences down to time-served and ES = 25% of prison time served.
The 12 categories are: (1) Drug possession
(2) Drug manufacture/deliver
(3) Burglary
(4) Unarmed robbery
(5) 1st deg. SA-child
(6) Theft
(7) 2nd deg. SA-child
(8) Other public safety crimes
(9) Possession with intent to deliver-cocaine,
(10) Operating vehicle without owners consent
(11) Forgery
(12) Other homicide

Scenario **5: MOST LIKELY SCENARIO?**
For violent crime categories in the new world, judges sentence offenders to 85% of old world imposed sentences, and ES in the new world = parole in the old world.
For non-violent crime categories in the new world, judges adjust sentences down to time-served and ES = 150% of prison time served.

Hariharan and Tyllo walked the committee through these various scenarios, and showed how corrections populations would change under each. Described roughly, scenario 1 is a worst-case scenario that would result in the greatest increase in prison population, and scenario 2 the best-case scenario that would result in the smallest increase. The remaining 3 scenarios are possibilities between these extremes.

Hurley asked why the probation graph showed a hump in 2003. Tyllo said that was because probation terms overall were averaging around 3 years.

Brennan commented that Dickey and Professor Mike Smith had helped the modelers by isolating and helping to solve a couple of troublesome issues: (1) how sensitive the model was to new additions, on which the modelers did historical research and determined it should be 4%; and (2) how sensitive the model was to revocation rates, which was solved by using the maximum revocation rates per crime category which the data supported.

Brennan contrasted the prison population estimates with that of the Legislative Fiscal Bureau, which were much higher. The modelers broke down the bureau's estimates and showed how the monthly increase the bureau was assuming was too high. He also said that while the model can forecast, that is only the first phase of its uses, and that its real strength is to be used in policy debate by isolating important crime categories and debating median sentences therefor.

Tyllo explained to the committee how a scenario was created. Frank asked about minimum, median, and maximum sentences for each of the 47 crime categories. Lutz said that those statistics are used as part of the model, and could be produced as a report. Hariharan explained how the model computed cost, based on fixed and variable costs. Frank asked how consecutive sentences were handled. Rick Geithman of DOC-bureau of technology management responded that due to data constraints, the model does not take into account each individual offender's consecutive sentences, but it does calculate the aggregate of consecutive sentences across a crime category.

Dickey thought that while the number of 20,000 prisoners might not seem that high, it might take on a different context when contrasted with prison population in 1990 or 1985. Also, he noted that the model's constraints meant that it could not take into account ES periods beyond 2010, which he considered a large contingent liability. Judge Lamelas agreed that judges would utilize extended supervision more in the "new world."

Hurley thought that many offenders now placed on probation with a year in the county jail as a condition would be put into prison with time on extended supervision. Judge Lamelas did not necessarily agree since many judges gave condition time for the offender to maintain employment. Hurley hoped she was right.

Hariharan thanked the committee for their help with Systems Seminar's development of the computer model.

Judge Barland opened the floor for public comments, but there was none.

Objections to Vote on Sentencing Guidelines Format

Judge Sykes registered an objection about the vote on the sentencing guidelines format that morning. She said that in March at the Country Inn the committee had voted for the Lamelas-Everts proposal, by a margin of 9 votes to 5 votes for the Rule-of-Law approach. She said that the Rule-of-Law approach had been resurrected without the 2/3 requirement of a motion for reconsideration, She thought the votes of 7 of the 18 committee members had effectively undone the preferences of the vote of 9 committee members who had voted for the Lamelas-Everts approach in March, and that that was not right. She suspected that the absent members would have voted for the Lamelas-Everts approach.

Judge Barland appreciated her comments, and commented that he thought his proposal was not the Rule-of-Law approach, but rather a format which attempted to meld different points of view. Judge Sykes disagreed. She thought it was functionally and substantively the same.

Tobin concurred in part with Judge Sykes. The committee is trying to avoid having to revisit the same issues time and again, and he regarded what the committee decided as less tentative as each meeting progressed. Yet he thought the committee should not lock itself into parliamentary rules to make it difficult to have matters reconsidered by the full committee.

Judge Wells agreed, and said that this is an evolutionary process. He said he voted for the Barland format because he liked the risk evaluation part of that format better than the Lamelas-Everts approach, but he saw the Barland format as a modification of the Lamelas-Everts plan, not a revision of the Rule-of-Law approach at all.

Judge Sykes said that the committee now found itself in the position of forwarding a recommendation to the legislature with the support of only 7 committee members. Senator Huelsman said that she was concerned with the committee forwarding any

recommendation on which there is a seriously split vote. She thought a mechanism should be set up to address the concerns of those in the minority in the vote today so that they can be transmitted to the guidelines committee for attempted resolution.

Judge Lamelas expressed concern about Judge Barland's statement that from now on it would take a 2/3 vote to reconsider something. She presented the Barland format to the full committee because her sense of the committee overall was that the support for the Lamelas-Everts approach that had prevailed in the March vote was not particularly deep, and that the committee had divided on this topic.

Dickey said he too was bothered by the 2/3 rule, and he sees this process as evolutionary. He thought the guidelines format should be back on the table for discussion, by whatever mechanism. He would vote for a motion to reconsider.

Hurley said that the Barland format was very different than the Rule-of-Law approach in philosophy and in detail. He said there was another definitive vote taken by the full committee in March, which was to adjust down to time-served the numbers placed in the graph cells. Notwithstanding that vote, the committee had gone in another direction. He did not hear anyone criticizing that, but rather people ignoring it. He said that he has compromised a lot of what he wanted to do in order to reach consensus, and given the impending reporting deadline, he asked Judges Lamelas and Sykes to rethink their positions, or the committee would present a package to the legislature with 18 dissents from 18 members.

Judge Lamelas disagreed that she had not accommodated other points of view. She pointed out that she had agreed, without being asked, to present Judge Barland's format to the committee without asking for a 2/3 vote because of her sense that there was not deep support among committee members for a particular guidelines format.

Because he sensed the division in the committee, Judge Barland withdrew his earlier requirement of a 2/3 vote to reconsider the vote that morning. He thought that at the next committee meeting, the committee should come to the table with the idea of reaching a consensus, especially in the most nebulous area of the committee's work, sentencing guidelines.

Dickey thought a rich debate about what the committee should be doing would be of great value to the state. The legislature passing what the committee approves is not necessarily the only value the committee could produce.

Jennifer Dubberstein asked that members submit any travel vouchers to her quickly for reimbursement from this fiscal year's budget.

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

STATE OF WISCONSIN
CRIMINAL PENALTIES STUDY COMMITTEE
CODE RECLASSIFICATION SUBCOMMITTEE

CLASSIFICATION OF DRUG FELONIES IN A NEW A-I SYSTEM OF FELONY CLASSIFICATION’

INTRODUCTION

Among the charges given to the Criminal Penalties Study Committee by the Wisconsin legislature are the following:

1. Creating a uniform classification system for all felonies, including felonies outside of the criminal code.’

2. Classifying each felony and Class A misdemeanor in a manner that places crimes of similar severity into the same classification.’

3. Consolidating all felonies into a single criminal code.“

Most of Wisconsin’s drug offenses are codified in Chapter 961 of the Statutes. This chapter is not part of the Wisconsin Criminal Code,[4] though many of the Code’s general provisions apply in drug prosecutions’ and, unless there is a specific provision to the contrary, so do the provisions of the Wisconsin Code of Criminal Procedure.[6]

Chapter 961 is a relatively self-contained drug code for the state. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent, its own set of definitions, and its own system of sanctions. At present its felonies and misdemeanors are not classified in either the A-E felony classification system or the A-C misdemeanor classification system provided for in Wis. Stat. secs. 939.50 to 939.5 1.

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[1] See 1997 Wis. Act 283 sec. 454(1)(e)1.
[2] See 1997 Wis. Act 283 sec. 454(1)(e)2.
[3] See 1997 Wis. Act 283 sec. 454(1)(e)3.
[4] Chapters 939 to 95 I comprise the Wisconsin Criminal Code. See Wis. Stat. sec. 939.0 1.
[5] Wis. Stat. sec. 939.20 provides: “Sections 939.22 to 939.25 [definitions of criminal intent, criminal recklessness. criminal negligence. and other miscellaneous words and phrases] apply only to crimes defined in chs. 939 to 951. Other sections in ch. 939 [the general provisions of Wisconsin’s substantive criminal law] apply to crimes defined in other chapters of the statutes as well as to those defined in chs. 939 to 95 1.”
[6] Wis. Stat. sec. 967.01 provides in pertinent part that “Chapters 967 to 979 [the Wisconsin Criminal Procedure Code] shall govern all criminal proceedings.. . ..”

METHODOLOGY FOR CLASSIFYING DRUG OFFENSES IN THE PROPOSED A-I CLASSIFICATION SYSTEM

With the exception of certain special factors articulated below, the subcommittee utilized the same approach to the classification of controlled substances offenses that it used for classifying Criminal Code felonies and non-drug felonies codified elsewhere throughout the Wisconsin Statutes.

M.R. **Conversion.** Drug crimes are initially placed in the new A-J classification system by determining the mandatory release (M.R.) date under current law when the court imposes the maximum sentence. As a general rule M.R. is fixed by statute at two-thirds of the sentence actually imposed. For the offender who receives the maximum sentence, M.R. is two-thirds of that maximum. Service of the sentence to M.R. reflects the longest the defendant can be held in prison before being mandatorily paroled. That parole is subject to revocation and the defendant may be returned to prison if conditions of parole are violated.

The Code Reclassification Subcommittee concluded that the maximum sentence of incarceration for each crime in the new truth in sentencing system ought roughly parallel the maximum the person could serve in prison under the current indeterminate sentencing model before reaching M.R. To allow for the worst case scenario of a prisoner who under current law is held to M.R., the subcommittee applied the M.R. converter to the maximum possible sentence under current law before classifying each crime in the new A-I classification system.

Felony Class Adjustments. After application of the M.R. converter to initially place a crime in one of the new A-I classes, the subcommittee then considered whether an adjustment up or down was necessary so that crimes of similar severity are classified together. This was done in response to a specific charge from the legislature.[7] In making its final determination about the classification of offenses, the subcommittee also endeavored to:

- Allow enough incarceration exposure for the worst case-worst offender scenario (while recognizing that sentencing guidelines and judicial discretion will inform the sentencing of less serious variations and that penalty enhancers and repeat offender statutes allow for cases whether the maximum penalty for the underlying crime is insufficient).

- Show proper deference to judgments already made by the legislature about maximum possible penalties.

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[7] See 1997 Wis. Act 283 sec. 454(1)(e)2.

- Classify crimes that involve death or serious injury (or the potential for such harm) in higher categories than those involving offenses against property or other non-violent behavior.

- Consider data about sentencing patterns and time actually served for offenses when such data was available and when the subcommittee had some measure of confidence in its reliability.

- Account for the political reality that its recommendations must survive the scrutiny of both the legislature and the governor in order to become law.

With regard to drug offenses, the subcommittee also took into account the statement of legislative intent codified in Wis. Stat. sec. 961.001 as well as the interplay between the federal and state governments in the enforcement of overlapping drug laws.

IMPACT OF CLASSIFICATION ON THE NATURE OF DRUG PENALTIES

Under current law drug offenses are not classified; each has a specific penalty articulated in Chapter 961. For drugs that are stratified by amounts delivered or possessed with the intent to deliver, different penalty systems are used. In some instances the maximum amount of imprisonment escalates with the amount of the drug. In others presumptive minimum penalties are used to distinguish among amounts. In yet others a combination of these approaches is used.

Bringing drugs within a uniform system for classifying crimes (a charge given to the Committee by the legislature) means that the penalty structure for these offenses will be expressed in terms of a maximum fine and a maximum term of imprisonment. Once a drug offense is placed in a given felony classification, the penalty range for that classification will apply:

There is at least a two-fold impact of such classification. First, for all felony classes into which drugs have been placed. there is no minimum term of imprisonment and no minimum fine (presumptive or mandatory). In appropriate cases the judge would have the discretion to place the offender on probation. The subcommittee unanimously agrees that this is a desirable outcome of classifying drug offenses. It believes that judges should have the same full range of penalties available to them when sentencing drug offenders as they have when sentencing persons convicted of such dangerous offenses as homicide (other than first-degree intentional homicide), armed robbery, sexual assault, or aggravated burglary. It also believes that the exercise of sound judicial discretion in sentencing drug offenders should not be restricted by minimum penalties when the

legislature has not seen fit to so restrict discretion when sentencing offenders convicted of other serious felonies like those noted above.[8]

Another impact of classification is the reduction in maximum fines. Under current law fines top out at $100,000 for THC (marijuana), $500,000 for cocaine, $500,000 for LSD, $500,000 for methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone, and $1 ,OOO,OOO for heroin. These amounts double for repeat offenders. As a practical matter these enormous amounts are not imposed on state law offenders and, if the drug defendant has sizable assets linked to his or her illicit activities. the forfeiture laws will be utilized to seize them. The latter is most attractive to the authorities because it results in some or all of the forfeited assets being retained by law enforcement agencies for official use.' The subcommittee unanimously recommends that its proposed fine structure for other classified felonies be applied to drug felonies as well with the exception of Class C drug felonies for which it proposes a special maximum $100,000 fine. For the other classes the maximum fines would be as follows: $50,000 for drug offenses in Classes D and E, $25,000 for offenses in Classes F and G, and $10,000 for offenses in Classes H and I. These limits are more than sufficient to encompass the kinds of fines judges impose in state drug prosecutions today.

These changes are in no way intended to depreciate the seriousness of drug offenses or to minimize the impact drugs have had on modem society. Rather. they bring drugs into the kind of uniform classification system which the subcommittee believes was intended by the legislature when it commanded that the committee create "a uniform classification system for all felonies, including felonies outside of the criminal code."[10]

ACKNOWLEDGEMENTS

Several experts from the bench and bar provided invaluable insight to the subcommittee as it undertook the task of classifying drug offenses. Those who generously shared their knowledge and experience, either in person or in writing or both, include the following:

Terese M. Dick, Deputy First Assistant State Public Defender"

Kim Heller-Marotta. Assistant State Public Defender'*

Patrick Kenney, Assistant District Attorney for Milwaukee County[13]

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[8] The Committee recognizes that some presumptive minimum penalties are used in the penalty enhancer statutes. It will be recommending that these be repealed as well for the same reasons as those articulated in the text accompanying this note.
[9] <u>See</u> Wis. Stat. sec. 961.55 <u>et seq</u>.
[10] <u>See</u> 1997 Wis. Act 283 sec. 454(I)(e) 1.
[11] Ms. Dick is a supervisor of the Drug Practice Group in the 'Milwaukee SPD office.
[12] Ms. Heller-Marotta is a supervisor of the Drug Practice Group in the Milwaukee SPD office.
[13] Mr. Kenney is the Legal Director of the Milwaukee Metropolitan Drug Enforcement Group.

Honorable Jeffrey A. Kremers, Circuit Judge of Milwaukee County[14]

Donald V. Latorraca, Assistant Attorney General, Wisconsin Department of Justice”

Karen Loebel, Assistant District Attorney for Milwaukee County’”

John Stoiber, Assistant District Attorney for Milwaukee County”

Honorable Lee Edward Wells, Circuit Judge of Milwaukee County”

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[14] Judge Kremers has served as a judge in one of the Milwaukee County courts which handles drug cases exclusively.

[15] Mr. Latorraca is assigned to the Criminal Litigation. Antitrust and Consumer Protection Unit of the Department of Justice and has extensive experience in the investigation and prosecution of drug cases.

[16] Ms. Loebel is a supervisor in the Drug Unit of the Milwaukee County District Attorney’s Office.

[17] Mr. Stoiber is a supervisor in the Drug Unit of the Milwaukee County District Attorney’s Office.

[18] Judge Wells has served as a judge in one of the Milwaukee County courts which handles drug cases exclusively.

COLOR CODES

ENTRIES IN GREEN REFLECT UPWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER.

ENTRIES IN BLUE REFLECT NEW CRIMES RECOMMENDED FOR ENACTMENT BY THE LEGISLATURE OR EXISTING CRIMES FOR WHICH SIGNIFICANT AMENDMENTS ARE PROPOSED.

ENTRIES IN RED REFLECT DOWNWARD CLASS ADJUSTMENT AFTER APPLICATION OF M.R. CONVERTER

ENTRIES IN BLACK REFLECT THE NATURAL PLACEMENT OF CRIMES IN A-I SYSTEM AFTER APPLICATION OF THE M.R. CONVERTER.

KEY TO ABBREVIATIONS

DELIVERY: Manufacture, distribution or delivery
COCAINE: Cocaine or cocaine base
METH: Phencyclidine, amphetamine, methamphetamine or methcathinone
LSD: lysergic acid diethylamide
PSILOCIN: psilocin or psilocybin
THC: tetrahydracannibonols (marijuana). NOTE: All weight values for THC should also be expressed in terms of the number of plants with the converter of 1 plant = 50 grams applied.

CLASS A (LIFE)

NO ENTRIES

CLASS B (40 MAX PRISON; 20 E.S.)

NO ENTRIES

CLASS C (25 MAX PRISON: 15 E.S.) ($100.000 MAX FINE[19])

Delivery of COCAINE > 40 g[20] — 961.41(1)(cm)4
Possession of COCAINE w/intent to deliver > 40 g[21] — 961.41(1m)(cm)4
Delivery’of HEROIN, > 50 g[22] — 961.41(1)(d)4
Possession of HEROIN w/intent to deliver > 50 g[23] — 961.41(1m)(d)4
Delivery of METH > 50 g (from E)” — 961.41(1)(e)4
Possession of METH w/intent to deliver > 50 g (from E)‘” — 961.41(1m)(e)4

CLASS D (15 MAX PRISON; 10 E.S.) ($50.000 MAX FINE)

Delivery of COCAINE > 15 g but ≤ 40 g — 961.41(1)(cm)3
Possession of COCAINE w/ int. to deliver > 15 but ≤ 40 g — 961.41(1m)(cm)3
Delivery of HEROIN, > 10 g but ≤ 50 g — 961.41(1)(d)3
Possession of HEROIN w/intent to deliver > 10 g but ≤ 50 g — 961.41(1m)(d)3
Delivery of METH > IO g but ≤ 50 (from E) — 961.41(1)(e)3
Possession of METH w/intent to deliver > 10 g but ≤ 50 g (from E) — 961.41(1m)(e)3

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[19] Under the Committee’s proposed restructuring of fines, a Class C felony has a maximum fine in the amount of $50,000. However, as to drug felonies in the Class C category, it is recommended that a special ceiling of $100,000 be established.

[20] The Committee recommends that all cocaine delivery offenses involving more than 40 grams be classified as a C felony. It further recommends that the categories of 40-100 grams and more than 100 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 40 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of cocaine delivery laws are prosecuted in the federal system. In the view of the Committee 2.5 years of exposure for state crimes is sufficient and the additional categories of 40- 100 and more than 100 grams are therefore unnecessary.

[21] See preceding note.

[22] The Committee recommends that all heroin delivery offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams, 200-400 grams, and more than 400 grams for this offense be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of heroin delivery laws are prosecuted in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400. and more than 400 grams are therefore unnecessary.

[23] See preceding note.

[24] The Committee recommends that all delivery methamphetamine, amphetamine, phencyclidine (PCP) and methcathinone offenses involving more than 50 grams be classified as a C felony. It further recommends that the categories of 50-200 grams. 200-400 grams, and more than 400 grams for these offenses be eliminated. Using the Class C felony classification for all offenses over 50 grams provides the courts with 25 years of real prison time within which to sentence the most serious of offenders who are prosecuted under state law. The Committee has taken into consideration the fact that the most serious violators of these delivery laws are subject to prosecution in the federal system. In the view of the Committee 25 years of exposure for state crimes is sufficient and the additional categories of 50-200, 200-400, and more than 400 grams are therefore unnecessary. The Committee has considered the threat to public safety posed by recent increases in methamphetamine activity (most notably in the rural parts of western Wisconsin) and has noted the pending legislation to treat this substance on a par with heroin, which the recommendation of the Committee does. **See** 1999 A.B. 318.

[25] See preceding note.

CLASS E (10 MAX PRISON: 5 E.S.) ($50,000 MAX FINE)

Offense	Statute
Delivery of COCAINE > 5 g but ≤ 15 g	961.41(1)(cm)2
Possession of COCAINE w/ int. to deliver > 5 but ≤ 15 g	961.41(1m)(cm)2
Delivery of HEROIN, > 3 g but ≤ 10 g	961.41(1)(d)2
Possession of HEROIN w/intent to deliver > 3 g but ≤ 10 g	961.41(1m)(d)2
Delivery of METH > 3 g but ≤ 10 (from H)	961.41(1)(e)2
Possession of METH w/intent to deliver > 3 g but ≤ 10 g (from H)	961.41(1m)(e)2
Delivery of LSD > 5 g	961.41(1)(f)3
Possession of LSD w/intent to deliver > 5 g	961.41(1m)(f)3
Delivery of THC > 10,000 g[26]	NEW STATUTE
Possession of THC w/ intent to deliver > 10,000 g[27]	NEW STATUTE
Delivery of a narcotic drug included in Schedule I or II	961.41(1)(a)
Possession w/intent to deliver a narcotic drug included in Schedule I or II	961.41(1m)(a)
Delivery of PSILOCIN > 500 grams	961.41(1)(g)3
Possession w/intent to deliver PSILOCIN > 500 grams	961.41(1m)(g)3
Delivery or possession w/intent to deliver a counterfeit substance included in Schedule I or II which is a narcotic drug	961.41(2)(a)

CLASS F (7.5 MAX PRISON: 5 E.S.) ~$25,000 MAX FINE)

Offense	Statute
Delivery of COCAINE > 1 g but ≤ 5 g	961.41(1)(cm)1
Possession of COCAINE w/ int. to deliver > 1 but ≤ 5 g	961.41(1m)(cm)1
Delivery of HEROIN ≤ 3g	961.41(1)(d)1
Possession of HEROIN w/intent to deliver ≤ 3 g	961.41(1m)(d)1
Delivery of METH ≤ 3 (from H)	961.41(1)(e)1
Possession of METH ≤ 3 g (from H)	961.41(1m)(e)1
Delivery of LSD > 1 g but ≤ 5 g (from H)	94 1(1)(f)2
Possession of LSD w/intent to deliver > 1 g but ≤ 5 g (from H)	961.41(1m)(f)2
Delivery of THC > 2500 g but ≤ 10.000 g	NEW STATUTE
Possession of THC w/intent to deliver > 2500 g but ≤ 10,000 g	NEW STATUTE
Delivery of PSILOCIN >100 but ≤ 500 grams	961.41(1)(g)2
Possession of PSILOCIN w/intent to deliver >100 but ≤500 g	961.41(1m)(g)2
False or fraudulent drug tax stamp	139.95(3)
Possession of any amount of piperidine	961.41(1n)(c)
Use of a person who is 17 years of age or under for the purpose of the delivery of a controlled substance[28]	961.455(1)

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[26] Under current law the maximum penalties for delivery of THC apply to deliveries of 2500 g or more. Considering the great rang between this amount and the amount at which federal authorities are likely to become interested in the case (100400 kilograms) and given that state cases can involve amounts well in excess of 2500 g, the Committee recommends that the amount categories on the higher end be as follows: > 10.000. 2500 to 10.000. and 1000-2500 grams.

[27] See preceding note.

CLASS G (5 MAX PRISON: 5 E.S.) ($25,000 MAX FINE)

Delivery of COCAINE ≤ 1 g[29]	NEW STATUTE
Possession of COCAINE w/ int. to deliver ≤ 1 g[30]	NEW STATUTE
Delivery of LSD ≤ 1 g (from H)	961.41(1)(f)1
Possession of LSD w/intent to deliver ≤ 1 g (from H)	961.41(1m)(f)1
Delivery of THC > 1000 but ≤ 2500 g[31]	961.41(1)(h)3
Possession of THC w/intent to deliver > 1000 but ≤ 2500[32]	961.41(1m)(h)3
Delivery of PSILOCIN < 100 grams	961.41(1)(g)1
Possession of PSILOCIN w/intent to deliver < 100 grams	961.41(1m)(g)1

CLASS H (3 MAX PRISON: 3 E.S.) ~$10,000 MAX FINE)

Delivery of THC > 200 but ≤ 1000 g	961.41(1)(h)2
Possession of THC w/intent to deliver > 200 but ≤ 1000 g	961.41(1m)(h)2
Delivery of any other controlled substance included in Schedule I, II or III, or a controlled substance analog of any other controlled substance included in Schedule I or II	961.41(1)(b)
Delivery or possession with intent to deliver any other counterfeit substance included in Schedule I, II or III	961.41(2)(b)
Possession with intent to deliver any other controlled substance included in Schedule 1, II or III, or a controlled substance analog of a controlled substance included in Schedule I or II	961.41(1m)b
Possession of a Schedule I or II controlled substance not bearing drug tax stamp	139.95(2)
Delivery of a substance included in Schedule IV	961.41(1)(i)
Possession with intent to deliver a substance included in Schedule IV	961.41(1m)(i)

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[28] Statute should be amended to prohibit use of a person "under the age of 17 years" for the purpose of delivering a controlled substance. This would be consistent with recent amendments to Wisconsin's Juvenile Code.

[29] The Committee recommends creation of a new category for delivery of cocaine to cover amounts of 1 gram or less. This encompasses the vast majority of state delivery cases and the 5 year penalty of Class G is sufficient for offenses in this category. As a matter of fact sentencing data available from the Department of Corrections (as substantiated by the experience of experts who assisted the Committee) reveal that the vast majority sentences statewide for deliveries of 5 grams or less (the lowest category under current law). when adjusted for truth in sentencing and time actually served, result in actual incarceration well within the 5-year range.

[30] See previous footnote.

[31] Under current law the lower end THC weight categories are 500 g or less and more than 500 but less than 2500 grams. The Committee recommends that the amounts be more stratified to more accurately reflect the diversity of violations and to structure penalties accordingly. Thus it recommends that the lower end amount ranges be as follows: > 1000 but ≤ 2500 g, > 200 but ≤ 1000 g, and ≤ 200 g.

[32] See preceding note.

CLASS H (3 MAX PRISON; 3 E.S.) ($10,000 MAX FINE) (continued)

Offense	Statute
Delivery or possession with intent to deliver a counterfeit substance included in Schedule IV	961.41(2)(c)
Acquire or obtain a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge	961.43(2)
Possession or attempted possession of gammahydroxybutric acid, gammahydroxybutyrolactone, ketamine or flunirazepam[33] (from I)	961.41(3g)(f)

CLASS I (18 MO. MAX PRISON; 2 YRS E.S.) ($10,000 MAX FINE)

Offense	Statute
Delivery of THC $\leq$ 200 g	961.41(1)(h)1
Possession of THC w/intent to deliver $\leq$ 200 g	961.41(1m)(h)1
Fraudulent drug advertising	100.26(7)
Delivery of a substance included in Schedule V	961.41(1)(j)
Possession with intent to deliver a substance included in Schedule V	961.41(1m)(j)
Delivery or possession with intent to deliver a counterfeit substance included in Schedule V	961.41(2)(d)
Possession of a narcotic included in Schedule I or II[34] 961.41(3g)(a)1	
Possession or attempted possession of Heroin	961.41(3g)(a)
Distribution or delivery of imitation controlled substance	961.41(4)(am)3
Keeping of a drug house	961.42(2)

[33] The substances included in the text accompanying this footnote include what have come to be known as "date rape" drugs.

[34] A first offense under this statute is now punishable by 1 year and subsequent offenses are punishable by 2 years. The Committee recommends deleting this distinction, classifying all offenses a Class I felonies, and treating the fact of prior conviction as a sentencing factor or, when appropriate, as a basis for invoking repeat offender laws.

CONTROLLED SUBSTANCES OFFENSES WITH STRATIFIED PENALTIES IN THE A-I SYSTEM

ALL OFFENSES INCLUDE DELIVERY & POSSESSION WITH INTENT TO DELIVER

COKE = COCAINE
HEROIN = HEROIN
METH = METHAMPHETIMINE AMPHETAMINE, PHENCYCLIDINE (PCP) AND METHCATHINONE
PSILOCIN = PSILOCIN AND PSILOCYBIN
LSD = LYSERGIC ACID DIETHYLAMIDE
THC = TETRAHYDROCANNABINOLS (MARIJUANA)[35]

A	B	C[36]	D	E	F	G	H	I
		COKE > 40 g		PSILOCIN > 500 g				
			COKE > 15 g but ≤ 40 g		PSILOCIN > 100 g but ≤ 500 g			
		HEROIN > 50 g		COKE > 5 g but ≤ 15 g		PSILOCIN ≤ 100 g		
			HEROIN > 10 g but ≤ 50 g		COKE > 1 g but ≤ 5 g			
				HEROIN > 3 g but ≤ 10 g		COKE ≤ 1 g		
					HEROIN ≤ 3 g			
		METH > 50 g		THC > 10,000g				
			METH > 10 g but ≤ 50 g		THC > 2500but < 10,000g			
				METH > 3 g but ≤ 10 g	-	THC > 1000but ≤ 2500 g		
					METH ≤ 3 g		THC >200 but ≤ 1000 g	
				LSD > 5 g				THC ≤ 200 g
					LSD > 1g but < 5 g			
						LSD ≤ 1 g		

[35] Marijuana amounts should also be expressed in terms of "plants" in the ratio of 1 plant = 50 grams
[36] Class C drug felonies should have a maximum fine of $100,000.

ADDITIONAL RECOMMENDATIONS REGARDING CONTROLLED SUBSTANCE STATUTES

In addition to the classification of drug offenses described above. the subcommittee also makes the following recommendations regarding the provisions of Chapter 96 1 of the Statutes:

1. The penalty doubler for second and subsequent offense? should be recast to resemble the general habitual criminality statute"' but should remain codified in sec. 961.46 with the procedures now specified therein. ln particular the subcommittee recommends that if a defendant is a second or subsequent drug offender,[39] the maximum incarceration penalty[40] may be increased as follows:

   Four years if the present offense is a Class E, F, G, H or I felony.

   Six years if the present offense is a Class C or D felony.[41]

2. Simple possession or attempted possession of (a) cocaine or cocaine base,[42] (b) lyseric acid diethylamide, phencyclidine. amphetamine, methamphetamine, methcathinone, psilocin or psilocybin,[43] and (c) tetrahydrocannibinols (THC),[44] all of which are misdemeanors, should retain their present misdemeanor penalties unless the offender qualities as a second or subsequent offender,[45] in which case the possession or attempted possession offense should be classified as a Class I felony. The subcommittee makes no recommendation for changing the penalties of other misdemeanor offenses codified in Chapter 961. Nor does it classify those misdemeanors because doing so would be beyond the charge given to the Committee by the legislature.[46]

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[37] See Wis. Stat. sec. 961.48.
[38] See generally Wis. Stat. sec. 939.62.
[39] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 961.48(3).
[40] The proposal speaks of increasing the maximum period of incarceration for repeat drug offenders. It does not increase fines. Further, any reference to doubling minimum penalties should be deleted because of the general recommendation against the use of minimum penalties for drug and non-drug offenses alike.
[41] No drugs felonies are proposed for classification in Class A or B.
[42] See Wis. Stat. sec. 961.41(3g)(c).
[43] See Wis. Stat. sec. 961.41(3g)(d).
[44] See Wis. Stat. sec. 961.41(3g)(e).
[45] Persons qualifying as second or subsequent offenders are described in Wis. Stat. sec. 96 I .48(3).
[46] 1997 Wis. Act 283 sec. 454(l)(e)2 directs the Criminal Penalties Study Committee to classify "each felony and Class A misdemeanor." There is no direction to classify what are currently unclassified misdemeanors (like those in Chapter 961) though doing so may be desirable at some point in the future.

3. The penalty enhancer for distribution of or possession with intent to deliver a controlled substance on or near certain places (e.g., within 1,000 ft. of a park, jail or correctional facility, school, youth center, etc.)[47] should be set at 5 years. The provisions for minimum penalties associated with this enhancer should be repealed for the reasons articulated above. The judge should have the full range of penalties available when exercising sentencing discretion in these kinds of cases.

4. The penalty doubler for distribution to prisoners[48] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. In this regard the subcommittee notes that one who distributes to a prisoner within the precincts of a prison, jail or other correctional facility will be subject to the penalty enhancer described in the preceding paragraph.

5. The penalty doubler for distribution to persons under age 18[49] should be recast as a sentencing enhancer which increases the maximum term of imprisonment by 5 years. The provision for doubling fines and presumptive minimum penalties should be repealed.

6. The penalty enhancer for distribution or possession with intent to deliver certain controlled substances on public transit vehicles[50] should be recast as a statutory sentencing aggravator which may result in a lengthier disposition but which does not otherwise increase the maximum term of imprisonment. The subcommittee believes that existing penalty ranges proposed for delivery and possession with intent to deliver are adequate to deal with the aggravating circumstance of delivery or possession with intent to deliver a controlled substance while on a public transit vehicle.

LEGISLATIVE CHARGE TO CONSOLIDATE ALL FELONIES (INCLUDING DRUG CRIMES) INTO A SINGLE CRIMINAL CODE

Finally, the subcommittee addresses the last of the legislative charges quoted on the first page of this document regarding the consolidation of all felonies into a single criminal code. The subcommittee strongly opposes this change in the Statutes for

[47] See Wis. Stat. sec. 961.19.
[48] See Wis. Stat. sec. 961.465.
[49] See Wis. Stat. sec. 961.46.
[50] See Wis. Stat. sec. 961.492.

numerous reasons and respectfully urges the legislature to reconsider it. Among the reasons for its opposition are the following:

1. Over 200 felonies are placed in various chapters of the Wisconsin Statutes other than in the Criminal Code. They are logically codified with the subject matter of the various statutory chapters and for ease of access should remain where they are. To remove the crimes from their related substantive law provisions would promote needless confusion among the lawyers, judge, legislators and others who must use these laws and would require looking in multiple places for related provisions. DNR crimes should remain with other DNR statutes; traffic crimes should remain with other Vehicle Code statutes; securities crimes should remain with other securities laws, etc.

2. 1997 Act 283 speaks only in terms of relocating all felonies to the Criminal Code. Thus, misdemeanors would remain scattered throughout the statutes while felonies would be in the Criminal Code, even if those felonies and misdemeanors. dealt with related subject matter.

3. The Criminal Code has not been recodified since the 1950's. Since that time it has become inordinately complex with the addition of literally countless provisions. To overburden the Code with addition of over 200 more felonies would produce a document that would defy usage by even the most talented of lawyers, judges. legislators and other users.

4. Finally. with respect to drug offenses, it has been observed above that Chapter 961 is a relatively self-contained drug code for the State of Wisconsin. Beyond the complex set of crimes codified therein, it has its own declaration of legislative intent. its own set of definitions, and its own system of sanctions. To engraft the drug code upon the Criminal Code without a general recodification effort involving the integration of both (assuming that would be desirable) would do little. if anything, to promote statutory clarity and ease of use. Rather, it would pose a substantial risk of unnecessarily confounding what are already complex and difficult chapters of the Wisconsin Statutes.

Respectfully submitted,

CODE RECLASSIFICATION
SUBCOMMITTEE

BY: PROF. THOMAS J. HAMMER
CHAIR

Olsen, Jefren

From: Dubber-stein, Jennifer
Sent: Tuesday, July 27, 1999 2:18 PM
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: Friday, July 9, 1999 Criminal Penalties Study Committee Meeting

Attached please find the agenda for the above referenced meeting. Also attached are the minutes from the July 9, 1999 meeting.

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

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

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

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

1. **Call to order - Committee Chair Judge Thomas Barland**
2. **Consideration of minutes of July 9, 1999 meeting**
3. **Report on results of survey at June 16, 1999 State Prosecutors Education and Training Conference in Egg Harbor, WI - Matt Frank, Mike Brennan, and Jennifer Dubberstein**
4. **Code reclassification subcommittee report - Subcommittee Chair Professor Tom Hammer**
5. **Sentencing guidelines subcommittee report - Subcommittee Chair Judge Elsa Lamelas**
6. **Discussion of preliminary draft of final report - Judge Bar-land, Committee Reporter Professor Tom Hammer, Mike Brennan**
7. **Any public comments**
8. **Adjournment**

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<u>Criminal Penalties Study Committee</u>

July 9, 1999 Meeting Minutes
Room 4 17 North, State Capitol Building, Madison, Wisconsin

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

The committee approved unanimously the minutes from the June 25, 1999 meeting.

Presentation by William Grosshans
of the Department of Corrections

Bill Grosshans, the administrator of the Division of Community Corrections ("DCC") within the Department of Corrections ("DOC") made a presentation using overheads to the committee concerning the past, present, and future of probation in Wisconsin, and what extended supervision might look like in the new world of Truth-in-Sentencing,

Grosshans has been with DOC for 21 years and has worked as an agent, a supervisor, a regional chief, and an administrator of different divisions. At previous meetings he has made presentations to this committee, and he has been an active participant at the meetings of the extended supervision revocation subcommittee. He divided his presentation into 3 areas: (1) the perceived problems with probation; (2) the DOC's Racine & Dane County experiments; and (3) extended supervision ("ES").

The perception that probation insufficiently supervises offenders usually comes from southeastern Wisconsin, and particularly Milwaukee. One of the problems Grosshans sees is media reports, in which the department's failures are highlighted and remain in the minds of the public. Another problem is that when a probationer comes before a judge for sentencing on a withheld probation term, and a judge examines the probationer's supervision record, it is often quite poor. Judges often wonder why probationers have not been revoked earlier.

Grosshans also sees a lack of secure prison and jail beds in which to hold probationers accountable, and a perception among agents that the cumbersome revocation process rarely works. He said DOC has not publicized its successes with probation, and has not properly involved the community in the department's work with probationers. Finally, he sees a lack of program evaluation and databases monitoring how the probationers are doing in certain cases, and whether or not probation is succeeding in that particular case.

What efforts is the DCC making to solve the probation "problem"? Grosshans directed his comments to the Milwaukee area, the locus of most complaints. DCC has strengthened its relationship with the Milwaukee police department. Jan Cummings, a DOC regional chief, attends all police command staff meetings. DCC also has developed an absconder unit to actively search for people who violate their supervision and who do not report to their agents. Twenty probation agents are active seven days a week in that unit. The Milwaukee police department has designated six officers who work along with this absconder unit to go out and find absconders. DCC has implemented a re-offender prevention enforcement ("ROPE") program, in which probation officers team with Milwaukee police officers to go out into neighborhoods in non-traditional working hours and on weekends to knock on doors to ensure that probationers or parolees are where they should be. These are unannounced visits; if a probationer or parolee is not there, or if contraband is found, the probationer is located and jailed.

In Milwaukee, DCC has set up intake units in the Milwaukee County Courthouse and Safety Building so that immediately after offenders are placed on probation they have contact with a DOC representative, rather than a long interval taking place between sentencing and reporting to DCC. DCC is attempting to move away from "fortress probation" by developing neighborhood supervision. DCC works with the Milwaukee police department in neighborhood precinct offices.

Most importantly, more secure beds have been added in Milwaukee. DCC has arranged with the Milwaukee County Sheriff to add 125 beds, and has also provided 300 beds at the Racine Correctional Institution just for violators from Milwaukee County. A 400-bed addition has been constructed at the Milwaukee County House of Corrections, and for the next 3 years 300 of those beds will be used to hold probation offenders accountable for their conduct. Further, in February 1999, the division broke ground for a 1,048 bed secure facility in Milwaukee, which will be run like a jail to hold probation and parole violators.

Also, agents can now incarcerate offenders and place them in the county jail without their supervisor's approval for 10 days, a suggestion made by the Intensive Sanctions Review Panel chaired by Judge Lamelas. DCC has created community advisory boards across the state, including in Milwaukee, and the Milwaukee region has been assigned two regional chiefs to handle the magnitude of the caseload in that area.

Judge Barland asked about the perception that there is a high turnover of agents in Milwaukee. Grosshans said that about 25% of DCC's staff in Milwaukee are entry-level. DCC is interesting in doing more local recruiting to reduce the number of agents from other areas of the state who are hired, work in Milwaukee, and then seek reassignment elsewhere in the state after they have completed their tour in Milwaukee. DCC is aware of this problem and is discussing it. But incentive solutions to keep agents in Milwaukee could run into union opposition.

Mike McCann asked about the number of entry-level agents in other areas of the state. Grosshans said north of state highway 33, there are few entry-level positions and many senior staff, while Dane County has a lower percentage of entry-level agents than Milwaukee, and Racine and Kenosha's staff is about 40% entry-level. McCann asked whether there is a higher ratio of offenders-to-agent in Milwaukee than elsewhere, and whether turnover exacerbates that figure. Grosshans said it depended on which office in Milwaukee was being discussed. Some offices enjoy more stability and smaller caseloads than others. He said that DCC has a series of specialized units in Milwaukee, including 3 drug units, a high-risk-offender unit, and a sex-offender unit. Those units skew the case load numbers downward, since they have much lower offender-to-agent ratios. McCann also asked about the results of the absconder unit. Grosshans said that to date the unit had located 950 offenders, some of whom were gone for a long time, others for a short time. Finally, McCann asked whether a supervisee with a number of failed urine tests might still not be revoked. Grosshans admitted that was a perception, but Secretary Litscher has indicated that the DOC will not allow the need for secure beds to dictate the in- or out-of-custody decision.

Linda Pugh asked whether or not the use of police officers in the field reflected a shortage of probation and parole officers. Grosshans said it did not.

Judge Malmstadt asked about the minimum education requirement and starting pay for an entry-level probation officer. Grosshans said that applicants must have a 4-year degree or the equivalent work experience, and the starting pay is about $11 SO per hour.

Matt Frank commented that Grosshans's presentation was directed towards reallocation of existing resources and trying new approaches. Frank wondered whether the answer to this problem was to manage existing resources better, or whether more resources are necessary. He asked Grosshans to address whether DCC will seek more resources for this problem, and whether this committee should recommend to the Legislature its estimate as to what resources DCC needs to effectively supervise probationers. Grosshans replied that DOC has its budget before the Legislature now, and that it has sought funding to cover growth in caseloads.

Steve Hurley said if judges continue to give higher sentences because they do not trust probation and parole, the system is cannibalized because funds are taken away from probation and parole and expended on prison beds. He thought this committee must make a fundamental decision whether it will recommend sentences to the legislature such that limited resources be directed towards probation, or towards the building of prison beds.

Judge Wells said he was frustrated with probation agents not returning to court to update him on a probationer's performance. Some times he would order jail time as a condition of probation, stay that jail time, and order the probationer to return in a few months to see how the probationer was doing and decide whether or not the jail time should be served. Often, the probation officer would not appear at that later date, and there would be no report as to how the defendant had done on probation.

Tom Hammer asked Grosshans to comment on any plan to strengthen probation for drug offenders. Grosshans said Mike McCann and Secretary of Corrections Litscher will be meeting toward the end of July to discuss this topic. McCann hoped that such a program would not need a maximum security facility. He speculated that a defendant could be sentenced to 18 months or 2 years incarceration, but with the option, if the defendant pursues it, of entering a program that could result in a year or even less of time out of the community. In that program the offender would receive intensive job preparation and a high school degree.

Grosshans moved on to the second part of his presentation, which focused on the Racine and Dane County probation experiments. In these experiments, DCC has tried to develop a partnership with the community, to have strategies for local crime prevention, to supervise offenders actively, and to commit additional resources to enhance supervision. DCC has also evaluated these programs' successes and failures.

The enacting legislation for these experiments mandated that the programs take place in southern Wisconsin, so DCC chose Racine and Dane Counties. The legislature provided $7.6 million for 64 additional staff, 47 of whom are agents. The offices equally split $1.6 million for purchase of services. The agent-to-offender ratio was l-to-17. In Dane County, neighborhood supervision has been developed in which housing for the probationers has been located in the probationer's neighborhood and community police stations have been set up. In Racine County, DCC has located its facility in the same houses as community police stations and community-oriented policing houses.

After one year, the International Committee of Corrections Association independently reviewed the experiments. The Racine County project scored 1st, and the Dane County project scored 3rd, of the 150-200 such programs in the United States.

The experiments have produced close positive working relationships with local law enforcement. Day-reporting centers have been developed. The experiments have demonstrated that offenders need to be programmed for at least 70% of their day. In addition to work, they need to be involved in other treatment, parenting, and/or cognitive skills programming. The staffs attitude is positive because they believe the caseloads are manageable, and resources are available to purchase services the supervisees require. Technology is also being used. Geographical information systems in Racine and Dane Counties are used to plot where offenders are. Both programs have community advisory boards.

Tom Hammer asked how an offender is admitted into one of the experimental projects. Grosshans said they are chosen if they reside in that neighborhood. Judge Malmstadt asked what the ratio of agent-to-offender was in Milwaukee. Grosshans said it averaged l-to-72, but that it varied based upon specialized programming. Sex offender, drug, and mental health unit ratios are smaller. Across the state, the ratio of was l-to-58

Grosshans moved on to the third and final part of his presentation: what extended supervision ("ES") could look like in the "new world" of Truth-in-Sentencing. He passed out a chart to the committee members outlining his comments on this topic, a copy of which is in the committee's files. The extended supervision revocation ("ESR") subcommittee had concluded that the strict supervision model from the Intensive Sanctions Review Panel should be adopted.

The primary goal of ES is to enhance public safety by the strict supervision of all offenders leaving prison and entering the community. Such supervision would be based upon a probationer's behavior. A supervisee would not move into less strict supervision unless he has met all requirements at the current level. The supervisee's conduct dictated what level of supervision he would receive. DCC recommends a minimum of at least 2 weekly face-to-face contacts, and at least 4 additional collateral contacts per offender; mandatory employment, school or community service; and mandatory electronic monitoring. DCC also has contracted for the lowest level of supervision of offenders, for example those who just need to pay restitution or court fiscal obligations.

For ES, DCC is adopting the Intensive Sanctions Review Panel report recommendation of a l-20 ratio of agent to supervisees. As Grosshans said before, ES would cost $8,881 per offender per year. For purposes of comparison, the Lamelas panel strict supervision model cost $3,500 per offender per year; intensive sanctions cost $2,100 per offender per year; and traditional probation and parole costs $1,400 per offender per year.

Grosshans said DCC recommends institutional visits of ES agents to their supervisees who get revoked and returned to prison; transportation services from the prison directly to the ES agent; and an absconder unit for ES supervisees who do not report. Grosshans also approved of the ESR subcommittee's work, including the streamlined revocation process. DCC is in the process of updating the reincarceration grid for the ES agent to use in the agent's reincarceration recommendation to the ALJ at the revocation hearing. Grosshans strongly endorses the "time-out" option of using up to 90-days in lock-up as an alternative-to-revocation.

Also, DCC has received a large computer budget under which each agent will have either a laptop or desktop computer linked to the prison and the rest of DOC. DCC has tested global positioning technology, which has been used to trap absconders in the state, but it is only in the experimental stage. While polygraphs are used with certain sex offenders in Racine, DCC would like that program to go statewide. DCC also wants to use Juris-monitoring, a domestic violence electronic monitoring device. The victim's home contains the device, and if the supervisee gets within a certain distance of the home, a signal goes off, and the victim can alert the police department.

Judge Barland asked whether the $8,881 per offender per year figure was appropriate to use as part of a recommendation in the committee's final report to strengthen probation. Grosshans said it was. Mike Brennan asked whether that figure remained static during the course of a supervisees ES term. Grosshans said the figure decreased as a supervisee's amount of supervision decreased.

Judge Wells asked Grosshans for his reaction to judges' monitoring supervisees during their ES periods. Grosshans thought that was a good idea. Matt Frank asked what could be done for supervisees under current law. Grosshans thought that in the next biennial budget, those concerns should be addressed. Steve Hurley asked whether ES agents would be a separate staff. Grosshans said perhaps in certain areas, like Milwaukee. Hurley asked how you would prevent the dilution of services by using the same agents for parole and ES. Grosshans would argue for a time-study to show the relative burdens of the differing supervisions.

Mike McCann said he did not think that the loss of confidence in probation in Milwaukee stemmed from lack of leadership. He thought it was from the belief that because of overcrowding in the prison system, there was pressure not to revoke people due to lack of bed space. Grosshans said Secretary itscher has made it very clear that in-out decisions will not be made based upon availability of bed space.

Hurley raised a concern he thought Walter Dickey would have: Can you implement this model for ES without changing probation and parole? Given what ES could look like, Dickey is concerned judges will be induced to use ES rather than probation. Accordingly, the ES caseload could be far greater than imagined. Hurley asked whether, given this dichotomy, probation might not have to be changed in the same ways as ES is projected to look like. Grosshans thought that was a good question for this study committee.

Judge Malmstadt felt strongly that whatever recommendations the committee makes for ES it should also make for probation. Judge Barland asked Grosshans whether or not he agreed with that statement. Grosshans said DCC was already implementing some aspects of the ES strict supervision model for probation.

Mike Brennan asked whether there has been talk of translating the successes of the Racine and Dane County experiments elsewhere in the state. Grosshans said Secretary Litscher has indicated that should be a goal. Judge Barland asked whether this biennium's budget allowed for that. Grosshans said it did not: any expansion of the Racine-Dane approach would have to be deferred until the next biennium.

Judge Fiedler asked whether, if the state were to implement the model for probation that this committee is recommending for ES, the results would be appreciably better. Grosshans did not think he could answer that. Judge Wells asked whether there was anything a judge could do to ensure that an offender gets in an intensive-supervision program. Grosshans thought the only major way that courts could get involved in that way would be through drug courts.

Code Reclassification Subcommittee Report

A few days before the meeting, Professor Tom Hammer, subcommittee chair, had distributed to all committee members handouts of the subcommittee's recommendations for the classification of (a) drug code felonies and (b) non-criminal code, non-drug code felonies. (Copies of these handouts are in the committee's files. The handouts will be adapted for inclusion in the committee's final report.) Hammer said that the subcommittee's deliberative process for the drug-code felonies was different than that used for the subcommittee's other work. Prosecutors and public defenders knowledgeable about drug prosecutions and the drug code were brought in and provided tremendous assistance.

Hammer discussed the subcommittee's recommendations concerning Chapter 961, the drug code. He described how the drug crimes had been arrayed within'the proposed Class A-I scheme, what the maximum prison and ES ranges are, and how mandatory and prescriptive minimums had been removed. He noted that to fit drug crimes into the new Class A-I scheme was not easy. The Legislature had chosen to establish drug penalties differently than for other crimes. The drug penalties did not even use the same amounts from drug to drug: for example, cocaine amounts (5 grams or less, 5-15 grams, etc) differed from heroin amounts (3 grams or less, 3-10 grams). Fine amounts also differed from non-drug crimes. Drug tines could be assessed as high as $1 million, although Milwaukee County Assistant District Attorney Pat Kenney, in charge of that office's drug unit, said he could recall only 3 cases in 9 years in which even a $10,000 fine was given. As a practical matter, if the defendant had substantial assets, the prosecutors could pursue the forfeiture of those assets rather than seek a high fine.

The subcommittee heard lengthy presentations about drug crimes and penalties from the public defenders and the prosecutors. Rather than begin by classifying the most serious crimes as it had with the criminal code, the subcommittee classified the most litigated drug crimes using the mandatory release converter, and then, after discussion, moved crimes higher or lower on the Class A-I scale. Hammer walked the committee through the various classes and where drug penalties fell. He said the subcommittee was aware of the interplay between state and federal drug laws, and what amount of drugs was at issue before a case was handled in federal rather than state court.

Steve Hurley noticed that by and large, the amounts of drugs each crimes penalizes remained the same before and after classification. He asked whether or not the subcommittee considered changing those amounts. Hammer said that while that question was raised, even the witnesses before the subcommittee generally did not feel comfortable doing so, although certain new amount levels were inserted to better match the level of drug dealer with the proper penalty. This was done for cocaine and for marijuana. Methamphetamine was taken out of its previous grouping with other amphetamine drugs and given its own penalty schedule similar to heroin.

The subcommittee also made other recommendations to make Chapter 961 look more like the rest of the criminal code. The subcommittee recommends that penalty doublers, presumptive minimum penalties, and mandatory minimum penalties be eliminated to mirror the approach of the criminal code. The subcommittee recommends that the "drug repeater" statute remain to keep that aspect of the drug code like the habitual criminality enhancer in Chapter 939. Also, the penalty enhancer for distributing or possessing with intent to distribute controlled substances on or near certain places should be retained, but the no-parole and presumptive minimum aspects of the enhancer were eliminated. The subcommittee looked at other serious non-drug crimes and did not find such minimums. Thus, it recommended that the judge have maximum flexibility to use the enhancer's extra time if necessary, but also not to have to use it if the "within 1000 feet" requirement was only technically violated. The subcommittee also heard from certain judges that they would like meaningful alternatives for some defendants in drug cases, but that they did not believe existing probation was sufficient supervision.

Senator Huelsman and Mike McCann complimented Tom Hammer on his subcommittee's work.

Judge Malmstadt asked whether heroin was still the worst of these drugs, and if so, should not its penalty schedule be harsher. Hammer was not prepared to say whether heroin is the worst or not. He said the subcommittee would revisit the amount levels for the heroin penalties.

Judge Lamelas asked what interplay the code reclassification subcommitte foresaw between penalty enhancers and sentencing guidelines. Hammer said that his subcommittee recommended retaining the most used penalty enhancers, transforming most little-used enhancers into statutory aggravators, and deleting a few unused or duplicative ones.

Judge Wells liked the drug code proposals because they eliminated two things that bothered all actors in the criminal justice system: presumptive minimum sentences and mandatory minimum fines.

Hammer discussed the proposed classifications for the non-drug, non-criminal code felonies. The subcommittee worked with a list of such crimes from the Legislative Reference Bureau it thought to be complete. These crimes were considered the same way as those crimes in the criminal code and drug code: they were converted using the mandatory release period, and then after subcommittee discussion some crimes were moved up or down the Class A-I scale. The subcommittee did not recommend altering unique or high fines, such as for securities laws violations.

Hammer also said that the subcommittee is developing a Class A misdemeanor fleeing statute.

There were no other comments or questions of Hammer. Judge Barland complimented him on his and the code reclassification subcommittee's extraordinary work.

The committee recessed for lunch from 11:55 a.m. until 12:30 p.m.

Sentencing Guidelines Subcommittee Report and Discussion

The committee reconvened to hear a report on the work of the sentencing guidelines subcommittee from Judge Elsa Lamelas.

She said that the full committee has had 2 votes on the type of guideline format to recommend. Those 2 votes resulted in the adoption of 2 fairly different guideline formats: the "Lamelas-Ever&" format and the "Barland" format. At neither time did one guideline format manage to achieve deep support within the committee. Judges Barland and Larnelas had a number of discussions about melding these 2 versions. A copy of that latest, joint proposal was distributed to each committee member, and Judge Lamelas used an overhead projector to explain it. (A copy is retained in the committee's files.)

A practical concern was who would fill out the sentencing guidelines worksheet. The worksheet was drafted such that before sentencing, the presentence writer or a person designated by the judge could fill out all but 1 section.

The offense severity assessment attempts to give objective weight to former penalty enhancers transformed into statutory sentencing aggravators. It also incorporates aggravating and mitigating factors, both general and crime-specific.

A major area of discussion within the **offender risk assessment** was whether and how an offender's past criminal history should be weighed. The Lamelas-Everts guideline format called for a numerical scoring of criminal history. The Barland format did not. The full committee is split on this question. Judges Barland and Lamelas attempted to bridge this gap by writing out in narrative format some of the suggested correlations between the number and nature of past criminal convictions and/or past legal status and offender risk. For example, if the offender had previously been convicted of committing a certain number of felonies, he could be considered a medium- or high-risk. Because of concern about how such correlations might unduly impact minorities, only violent misdemeanors were considered. Also, before and after these correlations, the format warned that the criminal history scoring could overstate or understate an offender's risk.

Judge Barland noted that the largest change from the past formats was the narrative approach to offender risk assessment. This narrative approach to the criminal history component of risk assessment removes any scientific caste that scoring might give, while preserving a correlation between recidivism and risk.

Steve Hurley was concerned that no subcommittee meeting had taken place since the full committee meeting on June 25, 1999, and yet this joint proposal had been offered for committee consideration. He did not think a vote should occur on the joint proposal until the subcommittee had an opportunity to review and discuss it. Greg Everts thought it proper that the joint proposal be discussed because the guidelines subcommittee has had trouble making progress on the guidelines format in the past. Because the full committee was present, Everts thought the joint proposal should be discussed and a decision made so that it can be included in the final report. Hurley disagreed, and thought discussion would result in confrontation rather than consensus.

Judge Fiedler thought the committee should discuss the joint proposal. He noted that the full committee had taken votes in March and in June, and had adopted seemingly contradictory guideline formats. Given the impending August 31st deadline, and the difficulties the guidelines subcommittee had faced, he thought the joint proposal should at least be discussed. Nick Chiarkas thought there was no problem with discussing the joint proposal, but he would not take a vote on it before the subcommittee could at least meet to discuss it. Mike McCann thought that the full committee would benefit from discussing the joint proposal, although a vote on it could be postponed.

Judge Lamelas wanted guidance from the full committee as to which guideline format it prefers. Otherwise, the work that must be done on the subcommittee level cannot progress.

Senator Huelsman thought that a list of the pros and cons of the joint proposal would be helpful. To some committee members not on the guidelines subcommittee, the differences between the proposals were not always clear.

Walter Dickey said that attacking the process is the refuge of people who cannot win on the merits, so he was disinclined to attack the process. But he said that this whole matter has not been handled in a way designed to advance the committee's thinking and come up with a good product. He thought the full committee would remain polarized, and a format like the joint proposal would pass, although he would not vote for it. Had this topic been approached in a problem-solving way, he did not think the committee would be at this juncture. As sympathetic as Dickey was to Hurley's point, he thought the committee might as well discuss it, since there will not be much real progress made on these questions anyway.

Judge Barland said that thus far procedure had been discussed. In view of the committee's difficulties in deciding upon a guidelines format, he thought the committee should not vote on such an important issue without further time spent with the joint proposal. He thought that the committee should decide on the procedure for resolving this problem, and then refer it back to the subcommittee.

Judge Sykes thought the joint proposal should be discussed, and at the conclusion of the discussion, the full committee can decide whether it would make sense or be a pointless exercise to refer the matter back to the subcommittee.

Steve Hurley reviewed the history of the full committee considering and adopting different guideline formats. He wanted to take this topic back to the subcommittee for discussion. Nick Chiarkas agreed with Hurley. The only other position is against this document, and Chiarkas said did not think committee members had had enough time to review it.

McCann made a motion that for the next 40 minutes the committee discuss the joint proposal, and then the committee not take a vote. Judge Wells seconded the motion. On a voice vote, the motion carried.

Greg Everts liked Senator Huelsman's idea to discuss the pros and cons of the joint proposal. He reviewed the history of the different formats and said that much effort had been made to try and meld the approaches and come up with a consensus and that Hurley had been involved in that process. He said that no consensus had been reached at the subcommittee level on guidelines format. Judge Malmstadt said we were not discussing that issue, but something else.

Everts liked Senator Huelsman's idea of listing the pros and cons of the joint proposal. Hurley said that the joint proposal did not differ much from Judge Lamelas's last proposal. The only difference is that the numerical score for criminal history is removed; the emphasis is still on prior convictions.

McCann thought that any guidelines format that did not consider criminal record could risk enhancing racial disparity. He recalled Sandra Shane DuBow saying that one reason to use numbers was to get rid of disparity. McCann felt that the Barland format, if it ignored criminal history, left open the door for African-Americans to receive longer sentences. He liked the joint proposal because it considered criminal record yet still left judges discretion.

Linda Pugh said that whether or not criminal history was included, either guideline format could be used for discriminatory ends. Judge Sykes agreed that no judge has a crystal ball, and that subjective factors always play a role. But to the extent that proportionality is a goal, a system that provides some objective weighting to criminal history will minimize some of the subjective factors.

Judge Malmstadt thought that considering criminal history will perpetuate racism because if African-Americans start with a criminal history, they will receive longer sentences. He believed that including criminal history automatically weighted the system against minorities. McCann responded by giving an example of how a judge without such a weighting system could give white and black defendants different sentences, but that a system with some objective norms could somewhat constrain a judge.

Barbara Powell agreed with Linda Pugh's comments - she did not think either format would make a difference on the issue of racial disparity in sentencing.

Hurley thought it was not the fact of a prior conviction that mattered, but rather the relevance of that prior conviction to the behavior before the court that mattered. For example, if the behavior that is being punished is drug delivery, and there is a prior conviction for substantial battery, that prior felony conviction is irrelevant. One cannot indiscriminately count prior offenses. Hurley said nothing in the joint proposal draws the judge's attention to the relationship between the prior record and the conduct before the court. McCann disagreed.

Judge Sykes said the joint proposal looks at the content of the prior felonies by counting only violent felonies. She did not think anybody would disagree that if an offender had committed violent offenses in the past, he ought to be treated differently than someone who has not. Hurley said it depended on the violent offense.

Judge Malmstadt thought Hurley was speaking about risk, while Judge Sykes was talking about "just deserts." Judge Sykes said that prior convictions have something to do with risk and recidivism. She had looked up past studies from the U.S. Department of Justice of felony defendants from urban counties from 1990-94, which demonstrated the statistical correlation between prior criminal convictions and future criminal conduct. During that time period, 54-55% of all felony offenders in large urban counties had at least 1 prior conviction. Most of those offenders had between 2 and 4 convictions.

Judge Wells thought we should keep the former Wisconsin sentencing guidelines in mind. Those guidelines took into account prior criminal convictions and legal status (bail, probation, or parole) at the time of conviction. Guidelines from other states and the federal government have made as the two most important concerns: (a) severity of the offense and (b) prior convictions and status at the time of offense. Because the joint proposal does not quantify those two factors, as did the former Wisconsin guidelines, it is important that everyone is aware that it is a subjective format. Judge Wells felt that if the committee would recommend along that route, it should go with a reasonably broad subjective guideline. If the Legislature chose to make the subjective guideline format mandatory, discretion would remain with the judges and lawyers, where he thinks it should reside. Judge Wells noted, however, the disadvantage of a subjective guideline: disproportionate sentences across the state.

Judge Lamelas had been thinking about how the guidelines format might help to formulate policy down the road. If the new sentencing commission begins to see that certain crimes result in overstating or understating criminal history, the commission could adjust the guideline format.

Senator Huelsman thought that instances of overstating or understating criminal history could be caught by the appropriate questions on the worksheet.

Hurley thought that factors such as whether an offender is employed, and that an offender is on bail, are more important to risk assessment than prior criminal history. In his opinion, this format directed judges to high starting points, and put the burden on the defense lawyer to argue that a sentence should come down. Hurley thought the format should guide the judge to assess risk, rather than begin with an artificially high starting point. In the long run, he submitted, this format would result in higher than necessary sentences.

Judge Sykes disagreed that this format directs the judge to an artificial starting point. She thought it directs the judge to a proportionate starting point. Offenders with similar prior criminal records would be treated similarly, absent other factors which the judge could take into account. She also noted that when the monthly ranges were being formulated for the 9-cell grids, special attention was given to the lower figure in each range to ensure that mitigating circumstances, even in the higher cells, were accommodated.

Judge Malmstadt thought the disagreement was not over whether prior criminal record indicated recidivism, but what type of criminal record made an offender risky. Chiarkas agreed that prior offenses are some indication of risk, but that family condition is also an indication of risk. He did not think criminal history should be chosen from among these factors and given preeminent position. Judge Sykes pointed out that in the "new world" of determinate sentencing, the committee is obliged to produce a system with some proportionality, as the judge is the sole decision-maker now. There will be no parole board for these offenders.

Judge Lamelas said that when she was a prosecutor, and she argued for a long sentence, in the back of her mind she knew that the parole board could even out a disparate sentence. Not so in the "new world" of Truth-in-Sentencing. Imposing sentence is a hard thing to do, especially for serious offenses. Judges have no divine insight. She fears going into the world of Truth-in-Sentencing without a system that give committed judges a relatively uniform starting point. Judges have good days and bad days, just like everybody else. She thinks about what kind of guideline system she can produce for a hardworking judge who wants to make a fair decision in the "new world."

The sentencing guidelines subcommittee scheduled meetings for Friday, July 16, 1999, and Friday, July 25, 1999, to continue to discuss the joint proposal for the sentencing guidelines format.

Matt Frank registered his vote for including criminal history in the sentencing guidelines format. He also said he was concerned that the cells in the formats' graphs did not contain definitive numbers. He asked that the guidelines subcommittee consider the monthly ranges for the cells in the graphs in addition to the guidelines format.

Judge Lamelas agreed, and added that the proposed monthly ranges also had to be costed out. Frank said that subcommittee members might like to see the monthly ranges along with the format.

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

Olsen, Jefren

From: Olsen. Jefren
Sent: Monday, August 02, 1999 6:19 PM
To: Brennan, Mike
Subject: Committee report distribution

Mike,

Here is some information on some of the questions that you asked about distribution of the committee's report.

First, as you know, under Act 283 the committee must provide the governor with a copy of the report. Next, the Act requires distribution to the legislature under s. 13.172 (2), stats., which says that the report must be submitted to the chief clerk of each house. The chief clerks then notify the members and, if directed by leadership, distribute copies to members or standing committees or others. Finally, under subch. II of ch. 35, all state agencies, including committees like yours created under s. 15.01 (3), must submit sufficient copies of any document it produces to the division for libraries and community learning in the department of public instruction so that the division can distribute the copies to the depository libraries under s. 35.83 (3), stats. The grand total of statutorily required copies appears to me to be about a dozen: one to the governor; 2 to the legislature (one to each chief clerk); and 9 to the division in DPI. (Of course, probably want to provide others with copies, out of courtesy or political considerations or both--for instance, maybe you want key legislative committees and agency people to get their own copies.)

As to matters of style, I have no information as to specific requirements concerning format, typesetting, margin, etc. I guess those things are left up to the judgment of the committee's reporters, unless either of the chief clerk's offices have said otherwise. I still want to check one more source on that question, and I'll let you know when I've heard back (which I expect will be tomorrow).

Finally, as to the legislation that must be attached to your report, I want to let you know what I hope to have for you and the committee to review. If you haven't already received one, by next Tuesday you should have 6 individual drafts (or in some cases redrafts), one on each of the following topics: 1) classification of crimes (mostly felonies) in the criminal code; 2) classification of felonies in ch. 961; 3) classification of felonies that are outside of both ch. 961 and the criminal code: 4) ES revocation procedures; 5) the sentencing commission; and 6) sentence modification provisions (consisting of the geriatric proposal and the ES modification proposal). The committee can review them before and at its 8/16 meeting, and we will have time, I hope, to make changes for final review at the 8/20 meeting. After the drafts are finalized (I assume at the 8/20 meeting), I will combine the 6 drafts into one omnibus draft and attach an LRB analysis to it. For purposes of including it with the report, I assume that you will need the final omnibus draft early in the week of 8/23. If you have a firm date, let me know so that I can plan accordingly

Have you given any thought as to how the proposed legislation will be introduced, and by whom? I don't need to know this for purposes of getting the drafts prepared, but some legislators are probably eager to get the legislation and start working on it, and you may want to consider the matter so that we can arrange for introduction shortly after submission of the report.

Jefren

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

From: Brennan, Mike
Sent: Tuesday, August 03, 1999 10:10 AM
To: Olsen, Jefren; 'hammertQmarquette.edu'
Subject: RE: Sentencing statute incorporating current penalty enhancers

Jefren --

I speculate Tom will like option 1 over option 2, but I defer to Tom on this decision. He is out of town today, but will be in the office tomorrow.

Thank you for your e-mail earlier today re: distribution -- too bad we can't get away with sending out only 12 copies! This is an excellent starting point for our work on that front.

You are doing stellar work at this key time in our work. Thank you.

Mike

-----Original Message-----
From: Olsen, Jefren
Sent: Tuesday, August 03, 1999 9:57 AM
To: 'hammert@marquette.edu'
cc: Brennan, Mike
Subject: Sentencing statute incorporating current penalty enhancers

Tom Hammer and Mike Brennan:
I am working on the new sentencing statute that will incorporate most of the current penalty enhancers. There are 2 ways to create the new statute. First, I can simply create new text in the bill that lists the aggravating factors and then repeal the current enhancer statutes on which those factors are based. This approach will make the new sentencing statute easy to read, as all of its provisions will appear together in the bill.

Alternatively, I can renumber the existing penalty enhancer statutes to be a part of the new sentencing statute. This approach has the merit of showing exactly where the individual aggravating factors came from and will help to carry case law interpretations of the current language over to the language of the new sentencing statute. However, the second approach will make it more difficult for a reader of the committee's bill to follow the new sentencing statute because its provisions will be in several places in the bill.

Do you have a preference between the two methods?

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

Olsen, Jefren

From: Olsen, Jefren
Sent: Tuesday, August 03, 1999 5:37 PM
To: 'hammert@marquette.edu'
Subject: Classification of "Len Bias" 1st degree reckless homicide

Tom Hammer:

Section 940.02 (1) and (Im) are being classified as Class B felonies, as are s. 940.05 (1) and (2g). What about s. 940.02 (2)? The current draft has that as a Class C felony. Is that correct? Will that raise some of the same lesser-included issues that people were concerned about with respect to making s. 940.05 (1) and (2g) Class C felonies? Or is s. 940.02 (2) so narrow in applicability that, as a practical matter, it won't be a problem to give it a lower classification?

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

Olsen, Jefren

From: Tom Hammer [hammert@marquette.edu]
Sent: Thursday, August 05, 1999 4:24 PM
To: Jefren Olsen
Subject: Criminal Penalties

Hi Jefren,

Responding to your earlier questions, the Len Bias form of 1 st degree reckless homicide will be a Class C felony.

Regarding sentencing aggravators, Mike Brennan accurately predicted that I would much prefer a sentencing statute that lists the aggravators. It will be much easier for people who need to use it.

Next week, after I am finished with my section of the final report, I will begin going over your drafts. I will be in touch if I have any questions or suggestions. In the meantime let me know if there is anything else I can assist you with.

Thanks for your excellent work on this project so far.

Tom Hammer

Olsen, Jefren

From: Olsen, Jefren
Sent: Thursday, August 05, 1999 4:38 PM
To: 'Tom Hammer'
Subject: RE: Criminal Penalties

Tom,
Thank you for your response. The new version of LRB-0590, which makes the criminal code changes, is already being retyped. I'll be e-mailing it to Mike Brennan as soon as it's ready, which should be tomorrow.

The draft left the Len Bias offense as a Class C felony. I asked in the drafters note that will be attached to the draft whether that is what you wanted, so you can just ignore that question in the drafters note.

Also, based on Mike's prediction, the draft will contain a brand new statute that incorporates the provisions of the various enhancers that are repealed in the draft. This will make it easier for the committee and the legislature to see what the new statute looks like and says. Renumbering the relevant current language into the new statute would've had the same ultimate result in terms of how the enacted statute would look and what it would say, but renumbering current provisions to a new place and amending them at the same time can make a bill draft harder to follow and the intended result harder to conceptualize.

Thanks again.

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

-----Original Message-----
From: Tom Hammer [mailto:hammert@marquette.edu]
Sent: Thursday, August 05, 1999 4:24 PM
To: Jefren Olsen
Subject: Criminal Penalties

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Next week, after I am finished with my section of the final report, I will begin going over your drafts. I will be in touch if I have any questions or suggestions. In the meantime let me know if there is anything else I can assist you with.

Thanks for your excellent work on this project so far.

Olsen, Jefren

From: Dubberstein, Jennifer
Sent: Friday, August 13, 1999 8:58 AM
To: Alison Poe; Amanda Todd; Andrew Statz; Andy Hall; Andy Moore; Bill Clausius; Charles Hoornstra; Cheri Dubiel; Cindy Archer; Cindy O'Donnell; D. Erik Cummings; David Albino; David Schwarz; Dick Jones; Ed Bloom; Ed Eberle; George Mitchell; Helen Forster; James Johnston; Janean Cleveland; Jefren Olsen; Jennifer Dubberstein; Jere Bauer, Jr.; Jessica O'Donnell; Jon Litscher; Judge Jeffrey Kremers; Lee Pray; Linda Barth; Mark Grapentine; Mark Wehrly; Marla Stephens; Marline Pearson; Melissa Gilbert; Mike Flaherty; Prof. Michael Smith; Ray Sobocinski; Rep. Goetsch; Rep. Jon Richards; Rep. Sykora; Robert Pultz; Sandra Shane-Dubow; Sen. Gary George; Sen.Robson; Sharon Schmeling; Steve Jandacek; Steve Swigart; Susan Goodwin; Susan Marcott; Terry Marshall; William Grosshans; William Lundstrom
cc: Brennan, Mike
Subject: Monday, August 16, 1999 Criminal Penalties Study Committee Meeting

Attached please find the agenda for the above referenced meeting. Also attached are the minutes from the July 30, 1999 meeting.

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

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

Monday, August 16, 1999
9:30 a.m.

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

1. **Call to order - Committee Chair Judge Thomas Barland**
2. **Consideration of minutes of July 30, 1999 meeting**
3. **Code reclassification addendum to final report - Committee Reporter Professor Thomas Hammer**
4. **Consideration of proposed statute regarding racial bias during trial or sentencing - Mike McCann**
5. **Consideration of sentencing guidelines worksheets and notes - subcommittee chair Judge Elsa Lamelas & Steve Hurley**
6. **Discussion of draft final report by section:**
   a. **The Legislation that enacted Truth-in-Sentencing, this Committee's Charges, and this Committee's Working Structure**
   b. **The Classification of Crimes**
   c. **Temporary Advisory Sentencing Guidelines**
   d. **The Sentencing Commission**
   e. **Extended Supervision and its Revocation**
   f. **Computer Modeling**
   g. **Education of the Judiciary, the Bar, and the Public**
   h. **Issues the Committee has Identified for Further Study**

i. **Draft Legislation**
j. **Executive Summary**

6. **Any public comments**

7. **Adjournment**

Criminal Penalties Study Committee

July 30, 1999 Meeting Minutes
Room 4 17 North, State Capitol Building, Madison, Wisconsin

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

The committee approved unanimously the minutes from the July 9, 1999 meeting.

Results of June 16, 1999 Prosecutors Survey

Staff counsel Mike Brennan gave a short presentation on the survey done at the State Prosecutor's Education and Training conference in Egg Harbor, Wisconsin on June 16, 1999. Approximately 110 prosecutors attending the conference completed sentencing exercises for burglary, armed robbery, and sexual assault. Each crime had mitigated and aggravated fact scenarios, which the prosecutors considered using low- and high-risk offender profiles. The prosecutors scored all of the scenarios using both offender types under current law and under the new Truth-in-Sentencing law.

A spreadsheet analysis of the prosecutors' sentences was distributed to the committee, a copy of which is in the committee's files. The spreadsheet listed the median sentence lengths for each of the offense and offender scenarios. In comparison to sentences under current law, prosecutors recommended shorter prison terms for burglary, armed robbery, and drug dealing. Overall sentence lengths increased slightly, as prosecutors recommended longer extended supervision ("ES") periods for some scenarios.

Matt Frank mentioned that the prosecutors did decrease the prison components of the recommended sentences. He also said the prosecutors received a conversion table illustrating the time to first release, average time served, and mandatory release date of offenders sentenced under the current law.

Testimony before Assembly Corrections Committee

Judge Barland reported about the testimony given by him and Mike Brennan the previous day before the Assembly Corrections Committee, chaired by Rep. Robert Goetsch. The work of the Criminal Penalties Study Committee was the only item on the Corrections Committee's agenda. Barland and Brennan made brief presentations to the committee, and answered questions for 90 minutes. The Corrections Committee seemed interested in the CPSC's work. The CPSC bill may be assigned to the Corrections Committee when it is in the Assembly. Representative Goetsch hopes that any amendments to the CPSC bill will be offered in the Corrections Committee, and not on the Assembly floor. Judge Barland thought the CPSC's work was well-received by the Corrections Committee.

Judge Sykes had attended part of the testimony, and thought that the Representatives were receptive to the CPSC's work. Judge Barland and Mike Brennan fielded questions concerning penalty enhancers and strengthening community corrections. Judge Barland said that the Corrections Committee seemed receptive to the idea of increased resources for community corrections. Representatives also asked whether or not the CPSC supported the "prison pay-as-you-go" plan, considered by the Joint Finance Committee, which would require estimating the cost of any legislation affecting criminal penalties. Brennan said that a number of representatives expressed interest in the CPSC's work because they felt this was a group of experts taking a rational approach to criminal law, which they did not always feel the Assembly or Senate did.

Code Reclassification Subcommittee Report

Professor Tom Hammer reviewed the conclusions reached at the final code reclassification subcommittee meeting on July 19th in the form of a document which had been distributed to the committee the day before. A copy of which is in the committee's files. Those conclusions follow:

1. **Fleeing** - a misdemeanor version of this crime has been drafted. Committee members had concluded that a gap existed in the law for those short, not high-speed fleeings in which nobody got hurt and police officers or other individuals were not endangered.

2. **General battery statutes** - The code reclassification subcommittee tried to compress the great number of special circumstances batteries which exist under present law. Unfortunately, no consensus could be reached. The full committee should recommend that the legislature study this crime. But the subcommittee did improve the general battery statutes which are not focused on the special groups. It has proposed a statute with 4 battery offenses, rather than the current 9 offenses. Mike McCann complimented the subcommittee's recommended improvements.

3. **Classification of first-degree reckless homicide and second-degree intentional homicide** - Using the mandatory release converter, these homicide crimes fall into Class C, punishable by a maximum of 25 years in prison and 15 years. Hammer explained the lengthy debate in which the subcommittee had engaged as to whether or not these crimes should occupy the same class. The subcommittee considered the types of cases brought under each crime, and concluded that the most serious, dangerous felonies belong in Class B. Accordingly, the code reclassification subcommittee recommended that first degree reckless homicide be moved into Class B, while second-degree intentional homicide remain in Class C, as it involved mitigated forms of intentional murder like imperfect self-defense, and heat of passion.

Professor Hammer displayed a diagram showing the lesser-included offenses of each crime, and talked about how certain fact scenarios should allow for lesser-included versions of each crime, while other fact scenarios would hardly ever occur. It was the subcommittee's intent that second-degree intentional homicide not be a lesser-included offense of first-degree reckless homicide, because the legislature has not provided for mitigation in that way under the present law, although that is not to say that imperfect self-defense or heat of passion might not play a role in a first-degree reckless homicide.

Judge Sykes explained the subcommittee debate. Mike Tobin of the State Public Defender's office had argued strongly for second-degree intentional homicide as a Class C felony, lower than a first-degree reckless homicide, because there are mitigated circumstances such as self-defense, and heat of passion, which make that person less culpable than an offender who commits a first-degree reckless homicide. The subcommittee reasoned that first-degree reckless homicide should be raised from the mandatory release converter level of Class C to a Class B felony, as sometimes the only difference between first-degree intentional homicide and first-degree reckless homicide is the distance between the shooter and the victim. The subcommittee felt comfortable leaving second-degree intentional homicide as a Class C felony because although it is an intentional crime, by definition it occurs under more mitigated, less culpable circumstances than many other homicides. As a practical matter, the subcommittee did not think that facts would be presented in which judges or lawyers desired second-degree intentional homicide to be a lesser-included offense of first-degree reckless homicide. A defense attorney, for example, will want a second-degree reckless homicide jury instruction rather than a second-degree intentional homicide jury instruction when seeking a lesser-included offense instruction in a case charged as a first-degree reckless homicide.

Judge Malmstadt had checked with Milwaukee County Deputy District Attorney Jon Reddin, who said that while there were many convictions for first-degree intentional and reckless homicides, there were relatively few convictions for second-degree intentional and reckless homicides. Given the level of violence in the community reflected in first-degree reckless homicide convictions, Judge Malmstadt submitted that both crimes should be classified as a B felony.

Judge Lamelas agreed with Judge Malmstadt that the facts underlying these crimes were close, and that the two types of homicide should be in the same classification.

Steve Hurley agreed that the crimes should occupy the same classification, but he would place them both in Class C, and if, for example, the crime is a drive-by shooting, that should be an aggravating factor.

Professor Hammer reminded the committee that offenses of similar severity should be classified together. If first-degree reckless homicide is placed in Class C, it would be below first-degree sexual assault, which is placed in Class B.

Judge Wells thought the committee could be creating an appellate nightmare by placing the two crimes in different classifications. He thought both crimes should occupy Class B.

Professor Hammer pointed out that this discussion in the full committee mirrored the discussion in the code reclassification subcommittee over a number of meetings. He requested that a decision be made one way or the other today, so the subcommittee could finish its work. Judge Barland thought the issue should come to a vote.

A motion to treat second-degree intentional homicide as a lesser included offense of first-degree reckless homicide was defeated 9 votes to 5 votes, with 2 abstentions. A motion to classify second degree intentional homicide and first degree reckless homicide as Class B felonies passed 10 votes to 5 votes, with 1 abstention.

4. Juvenile Absconding Statutes - These rarely used statutes concern when a juvenile who has been adjudicated delinquent absconds before the dispositional hearing and is not picked up before turning 17 years old. The legislature created a special offense for these absconders and placed that offense in the same classification as the offense for which the absconder was being prosecuted. The code reclassification subcommittee recommends that this crime be classified in the same manner as under the present law. To do otherwise would involve making significant changes in the juvenile code.

5. Habitual Criminality - The code reclassification subcommittee recommends that habitual criminality be maintained in the law as it is today. The only changes involve the maximums by which the sentence may be increased if the person is adjudged a habitual criminal. The 2/3 mandatory release converter is applied to these offenses. This produces the changes that: (a) a misdemeanor habitual criminal may have his sentence increased by not more than 2 years; (b) a felony habitual criminal with the felony not punishable by more than 10 years may have his sentence increased by not more than 4 years; and (c) a felony habitual criminal with the felony punishable by more than 10 years may have his sentence increased by not more than 6 years. The subcommittee does not recommend changing the current "three strikes" or "two strikes" laws.

6. Penalty Enhancers - Now that the full committee has a better sense of the direction of the sentencing guidelines subcommittee, the code reclassification subcommittee recommends that a number of the current penalty enhancers be converted to sentencing aggravators to be used by the judge at sentencing, but not increase the maximum possible penalty. Five of the current chapter 939 enhancers should be maintained without changes: commission of a crime while using a dangerous weapon, violent crime in school zones, certain domestic abuse offense penalties, the hate crimes enhancer, and habitual criminality. As for those crimes with enhancers built into them, the subcommittee recommends that the aggravating conduct be considered at sentencing, rather than result in additional prison time, since those crimes were classified with the "worst case" scenario in mind. The subcommittee also recommends the repeal of a few other enhancers because of lack of use or because Truth-in-Sentencing provides sufficient prison time to penalize the aggravating conduct.

Professor Hammer reiterated that the approach of the code reclassification subcommittee has been that judges should have discretion to sentence an offender up to the maximum period for a crime or to the minimum period for a crime, including probation. This has resulted in removing from the criminal laws (except for operating a vehicle while intoxicated) presumptive minimum and mandatory minimum penalties. Mandatory consecutive sentences, such as for escape, have not been altered. The subcommittee thought it important not to freeze the hands of judges or prosecutors.

7. Not Guilty by Reason Of Mental Disease or Defect - Under current law, a judge can commit a person found not guilty by reason of mental disease or defect to up to 2/3 of the maximum period of incarceration of the crime charged, The code reclassification subcommittee recommends that the maximum term of institutionalization be the maximum term of confinement for each of the several classes of felonies, not the maximum term of imprisonment. That would mean these people are in the same situation under the new law as they are under current law.

Professor Hammer mentioned how everyone will need to get used to using new terminology: the maximum term of confinement plus the maximum term of extended supervision equals the maximum term of imprisonment.

8. Fines - The code reclassification subcommittee recommends that Class C and Class D have maximum fines of $100,000, higher than the amounts previously recommended for those classes.

9. Bifurcated sentence for misdemeanant - A question exists as to whether or not Act 283 requires that misdemeanants sent to state prison receive a Truth-in-Sentencing bifurcated sentence. The committee earlier discussed that if such misdemeanants are bad enough actors to be imprisoned for their crimes, they ought to be subject to extended supervision upon their release from prison. The code reclassification subcommittee recommends that Act 283 be amended to require that a judge sentencing a misdemeanant to state prison bifurcate that sentence into a term of incarceration and a term of extended supervision ("ES"), and that the period of ES be at least 25% of the period of incarceration.

10. **Probation** - Professor Hammer reminded the committee that the classification system impacts the maximum length of probation. The maximum period for an original term of probation on a single felony is the maximum term of imprisonment for that felony, or 3 years, whichever is greater. For example, the new crime classification of burglary is F, which has a maximum term of confinement of 7.5 years, of extended supervision of 5 years, for a total maximum term of imprisonment (in Truth-in-Sentencing parlance) of 12.5 years. This would mean the maximum term of probation for burglary is 12.5 years.

Judge Malmstadt thought the maximum term of probation should equal the maximum term of confinement, rather than the maximum term of imprisonment. Hammer said that if committee members thought that otherwise, unduly long probation terms would result, the committee should recommend changing the statute.

A motion to limit the term of probation to the maximum period of confinement time for the class of that felony or 3 years, whichever is longer, passed unanimously.

11. **Misdemeanor Operating a Vehicle Without Owner's Consent -** Mike McCann asked the code reclassification subcommittee to explore the creation of a misdemeanor operating a vehicle without owner's consent crime if the car was returned without damage and within 24 hours, Such a crime existed until a few years ago. The subcommittee concluded that such a crime was not needed because if an auto theft case was to be disposed of as a misdemeanor, a plea agreement to misdemeanor theft would suffice.

Judge Malmstadt thought the idea should be reconsidered, as did Steve Hurley.

A motion to reinstate the former misdemeanor version of operating a vehicle without an owners consent if the vehicle is abandoned within 24 hours undamaged, with the burden to be placed on the defense to show abandonment as an affirmative defense, passed 12 votes to 2 votes, with 2 abstaining.

Hammer commented that the Legislative Reference Bureau had worked hard to prepare the committee's recommendations in bill format, and that the draft legislation will be complete when the committee issues its report. Hammer publicly thanked the members of the code reclassification subcommittee and the committee staff for their help in working through a large volume of material.

Mike McCann asked whether or not the full committee should vote to adopt the code reclassification subcommittee's work. Judge Barland passed that question on to the full committee for discussion. Steve Hurley thought it would be more efficient and productive to vote on the entire report rather than on each part. McCann thought that if a committee member had a problem with a part of the report, now would be the time to find that out. A motion was made and seconded to adopt the full code reclassification subcommittee report as presented to the committee.

Discussion of Classification of Burglary

Judge Malmstadt opened discussion on the motion by questioning the proposed classification of burglary as a Class F (maximum 7.5 years prison, 5 years ES) rather than a Class G (maximum 5 years prison, 5 years ES) crime. He thought money spent incarcerating burglars should be shifted to incarcerating violent criminals.

A motion was made and seconded to classify burglary as a Class G rather than as a Class F crime. Professor Hammer reported that the code reclassification subcommittee had twice discussed such a reclassification, but both times rejected it as insufficient prison time to incarcerate the professional burglar who might only be able to be charged with one count, from a fingerprint, for example.

Judge Barland mentioned that there is a practical aspect to this debate, as the legislature will watch closely how the committee classifies certain crimes, especially burglary, to which their constituents are sensitive. He thought the Class F classification was a good example to the legislature that the committee is not recommending decreasing the available prison time for crimes about which citizens feel strongly. Judge Lamelas thought that 5 years was too short to punish the professional burglar, especially one who a resident might encounter during the course of the burglary.

Judge Fiedler raised the point that in 1994, the legislature passed a law that offenders committing certain crimes should presumptively remain in prison until their mandatory release date, and that burglary was one of those crimes. Judge Sykes also opposed lowering the classification of burglary because the crime involves a serious invasion of the security and sanctity of the home. She mentioned how strongly Milwaukee Mayor John Norquist felt that burglary was destroying certain Milwaukee neighborhoods, and that his support of the committee's work would be tied to it recommending sufficient prison time to punish burglars.

Steve Hurley was concerned that this classification question be considered in context. He worried about the cost of these classifications. Matt Frank agreed with Hurley.

Judge Lamelas noted that in the sentencing guideline worksheet proposed for burglary, 5 of the 9 cells will recommend probation at the lower end of the range in those cells, and only 1 of the 9 cells includes recommended a prison term longer than 5 years. She thought that concerns about lengthy sentences with a longer maximum will be addressed in part by proper use of the sentencing guidelines.

A motion was made to table this discussion until an analysis could be done costing out burglary as a Class F and as a Class G felony. That motion passed 8 votes to 7 votes.

The committee broke for lunch from 11:55 a.m. to 12:30 p.m.

After lunch, Judge Barland said that one more full committee meeting (then scheduled for August 20th) may not provide enough time to finish the committee's work. He thought a second full committee meeting should be added in August, at which a cost estimate of different classifications of burglary could be distributed. Judge Barland canvassed committee members for their availability for a second full committee meeting during August.

Committee members' schedules in August were busy. As a result of the few dates members were available, the advisability of tabling debate on the classification of burglary was questioned. A member in the majority on the motion to table the classification of burglary question moved to reopen the debate on that question. That motion to reopen passed 11 votes to 2 votes, with 3 abstentions.

A motion was made to classify the offense of burglary as a Class G felony (5 years prison, 5 years extended supervision) rather than as a Class F felony (7.5 years prison, 5 years extended supervision). That motion was seconded, and was defeated 9 votes to 5 votes, with 2 abstentions. Accordingly, the committee will recommend that the crime of burglary be classified as a Class F felony.

A motion to adopt all of the work of the code reclassification subcommittee was made and seconded. That motion passed 12 votes to 3 votes, with 1 abstention.

Geriatric Clause

Mike McCann introduced draft language, part of which was borrowed from Virginia's statutes, that if an offender has served 10 years of incarceration, and has reached 60 years of age, he could file a motion with the Program Review Board of the Department of Corrections to serve the remainder of his sentence on extended supervision. An offender who has served 5 years of incarceration and has reached 65 years of age could file such a motion as well. The Program Review Board, which makes the decisions on moving prisoners from higher to lower security, will survive the enactment of Truth-in-Sentencing (unlike the parole board, which will lapse, albeit many years in the future). If the Program Review Board determines that it is in the public interest pursuant to State v. Kenvon that the offender serve the remainder of his sentence on extended supervision after the age in question, it would refer the motion to the sentencing court, which would give notice to the district attorney and any victims and schedule a hearing. At the hearing, the court would decide whether or not to modify the remaining incarcerative portion of the sentence to extended supervision. McCann thought that such a motion should be filed not more than once per year, and no sooner than 1 year of reaching the applicable age. The clause would not apply to offenders convicted of Class A felonies.

Committee members discussed whether due process or equal protection problems might result in limiting this clause to Truth-in-Sentencing prisoners. The reason for the clause is because of the anticipated cost of incarcerating elderly and unhealthy prisoners. Steve Hurley said the clause was taxpayer neutral, as one way or the other, in prison or on Medicare, the public would be paying to take care of these prisoners.

McCann said he considered giving the Department of Corrections the power to file such a petition, but he thought double jeopardy considerations could arise by the government in effect initiating a "resentencing."

Bill Jenkins thought the geriatric clause was a great idea. He said that by introducing the idea, the committee was showing fiscal responsibility.

Matt Frank was uncomfortable with voting on the clause as currently drafted without exploring the implications of the clause's language. How broad can "public interest" be defined? McCann would consider alternative language proposed, but did not want to see the clause delayed for further discussion. Judge Bat-land proposed that the concept be voted on, but that a group gather to draft any revisions to McCann's proposal. Judge Wells agreed, and thought that the burden of proof should be on the defendant to provide the greater weight of the credible evidence that release to extended supervision was in the public interest. This standard is the same as the civil burden of proof. He also thought the offender should be entitled to a public defender.

A motion to adopt this geriatric clause passed 13 votes to 1 vote, with 2 abstentions,

Sentencing Judge to Change ES Conditions

Judge Barland raised the issue of whether or not the committee wishes to recommend that sentencing judges have the authority to change conditions of ES after the sentence has been imposed.

Mike Brennan said that Chapter 973 of the Wisconsin Statutes, as modified by 1997 Act 283, does not allow for such modifications. Judge Wells raised the idea two meetings ago as a possibility of something that judges might want because of the analog that exists between probation and extended supervision.

Steve Hurley said that at the end of lengthy prison terms, the sentencing judge may not know what programs might be available to order as conditions of ES.

A motion to allow the sentencing judge to change the conditions of extended supervision passed unanimously. Such a motion to change ES conditions from a defendant is limited to no earlier than 1 year before the offender's ES is to begin, and no more than once annually.

Sentencing Guidelines Subcommittee Report

Judge Larnelas reported that during the last couple of weeks there had been progress made in resolving differences with respect to a sentencing guidelines format. Steve Hurley and Greg Everts had contributed greatly to that progress. Many committee members not on the sentencing guidelines subcommittee had attended the subcommittee's meetings and helped advance the debate.

The guidelines as now envisioned contain 2 components: the **worksheet,** and accompanying **notes. The** form is called a worksheet to emphasize that the form is not the sentencing, but rather reflects the sentencing process and assists the judge in the sentencing process.

The notes helped clarify worksheet questions. The notes explain, enhance, and enlarge upon the sections of the worksheets.

Since the last full committee meeting, the guidelines subcommittee had held 2 full meetings attended by members of the full committee not on the guidelines subcommittee. Also, Judge Lamelas, Steve Hurley, and Greg Everts had met once, and Judge Lamelas and Steve Hurley had met again, all in an effort to develop the guideline worksheets and the notes.

A structural change in the worksheets is that crime-specific offense severity questions are placed at the beginning of the worksheets. These are the characteristics that differ from offense to offense. In almost all other respects, the guideline worksheets will be the same as each other.

The debate over risk assessment was solved by the worksheet posing normative questions concerning an offender's past criminal history with detailed commentary in the notes, rather than using a point scoring system. Also, the notes contain descriptions of a lesser risk, medium risk, and higher risk offender.

The worksheets include graphs that list how many people over the last five years were placed on probation for violating that crime. The worksheets will each include a two axis graph, in which risk assessment (lesser, medium, and high) is considered on the horizontal axis, and offense severity (mitigated, intermediate, and aggravated) is considered on the vertical axis.

To minimize confusion, the notes use the same numbering system as the worksheets. The notes introduce the guidelines as advisory, and state that the guidelines are to be applied consistently with applicable case law and statutory authority. The notes list the crimes for which guidelines have been prepared, and they explain the five sections of the worksheets: (1) offense-severity level, (2) risk assessment, (3) specific offense chart, (4) adjustments to the indicated sentence, and (5) imposition of sentence.

Then the notes list many of the factors appropriate to consider when imposing a sentence. This area of the notes is undergoing many revisions, especially in the area of sexual offenses.

After some debate as to how penalty enhancers should be considered using the proposed sentencing guidelines, Judge Bar-land suggested they be considered the same way as under the former Wisconsin sentencing guidelines: the judge arrived at the indicated sentence, following the graph and all other questions, and then considered application of the enhancer. Judge Lamelas agreed with that approach, and thought it should be listed under section **IV.B.** of the worksheet. Steve Hurley wanted to make sure that the dangerous weapons enhancer was not double-counted: once in the base punishment, and later after arriving at the indicated sentence. Hurley thought it important that the new sentencing commission consider the imposition of concurrent and consecutive sentences under the new guidelines system.

Judge Lamelas said that the sentencing notes define a violent offense as one that involves force or the threat of use of force. This is the same definition as in the former Wisconsin sentencing guidelines. Another topic of much discussion was how to define legal status: probation, parole, ES, **etc.** The notes define legal status as if at the time of the offense the defendant was on probation for any felony or violent misdemeanor; on parole; on extended supervision; subject to juvenile supervision following adjudication for an act that would have been a felony or violent misdemeanor if committed by an adult; an escapee; or an absconder. The guidelines subcommittee discussed at length whether or not a defendant being on bail meant he had a legal status. The committee decided that a person on bail did not have legal status.

Section III of the notes comment on the 9-cell graphs in the worksheets. The notes state that use of the graph does not envision equal distribution of offenders among the nine cells. The subcommittee discussed whether the top cell should always include the maximum period of incarceration for the offense, and it was decided it should. The subcommittee also discussed whether the bottom cell should always include probation, and it was decided it should. The notes state that the top and bottom cells should be reserved for the worst and best offenders, respectively.

Section IV of the notes refer to those adjustments to the sentence indicated by the graph. That is the natural place to consider any statutory aggravators. It also lists a number of other factors that were difficult to accommodate in either the offense severity or risk-assessment axis. These include read-in offenses, acceptance of responsibility, cooperation with authorities, attorney recommendations, and restitution paid at great sacrifice before sentence. The notes also discourage judges from imposing the maximum term for extended supervision, with the principal exception being for sexual offenders.

Judge Larnelas described how the guidelines subcommittee considered the monthly ranges produced for the cells in the graphs at the June 11, 1999 judicial survey. The median low and median high sentence lengths produced at that survey were inserted into the cells. The guidelines subcommittee considered and then adjusted to achieve what the committee considered to be proper and uniform ranges. The monthly ranges reflected that the high-risk offender with the most mitigated form of the offense tended to get a higher term of incarceration than a low-risk offender committing the most aggravated form of the offense. In recognition of the political pressures that may be on the judge at the time of sentencing, much attention was given to the lower number in the monthly range in each cell, to ensure that the lowest reasonable sentence was listed.

The subcommittee also considered the former Wisconsin sentencing guideline monthly ranges adjusted downward to reflect actual prison time served. Those numbers were rejected as being too low to properly punish offenders.

Generally, committee members were in favor of a broad range in each cell. Such a range gives a judge flexibility as to the sentence that will be imposed. But it also diminishes the ability to use the cells to predict cost, and it also might make it more difficult for litigants to get an idea of what sentence a judge might give.

Steve Hurley said that he and Judge Lamelas had worked hard to resolve their differences over the format of the guideline worksheet. Although he does not now have a problem with the format, he has difficulty with the monthly ranges in the worksheet graphs. The June 11, 1999 judicial survey was done without guidelines. He does not think the survey was a proper format at which to arrive at monthly ranges for the cells in the graphs. A diversity of interests should enter into that calculation, beyond judges and lawyers. Moreover, the fiscal impact of those numbers in the cells is not yet known.

Judge Lamelas believed that the survey was productive, especially in arriving at factors indicating severity of offense and offender risk. She emphasized that at the subcommittee meetings a number of non-subcommittee members, including non-judges, were present, and each of the charts was voted on and approved.

Mike McCann requested that on the 2 drug worksheets, harm to the victim include harm to the neighborhood. McCann agreed to submit his requested language changes to the worksheets in writing.

Matt Frank asked whether or not the guidelines subcommittee had decided to use historical time served data as relevant in developing the guidelines. Judge Lamelas said the subcommittee had rejected that idea, although Judge Malmstadt pointed out that the graphs some of the worksheets are comparable to the historical time served for those crimes.

Frank inquired whether or not the committee's final report would indicate that if judges generally follow these guidelines, it would result in a certain number of people being incarcerated, which would cost a certain amount. Judge Barland said that methodology had not been employed. Because the computer model was developed in parallel with the guidelines, a crossover of information was not possible. Frank asked whether there was a way to use the computer model to adjust the monthly ranges in the guideline cells on the worksheets. Judge Lamelas commented that that type of work had been done for the offenses of armed robbery and burglary, that it was extremely time-intensive, and that the work had not proved worthwhile because the crimes now had new maximum periods of incarceration. Frank thought that the legislature will ask how much the new guideline system will cost. Judge Lamelas said that one of the things that had troubled everybody who has worked on the committee is the difficulty of obtaining reliable data.

Mike Smith said that to answer such a question properly, for modeling purposes, the actual corrections files themselves had to be consulted, as no data system contains the information needed. Without a system reporting particularized data, the committee cannot figure out how many people are likely to fall into any one cell. The committee is stuck with approximations of where the median sentence will be, Smith said the more important question is not how many people will fall into each cell of a graph, but what is the likely consumption of resources of "old world" people over the next 5 years. There, the data systems can tell us something, and we have more confidence in that output than in previous projections done by other state entities.

Mike Brennan found helpful the relative comparisons of the various scenarios which had modeled different policy assumptions. Judge Barland said he tried to explain some of these concepts to the Assembly Corrections committee yesterday. This committee is presenting a computer model to the sentencing commission that can be enlarged upon to give a more accurate prediction than has been done previously. Brennan also contrasted the Legislative Fiscal Bureau estimates with those of the computer model, and how the computer model's forecasts were more accurate.

Judge Lamelas commented that the guideline worksheets would be forwarded to the sentencing commission for their use in formulating future guidelines. Mike McCann said not to forget that the legislature passed Truth-in-Sentencing without a cost estimate, and then asked this committee to give it the details.

Judge Barland asked for any further comments on sentencing guidelines, but there was none. The committee did not vote on the guidelines subcommittee's work because this was the first report of these conclusions.

Judge Barland reported that the final report was being drafted and edited. During drafting, the report's readership is being kept in mind. Accordingly, the executive summary will be significant, for if legislators read anything, it will be that section.

A discussion was had about a second full committee meeting in August, and it was decided that the full committee meet next on Monday, August 16th, 1999 at 9:30 a.m.

Judge Barland asked for any comments on the first draft of the final report, distributed 3 before the committee meeting, Greg Everts said that one of the report's recommendations, in addition to probation as an alternative to prison, should be further study of other alternatives to prison. A range of options short of prison should be developed, instead of just probation versus prison.

The only public comment was from Edward Reich of Janesville, Wisconsin, who believes that nutritional imbalances can lead to aggressive behavior. Mr. Reich could not stay to address the committee, but left a copy of a recent letter to the editor expressing his position.

At 3:25 p.m. the committee adjourned until its next meeting, which will take place at 9:30 a.m. on Monday, August 16, 1999 in Room 417 North of the State Capitol in Madison, Wisconsin.

Olsen, Jefren

From: Frank, Matt J.
Sent: Tuesday, August 17, 1999 4:03 PM
To: Brennan, Mike; 'judge barland'
cc: 'tom hammer'; Olsen, Jefren
Subject: RE: CPSC Open Meetings Notice and Agenda for Friday 8/20/99

Mike, I understand that you and Tom and Jefren will be discussing these tomorrow. If there are issues where the committee's desires are not already clear, I'd like to know about those and target those for prep for Friday. If the language suggestions are non-controversial and more mechanical, that won't be as big an issue.

Matt

----Original Message----
From: Brennan, Mike
Sent: Tuesday, August 17, 1999 4:00 PM
To: 'judgebarland'
cc: 'tom hammer'; Frank, Matt J.; Olsen, Jefren
Subject: CPSC Open Meetings Notice and Agenda for Friday 8/20/99

Judge & Tom --

I have added Matt Frank to the agenda after Tom, and before the Committee reviews the final report. He will discuss the various proposals of the AG's office for revisions to the draft legislation and the final committee report.

It is possible that some of the AG's proposals may have been resolved before Friday. If so, we will alert Matt.

A revised copy of the new agenda is reproduced below. It will be distributed late tomorrow afternoon unless we hear to the contrary.

Mike

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

Friday, August 20, 1999
9:30 a.m.

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

1. **Call to order - Committee Chair Judge Thomas Barland**
2. **Follow up on certain Code Reclassification issues and changes in proposed legislation - Committee Reporter Professor Thomas Hammer**
3. **Proposed revisions to draft legislation from Attorney General's office - Matt Frank**
4. **Discussion of draft final report by section:**
   a. **The Legislation that enacted Truth-in-Sentencing, this Committee's Charges, and this Committee's Working Structure**
   b. **The Classification of Crimes**
   c. **Temporary Advisory Sentencing Guidelines**

d. The Sentencing Commission
e. Extended Sup&vision and its Revocation
f. Computer Modeling
g. Education of the Judiciary, the Bar, and the Public
h. Issues the Committee has Identified for Further Study
i. Draft Legislation
j. Executive Summary

4. Any public comments

5. Adjournment

Olsen, Jefren

From: Brennan, Mike
Sent: Wednesday, August 18, 1999 9:34 AM
To: Olsen, Jefren
Subject: Proposed Report Language re: "Attempt" Statute

Importance: High

Jefren --

Please see below and work into sec. 939.32 revisions.

By the way, Tom and I are working together in my office today; feel free to call with ?'s (414) 227-5102

Thanks --

Mike

Attempts. As a general proposition Wisconsin law punishes attempts at one-half the maximum imprisonment and one-half the maximum fine for the completed crime. There are a few exceptions to this general rule. For example, an attempt to commit a crime for which the punishment is life imprisonment is punishable as a Class B felony. For a limited number of crimes, attempts are punished with the same maximum imprisonment and fine that apply to the completed offense.

The Committee recommends that an attempt to commit a crime for which the penalty is life imprisonment (Class A felonies) be classified as a Class B felony. Further, as to those limited number of crimes for which the legislature has concluded that attempts ought to be punished at the same level as the completed crimes, the Committee does not recommend any change.

The Committee further recommends that the general rule for calculating the maximum punishment for attempts be maintained at one-half the maximum for the completed crime. In the interest of clarity, it suggests that the statute be amended to specifically provide that the maximum punishment for an attempt is as follows:

- One-half the maximum term of confinement for the completed offense
- One-half the maximum term of extended supervision for the completed offense
- One-half the fine for the completed offense

Adding the first two components together would equal one-half the maximum term of imprisonment for the completed offense because, under Act 283, the maximum term of confinement plus the maximum term of extended supervision equals the maximum term of imprisonment.

Finally, the Committee recommends repeal of Wis. Stat. sec. 939.32(l)(b). This statute specifies that an attempt to commit battery to law enforcement officers, firefighters, probation agents, parole agents, extended supervision agents and aftercare agents is punishable as a Class A misdemeanor (9 months imprisonment). The Committee has proposed that these batteries be classified as Class H felonies (3 years maximum confinement followed by 3 years maximum extended supervision). An attempt to commit any one of these batteries ought to be punished using the general one-half formula (18 months maximum confinement followed by 18 months

maximum extended supervision). The Class A misdemeanor penalties for these attempts under current law are too low. Law enforcement officers, firefighters, and the others mentioned ought to have the same protection from attempted battery as others who have special protection under the battery laws which the Committee recommends for classification at the H felony level (e.g., emergency department workers, emergency medical technicians, first responders, etc.).

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
819 North 6th Street
Room 834
Milwaukee, WI 53203
(W)(414) 227-5102
(F)(414) 227-5104
mike.brennan@doa.state.wi.us

Olsen, Jefren

To: Brennan, Mike
Subject: RE: Proposed Report Language re: "Attempt" Statute

Mike and Tom:

Regarding the attempt revisions, is it necessary to say that the attempt statute does not cover every crime, but only felonies and a few specified misdemeanors? Also, I decided to put the language in s. 973.01 (2) instead of s. 939.32. I thought that was a bit more logical place because s. 973.01 (2) has the list of prison and ES caps. If you would prefer the language be placed in s. 939.32, it would probably make sense to put it in a new subsection (4) because the "maximum penalty" language in sub. (1) (intro.) would still fit for the misdemeanors covered under the statute.

Also, Mike and I were wondering what will happen in the case of an attempted misdemeanor battery that is also subject to the enhancer under s. 939.621, which makes misdemeanors into felonies. We think that the result is this: the attempted battery carries a maximum penalty of $5,000 and 4 1/2 months (one-half of nine months); the enhancer adds up to 2 years and makes it a felony; so the maximum bifurcated sentence length is 2 years, 4 1/2 months, and the 75% cap under s. 973.01 (2) (b) will apply because it is a felony not in one of the listed classes. Make sense?

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

-----Original Message-----
From: Brennan, Mike
Sent: Wednesday, August 18, 1999 9:34 AM
To: Olsen, Jefren
Subject: Proposed Report Language re: "Attempt' Statute
Importance: High

Jefren --

Please see below and work into sec. 939.32 revisions.

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Thanks --

Mike

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completed crimes, the Committee does not recommend any change.

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Finally, the Committee recommends repeal of Wis. Stat. sec. 939.32(l)(b). This statute specifies that an attempt to commit battery to law enforcement officers, firefighters, probation agents, parole agents, extended supervision agents and aftercare agents is punishable as a Class A misdemeanor (9 months imprisonment). The Committee has proposed that these batteries be classified as Class H felonies (3 years maximum confinement followed by 3 years maximum extended supervision). An attempt to commit any one of these batteries ought to be punished using the general one-half formula (18 months maximum confinement followed by 18 months maximum extended supervision). The Class A misdemeanor penalties for these attempts under current law are too low. Law enforcement officers, firefighters, and the others mentioned ought to have the same protection from attempted battery as others who have special protection under the battery laws which the Committee recommends for classification at the H felony level (e.g., emergency department workers, emergency medical technicians, first responders,&.).

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
819 North 6th Street
Room 834
Milwaukee, WI 53203
(W)(414) 227-5 102
(F)(414) 227-5104
mike.brennan@doa.state.wi.us

Olsen, Jefren

From:	Brennan, Mike
Sent:	Wednesday, August 18, 1999 2:31 PM
To:	Olsen, Jefren
Subject:	RE: Misc. fleeing/eluding issues; DOJ comments

Jefren --

Comments per your paragraphs below:

1) Keep fleeing as a revocation offense. Revo for felony fleeing only

2) Use "knowingly" and put into law expressly that this is not a lesser included offense of the fleeing felony. Add to 346.04(4)

3) & 4) Leave alone.

5) Make OAR misdemeanor punishable by a maximum of 1 year in the county jail.

6) We will consider very soon.

Mike

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
819 North 6th Street
Room 834
Milwaukee, WI 53203
(W)(414) 227-5102
(F)(414) 227-5104
mike.brennan@doa.state.wi.us

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

From:	Olsen, Jefren
Sent:	Tuesday, August 17, 1999 4:02 PM
To:	'hammert@marquette.edu'; Brennan, Mike
Subject:	Misc. fleeing/eluding issues; DOJ comments

Mike and Tom:

1) Regarding loss of license for violation of the new misdemeanor fleeing/eluding offense (proposed s. 346.04 (2t)): A court could (but would not have to) suspend the offender's license for up to one year under s. 343.30 (1). A court must revoke for "knowingly fleeing or attempting to 'elude" under s. 343.31 (1) (i) and (3) (d). I think that this language will probably be interpreted to cover only felony fleeing/eluding. Is that your intent? If not, we should amend s. 343.31 (1) (i) and (3) (d) to explicitly include the new misdemeanor offense. In fact, it might also make sense to amend those provisions to explicitly exclude coverage of the misdemeanor, if that is your intent.

2) With respect to mental states in the rules of the road chapter, "intentionally" appears only one other time (in s. 346.42). "Knowingly" appears a few more times (it's in the current fleeing/eluding statute). Some version of "purpose" appears about a dozen times. Do you want to try to recast the new misdemeanor using either or both of the latter terms?

3) As to the doubling of revocation period when there's a minor passenger in the car during a violation of s. 940.09 or 940.25, it appears that the court has little to do with setting the revocation period. Under s. 343.31 (3) (c) and (f), DOT must revoke for a 5 years or 2 years in the basic case and 10 years or 4 years in the case where a minor passenger was in the car. (Presumably there would have to be some sort of indication in the conviction record sent to DOT that there was minor passenger for DOT to impose the longer period.)

4) Also, if the draft repeals the penalty doubler under 940.09 (1 b) and 940.25 (1 b), should it also repeal the doubler under s. 346.65 (2) (f)?

5) I asked the lawyer who drafted the one year OAR penalty whether he thought the intent was to create a felony. He

didn't think so; in fact, there is some indication (though not conclusive) that the intent was to follow the DWI penalties, which at the time provided for a maximum of one year in jail.

6) Finally, we've reviewed the DOJ comments. Some we are already incorporating in some fashion; some could be easily incorporated; a few are strictly policy decisions for the committee; and one or two are I think based on misreadings of current law or provisions of the draft. Given the number of them, I won't go into more detail in this message, but we can chat about them on the phone today or tomorrow if you wish.

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

Olsen, Jefren

From: Brennan, Mike
Sent: Wednesday, August 18, 1999 2:37 PM
To: Olsen, Jefren
Subject: RE: Proposed Report Language re: "Attempt" Statute

Jefren --

Responding to each paragraph below:

1) Tom will call you re: this in the next 1/2 hour or so.

2) Yes, and Tom thinks it would be a great law school exam ?!

Mike

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
8 19 North 6th Street
Room 834
Milwaukee, WI 53203
(W)(414) 227-5102
(F)(414) 227-5104
mike.brennan@doa.state.wi.us

-----Original Message-----
From: Olsen, Jefren
Sent: Wednesday, August 18, 1999 11:25 AM
To: Brennan, Mike
Subject: RE: Proposed Report Language re: "Attempt" Statute

Mike and Tom:

Regarding the attempt revisions, is it necessary to say that the attempt statute does not cover every crime, but only felonies and a few specified misdemeanors? Also, I decided to put the language in s. 973.01 (2) instead of s. 939.32. I thought that was a bit more logical place because s. 973.01 (2) has the list of prison and ES caps. If you would prefer the language be placed in s. 939.32, it would probably make sense to put it in a new subsection (4) because the "maximum penalty" language in sub. (1) (intro.) would still fit for the misdemeanors covered under the statute.

Also, Mike and I were wondering what will happen in the case of an attempted misdemeanor battery that is also subject to the enhancer under s. 939.621, which makes misdemeanors into felonies. We think that the result is this: the attempted battery carries a maximum penalty of $5,000 and 4 1/2 months (one-half of nine months): the enhancer adds up to 2 years and makes it a felony; so the maximum bifurcated sentence length is 2 years, 4 1/2 months, and the 75% cap under s. 973.01 (2) (b) will apply because it is a felony not in one of the listed classes. Make sense?

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

-----Original Message-----
From: Brennan, Mike
Sent: Wednesday, August 18, 1999 9:34 AM
To: Olsen, Jefren
Subject: Proposed Report Language re: "Attempt" Statute
Importance: High

Olsen. Jefren

From: Brennan, Mike
Sent: Wednesday, August 18, 1999 6:22 PM
To: Olsen, Jefren
Subject: RE: Compiled CPSC drafts

Jefren --

We will try to use the corrected version of 99-3420, if you are able to e-mail it by 9 a.m. Thursday.

Thanks to you and Mike D. for all of your great work. You 2 are a pleasure to work with.

Mike

Mike Brennan
Staff Counsel
Criminal Penalties Study Committee
8 19 North 6th Street
Room 834
Milwaukee, WI 53203
(W)(414) 227-5102
(F)(414) 227-5104
mike.brennan@doa.state.wi.us

-----Original Message-----
From: Olsen, Jefren
Sent: Wednesday, August 18, 1999 5:54 PM
To: Brennan, Mike
Subject: Compiled CPSC drafts

<< File: 99-3420/P2 >>
Mike,
Attached is the draft that combines all of the 6 individual drafts previously drafted for you. The draft also incorporates changes suggested by you, Tom and the full committee on Monday, Tuesday and today. For your printing info, the draft is 191 pages long.

For purely technical reasons, we have to re-do the provision that amends Act 283 to give the committee the duty to educate the bar, etc., until the sentencing commission is appointed. In the interest of getting the draft out to you, we left in the technically "incorrect" provision. I'll try to get a corrected version to you tomorrow via email so you and, if necessary, the committee can see it on Friday.

On the telephone today we briefly discussed the question of effective dates for the enhancer repeals. Should those repeals take effect 12/31/99? Is the committee going to consider this question on Friday? We also need to keep in mind that, like Act 283, the draft contains some "in-text" applicability dates--for instance, in s. 971 .17 (1) concerning length of NGI commitments for persons committing felonies before, on or after 12/31/99. If the legislation gets through the legislature quickly this fall, those dates will pose no problem. If the legislation is stalled and won't take effect before 12/31/99, the legislation will need amending to change in-text applicability dates and avoid possible retroactivity questions.

Let me know if you have any questions or comments; otherwise, we'll see you on Friday.

Jefren Olsen

Attorney Jefren E. Olsen
Wisconsin Legislative Reference Bureau
P.O. Box 2037
Madison, WI 53701-2037
Tel: (608) 266-8906
Fax: (608) 264-8522
Email: jefren.olsen@legis.state.wi.us

1 (1) (intro.), 948.15 (1), 948.18 (1) and (2) and 949.03 (1)
2 (b); to repeal and recreate 939.61, 940.20, 941.13, 943.34,
3 943.45 (3), 943.50 (4) and 944.16 (intro.); and to create
4 26.05 (1) to (3), 26.06 (3) (a) to (c), 53.37 (4) (a) to (d),
5 74.44 (3) (a) to (c), 289.02 (5) (a) 1 to 3, 289.16 (1) (a) to
6 (c), 939.50 to 939.52, 940.19, 941.12 (2) to (4), 941.25 to
7 941.27, 943.11 (2), 943.24 (2), 943.30 (4) and 946.42 (lm) of
8 the statutes, relating to revision of the criminal code.

Analysis by the Legislative Reference Bureau

For an analysis of this bill, see the prefatory note and notes contained in the body of the bill which were prepared by the legislative council.

9
10 The people of the stateof Wisconsin, represented in senate and
11 assembly, do enact as follows:

PREFATORY NOTE: This bill is the result of a study duringthe 1971-73 and 1973-75 interims by the Legislative Council's Special Committee on Criminal Penalties. The Legislative Council created the Special Committee to study the subject matter of 1971 Senate Joint &solution 115 which directed that a study committee be created to "review existing criminal penalties to determine whether the penalty levelsare consistentwith eachotherforsimilarkindsof offenses and also to review the current appropriateness of penalty levels..."

The Special Committee, and its 5-person Subcommittee on Classifications, held a number of meetings to examine the hundreds of penalties in the statutes in order to assign a proper penalty classification to each criminal offense. This bill creates a uniform system for classifying all statutory offenses located in Chapters 939 to 948 of the statutes, "The Criminal Code".

The Special Committee on Criminal Penalties, chaired by Senator Fred A. Risser, Madison, consisted of the

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following members: Senator Jack D. Steinhilber, Vice chairman, Oshkosh; Representative Anthony S. Earl, Secretary, Wausau; Senator Roger P. Murphy, Waukesha; Representative Michael Early, River Falls; Representative Jon P. Wilcox, Wautoma; Hon. Edwin C. Dahlberg, County Judge, Beloit; Atty. Thomas P. Doherty, criminal Law Section, State Bar, Milwaukee; Prof. David Geary, Criminal Justice Department, University of Wisconsin-Milwaukee; Prof. Esther Heffeman, Sociology Department, Edgewood College, Madison; Paul Imler, Superintendent, Lincoln Boys School, Irma; Hon. Harold B. Jackson, Jr., Circuit Judge, Milwaukee; Daniel La Rocque, Marathon County District Attorney, Wausau; James W. Mathews, Warden, Wisconsin Correctional Camp System, Oregon; Atty. Frank Nikolay, Colby; Atty. Cliff Owens, Milwaukee; Prof. Frank Remington, Univ. of Wisconsin Law School, Madison: Frank Sarafin, Clark County Deputy Sheriff, Thorp; Gene Zangl, Chief of Police, Mayville; Harold Rautenberg, Chief of Police, Fond du Lac (resigned).

This bill establishes a classification system for Criminal Code offenses consisting of 5 classes of felonies, 3 classes of misdemeanors and 4 classes of forfeitures. The classifications and the maximum punishments for each are, as follows:

FELONY	MAXIMUM FINE	MAXIMUM IMPRISONMENT
Class A felony	-0-	Life
Class B felony	-0-	20 years
Class C felony	$10,000	10 years
Class D felony	$10,000	5 years
Class E felony	$10,000	2 years

MISDEMEANOR	MAXIMUM FINE	MAXIMUM IMPRISONMENT
Class A misdemeanor	$10,000	9months
Class B misdemeanor	$ 1,000	90 days
Class C misdemeanor	$ 500	30 days

FORFEITURE	MAXIMUM FORFEITURE	MAXIMUM IMPRISONMENT
Class A forfeiture	$10,000	-0-
Class B forfeiture	$ 1,000	-0-
Class C forfeiture	$ 500	-0-
Class D forfeiture	$ 200	-0-

As a general rule, the bill classifies criminal offenses based on the degree of actual or potential harm involved in their commission. Persons guilty of crimes resulting in death or serious physical harm to others are subject to heavy punishments. Other offenses involving less serious harm to persons have generally been considered

more serious than crimes against property alone. However, given an equal degree of physical harm to persons, crimes involving actualorpotentialharmtoboth persons and prqerty are punished more severely than offenses resulting in harm only to persons. Also, crimes involving actualorpotentialharmto a number of peopleortothegeneral public have been considered more serious than other offenses with a similar degree of harm but more limited in scope or application.

Section 943.20, relating to the theft, embezzlement' and misappropriation of funds presently divides offenses as misdemeanors or felonies based upon the value of the property. If the value of the property does not exceed $100, the offense is a misdemeanor. In this bill, the amount is increased fran $100 to $500. Presently there are 3 specializedproperty fraudstatuteswhich are misdemeanors regardless of the amount of the theft or fraud. In this bill, the $500 misdemeanor-felony dividing line is used for these offenses, resulting in the creation of 2 new felonies: s. 943.21, fraud on hotel or restaurant keeper and s. 943.24 (2), issuance of worthless checks.

The classification of individual penalties resulted in changing3 offenses from felonies to misdemeanors and15 offenses fran misdemeanors to felonies, including the creation of the 3 new theft-related offenses where the value of the property exceeds $500. Ten offenses were "decriminalized" or changed fran misdemeanors to civil forfeitures.

The offenses in the following sections or subsections have been changed in category from felony to misdemeanor, fran misdemeanor to felony or from misdemeanor to forfeiture (the present penalty is shown as stricken material in the body of the bill, except where a new section is created. Also see notes following sections):

FELONIES RECLASSIFIED AS MISDEMEANORS

942.01 (1) Defamation

944.30 Prostitution

947.08 (2) Distributing crime comics to minors

MISDEMEANORS RECLASSIFIED AS CLASS E FELONIES

940.08 (1) Homicide by negligent use of vehicle or weapon

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940.201 Child abuse

940.29 Abuse of institutionalized person

941.12 Interfering with fire fighting

941.325 Placing foreign objects in candy

943.06 (2) Possession of fire bomb

943.21 (3) (b) Fraud on hotel or restaurant keeper over $500

943.24 (2) Issue of worthless check over $500

946.03 (2) Use of premises for seditious purposes

946.42 (1m) Escape across state line

946.49 (2) Bail jumping by witness in felony case

946.62 Concealing identity when cormnitting misdemeanor

946.64 Communicating with jurors

946.76 Premature disclosure of search warrant

947.015 Bomb scares

CRIMES RECLASSIFIED AS CIVIL FORFEITURES

939.61 (1). Penalty where none expressed

941.25 Registration of machine gun by manufacturer

941.34 Fluoroscopic shoe-fitting machines

941.35 (2) Refusal to yield party line

941.35 (3) False emergency request on party line

943.13 (3) Posting trespass sighs on another's land

943.22 Use of cheating tokens

947,045 Drinking in motor vehicles on highway (renumbered 346.935)

947.047 Depositing metal or glass on shore

948.18 (1) and (2) Mistreatment of animals where no proof of fault required

In addition to creating a classification system for Criminal Code Offenses, the bill repeals certain obsolete or duplicative crimes, creates several new statutory offenses, and substantively rewrites or restructures a number of other crimes. These changes are explained in individual section notes located throughout the bill.

The only criminal offense in chs. 939 to 948 which remains unaffected by this bill is s. 940.04, the abortion statute. In January 1973, the U.S. Supreme Court, in Roe et. al. v. Wade (1973), 410 U.S. 113, and Doe et al. v. Bolton (1973), 410 U.S. 179, narrowly defined the powers of states in prescribing criminal sanctions for persons performing abortions. Subsequently, the Attorney General, in a letter to all Wisconsin District Attorneys dated January 31, 1973, stated his opinion that the above decisions "have effectively rendered unconstitutional and unenforceable" s. 940.04 of the statutes. Due to these developments and the controversial nature of the abortion issue, the Special Committee on Criminal Penalties has not included s. 940.04 in this bill.

1 SECTION 1. 26.05 of the statutes is amended to read:

2 26.05 TIMBER THEFT. Any person who unlawfully cuts or directs
3 or contracts for the cutting of forest products on the lands of
4 another as defined in s. 26.04 and who does not own or control
5 adjoining land: or who, though owning adjoining land bearing mer-
6 chantable forest products, cuts on an acreage substantially in
7 excess of the adjoining land; or who, as part of an unlawful cutting
8 operation, removes or destroys any survey monument or bearing tree,
9 shall be punished ~~as provided in s. 943.20 for the theft of prop-~~
10 ~~erty of the same value.~~ by the following:

11 SECTION 2. 26.05 (1) to (3) of the statutes are created to
12 read:

13 26.05 (1) If the value of the property does not exceed $100, a
14 fine of not more than $200 or imprisonment for not more than 6

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